Our Mission

The Jefferson Society, Inc. is a non-profit corporation, founded on July 4, 2012 for the advancement of its members' mutual interests in Architecture and Law. The Society intends to accomplish these purposes by enhancing collegiality among its members and by facilitating dialogue between architects and lawyers.

Inside This Issue

The Jefferson Society, Inc.

c/o 2170 Lonicera Way
Charlottesville, VA 22911

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QUARTERLY JOURNAL OF THE JEFFERSON SOCIETY

Monticello

Know of An Architect-Lawyer Who Has Not Yet Joined?

Send his or her name to President-elect Suzanne Harness at sharness@harnessprojects.com and we will reach out to him or her. All candidates must have dual degrees in architecture and law.

AUTHORS WANTED

Interested in writing an article, a member profile, an opinion piece, or highlighting some new case or statute that is of interest. Please e-mail Bill Quatman to submit your idea for an upcoming issue of Monticello. Contact: bquatman@burnsmcd.com

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Thoughts on Immigration

By Mehrdad Farivar, FAIA, Esq.
Morris, Povich & Purdy, LLP

In the aftermath of the Trump presidency immigration has been a hot topic. It has generated much debate and controversy, mainly in connection with terrorism and national security. The current discourse on immigration presents an opportunity to reflect on the powerful cultural and social impact of immigration as a phenomenon. Immigration has transformed human societies culturally, intellectually and economically, all over the world. It is almost impossible to imagine what the world would be like today, without the movement and settlement of large groups of people across its culturally and geographically diverse regions.

In the 20th century, architecture was in the forefront of the arts and professions in being international. Architectural movements travelled across national and cultural borders and changed the looks of cities, towns and communities far away from places where they first originated. After all, modern architecture was named the "International Style", because it was not tied to any particular local tradition. Many of the pioneers of International Style emigrated to the United States and other countries in the aftermath of World War II creating strong movements for aesthetic and technical change in the architecture of their host countries. Among them: Walter Gropius who went to Harvard, Ludwig Mies Van der Rohe who settled in Chicago, Le Corbusier and Luis Kahn who worked in India and Bangladesh, and Marcel Breuer who worked in New York.

Contemporary "starchitects" such as Foster, Rogers and Koolhaas have continued and expanded the tradition of early modern movement leaders by working internationally in many more countries. A whole host of other architects and firms with design talent and/or specific building type expertise are increasingly in demand worldwide. The growth of the economies of China, India, Brazil, the Middle East and elsewhere has significantly expanded the market for the services of such architects, worldwide.

(continued on page 2)

Thoughts on Immigration (continued from page 1)

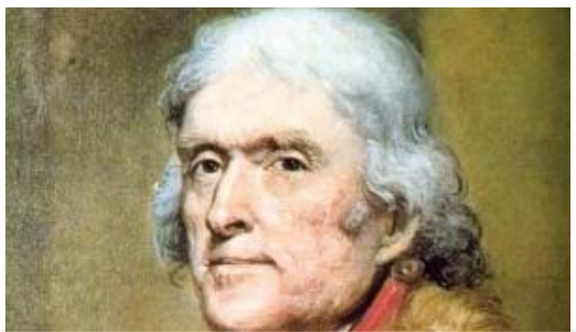
Although the legal profession has historically been deeply rooted in political, social and religious traditions that are very local in nature, it too is changing in the 21st century as people, businesses and goods move across national borders in ever increasing volume and frequency and information travels across the world in equal speed and increasingly identical content. Today, large law firms are becoming global. Some legal services are being outsourced to faraway places. Dispute resolution forums are no longer limited to local courts. International arbitration is becoming more frequent in resolving disputes among international parties. International forums are being formed in many regions of the world to resolve intra-governmental disputes.

Despite the recent claims in the news media of the advent of an emerging backlash against immigration and globalization in the Western world, there are seemingly unstoppable forces at work that point to an increase, rather than a decrease, in international commerce and the exchange of ideas, thoughts and practices. Information migrates, often instantly, even if the migration of people is legally restrained.

But the impact of immigration in the host countries is far more lasting than just the movement of a labor force or a refugee group across international borders, particularly when waves of immigration are caused by big political, economic or religious upheavals elsewhere in the world. When that happens, the children of immigrants, although born and raised in the host countries, tend to want to preserve their cultural and other heritage, blending it with the traditions of their host countries, adding richness to the collective societal culture for generations.

As an immigrant in this country and a resident of Los Angeles for nearly 40 years, I have witnessed first-hand how the presence of large immigrant groups has transformed Los Angeles over this period. Today, Los Angeles is home to large groups of Mexican, Korean, Iranian, Armenian, Chinese, Japanese and many other immigrant groups that have changed its cultural and economic landscape and have enriched it as a city and a community, culturally and economically. Some of the most vibrant sections of Los Angeles have been shaped, reshaped and transformed by immigrant groups over this period. Today Los Angeles is home to many diverse media companies broadcasting in different languages, cultural, artistic and religious organizations, restaurants, and stores that serve not just these immigrant groups, but the city as a whole, and sometimes even the people of the countries where the immigrant groups came from.

Will the Jefferson Society go international someday, with presence in other countries? It is possible in my view. Even likely.



Georgia: Court Upholds Jury Verdict in Negligent Misrep Claim

This case involved a design-build roadway at Fort Benning, Ga. for the Army Corps of Engineers. Sauer, Inc. was the general contractor; Alexander Contracting Co. and Hydro-Green were Sauer's paving subcontractors, and Jacobs Engineering, Inc. was the engineering consultant Sauer hired to design the project. It was alleged that during the bid process, Alexander received designs from Jacobs which it used to calculate its bid. The designs represented that the pavement should be 4.5 inches thick. Sauer later replaced Alexander with Hydro–Green, a construction company owned by a disabled veteran, in an attempt to meet a disabled veteran quota. Under this new arrangement, Hydro–Green was a subcontractor and Hydro–Green hired Alexander as its sub-subcontractor. Since Hydro – Green came into the project late, it did not directly review Jacobs's designs but simply adopted Alexander's contract price, which Alexander calculated based on Jacobs's designs.

After entering into contracts with Sauer, Hydro – Green and Alexander learned that they would have to pave 6-inch thick roads, instead of 4.5–inch thick roads because Jacobs's initial designs did not account for the Corps of Engineers' instruction to pave roads that could withstand traffic from ten heavy equipment transport vehicles per day.

Alexander and Hydro-Green claimed that they spent about $500,000 total in building thicker roads. When Sauer did not pay them for the increased cost of the thicker pavement, they sued both Jacobs and Sauer to recover damages.

The two paving subs settled their claims against Sauer prior to trial and proceeded to trial solely against Jacobs for negligent misrepresentation. The jury found in favor of the subs, awarding $357,665 to Alexander and $114,312 to Hydro – Green. Jacobs asked the trial judge to set aside the jury verdict because the plaintiff did not prove professional negligence. Plaintiffs responded that they had only alleged a claim for negligent misrepresentation, not professional negligence, and that they presented sufficient evidence to support that claim. The trial court agreed with the subs, saying: "The law in Georgia is simple: just because a negligence claim is asserted against a professional does not automatically make it a claim for *professional* negligence, which typically requires expert testimony to sustain." At trial, the engineer who ran the office for Jacobs in Columbus testified that he was aware that the Corp of Engineers instructed bidders – including Jacobs to design pavement thick enough to withstand traffic from ten heavy equipment transport vehicles per day; but he disregarded this because he thought it was "odd." The trial court said: "This is not a case as to which a layman can have no knowledge at all, and the court and jury must be dependent on expert evidence." The trial court refused to overturn the jury's verdict and Jacobs appealed. In a very short opinion, the 11th Circuit Court of Appeals affirmed the trial court ruling, finding no error and no misapplication of Georgia law. See, *Alexander Contracting Co., Inc. v. Sauer, Inc.*, 2015 WL 4603580 (M.D. Ga. 2015), aff'd 2016 WL 7047988 (11th Cir. 2016).

Illinois: A/E's Not Subject to Implied Warranty of Habitability

Good news for A/E's doing condo work! After a condo association sued the developer, architects, engineers, contractor, suppliers, and subcontractors for breach of implied warranty of habitability, the trial court granted motions to dismiss filed by the design professionals, suppliers and subs, then certified the question for an interlocutory appeal of whether claims for breach of the implied warranty of habitability may be asserted against design professionals and material suppliers who otherwise did not actually perform construction work.

This dispute arose over alleged defects in the condominiums, including defects in the windows and roofs that allowed water infiltration and resulted in property damage. The engineering firm filed a motion to dismiss the implied warranty of habitability claim and the architect filed a "me-too" motion.

The Court of Appeals noted that never before have Illinois courts allowed this theory against a design professional. In rejecting that cause of action, the court said that prior Illinois case law has held that "generally speaking, only builders or builder-sellers warrant the habitability of their construction work. Engineers and design professionals provide a service and do not warrant the accuracy of their plans and specifications." In reinforcing this holding, the court said, "We find no reason to depart from our precedent . . . which makes clear that an architect or engineering firm that assisted in design but otherwise did not participate in the construction of the real property is *not* subject to the implied warranty of habitability."

The case is *Sienna Court Condo. Ass'n v. Champion Aluminum Corp.*, 2017 IL App (1st) 143364.

Welcome New Jefferson Society Members!

We welcome the following:

NEW MEMBERS:

116. Raymond L. DeLuca, Esq.
Pepper Hamilton, LLP
Philadelphia, PA

117. Don Gray, Esq.
Meuleman Law Group, PLLC
Boise, ID

118. Laura Jo Lieffers, Assoc. AIA, Esq.
Moyer Law Group
St. Petersburg, FL

Action Items for Annual Meeting.

The TJS Nominating Committee has come up with the following slate of candidates:

OFFICERS:

For President: No election this year. Per 2016 Bylaws change, Suzanne H. Harness, AIA, Esq. will serve a two-year term (2017-2019)

For Treasurer: No election this year. Per 2016 Bylaws change, Donna M. Hunt, AIA, Esq. will serve the second year of a two-year term (2016-2018)

For Assistant Treasurer: Jose Rodriguez, AIA, Esq.

For Secretary: Julia A. Donoho, AIA, Esq., RIBA

DIRECTORS: (3 openings for three year terms)

Suzanne H. Harness, AIA, Esq.

To Be Announced

To Be Announced

During this transition year, to a smaller 9 member Board, and staggered 3-year terms, the following Directors have agreed to serve one additional year on the Board:

Mehrdad Farivar, FAIA, Esq.

Donna M. Hunt, AIA, Esq.

Julia A. Donoho, AIA, Esq., RIBA

Indiana: Sureties Unable to Force Unpaid Engineer to Arbitrate

This suit deals with a P3 project under which the Indiana Finance Authority (IFA) awarded a contract to a developer under a Public-Private Agreement to design, build, finance, operate, and upgrade approx.-imately 21 miles of existing State Road 37 into an interstate highway. The developer entered into a design-build contract with its affiliate (Isolux Corsan). Pursuant to the terms of the P3 contract and the design-build contract, Isolux Corsan executed a payment bond with several sureties in the penal sum of $15.3 million. The developer also entered into an engineering services contract (ESC) with a design firm (Aztec), which was then assigned to the design - build firm. The engineer alleged that the design-builder failed to make payments timely for over $4 million, so the engineer suspended services after giving three written notices of default.

The engineer then served written notice on the sureties and sued them in federal court under the payment bond. The sureties filed a motion to dismiss or, in the alternative, to stay the litigation and compel arbitration under the ESC, arguing that the contract contains a binding arbitration provision that covers "any dispute," which should include a claim on the payment bond. The engineer countered that the payment bond does not include an arbitration clause and does not even reference, let alone expressly incorporate the ESC. The court said that, "To compel arbitration, a party need only show: (1) an agreement to arbitrate, (2) a dispute within the scope of the arbitration agreement, and (3) a refusal by the opposing party to proceed to arbitration." The sureties admitted that the bond did not explicitly incorporate the ESC and there was no evidence that the parties intended for the arbitration provision to cover "an unnamed surety's failure to perform under a yet-to-be-secured payment bond" that the design-builder did not even dispute as owned. The court concluded that the sureties failed to satisfy the test for compelling arbitration. The case is *Aztec Eng'g Grp., Inc. v. Liberty Mut. Ins. Co.*, 2016 WL 6071752 (S.D. Ind. 2016).

Mississippi: Tortious Interference Judgment against County Engineer Reversed Because Engineer Acted Within Scope of Contract

A contractor sued the county for breach of contract, and then joined the county engineer into the suit for tortious interference with a road - construction contract. The case went to a jury who ruled in favor of the contractor, assessing $387,793 in damages against the county and an additional $182,500 in against the county engineer, including damages associated with lost bonding capacity due to outstanding accounts receivable. The county did not appeal, but the engineer did, on the basis that he had acted within the scope of his responsibility and without bad faith, and thus was not liable for tortious interference with contract. This dispute arose because the engineer's original plans erroneously estimated that 7,689 cubic yards of fill material would be required, when the project actually needed 17,700 cubic yards of fill material. The contractor failed to give proper notice to the county engineer, as required by contract, until the work was finished. The contract stated that failure to provide proper notice "shall be a conclusive waiver of any claim, or part thereof." However, a sympathetic trial judge rejected that defense, stating, "I don't think that the failure to comply with the notice provisions excuses performance on the part of the county."

The Court of Appeals agreed with the engineer and reversed the jury's verdict. The evidence showed that the county engineer had sent a letter to the contractor acknowledging the quantity error and offering a lower unit price than provided in the contract. The contractor declined to negotiate and filed suit.

As to the engineer's conduct, the Court of Appeals held that, "An individual has been held as privileged to interfere with a contract when the defendant occupies a position of responsibility on behalf of another and interferes within the scope of that responsibility and without bad faith." To overcome this privilege, the plaintiff must present evidence of bad faith, "that the actor was malicious or recklessly disregarding the rights of the person injured." The county engineer occupied just such a position of responsibility on behalf of the county and was operating within the scope of that responsibility in matters related to this contract, the Court said. "Evaluating and mitigating claims for a contract adjustment were part of his responsibilities." The Court did not find that the engineer's attempt to negotiate the price constituted bad faith, since the contractor failed to give notice of the overage until the project was complete.

In addition, the Court ruled that a plaintiff alleging tortious interference against a public employee must satisfy the notice requirements of the Mississippi Tort Claims Act. Here, the prerequisite of statutory pre - suit notice was never attempted by the contractor. Therefore, the judgment against the engineer was reversed.

See, *Springer v. Ausbern Const. Co.*, 2016 WL 4083981 (Miss. Ct. App. 2016).

New York: Conflicting Expert Affidavits Prevented Summary Judgment Against Architect

An architectural firm was sued for breach of contract over alleged design defects in a new fire station. The trial court entered partial summary judgment for the plaintiff and the architect appealed. At issue was whether the firm had failed to design a fire wall that complied with the requirements of the New York building code. The plaintiff's expert witness was found qualified to render opinions, but he failed to support his conclusory assertion that a fire wall was required with citation to applicable provisions of the building code and otherwise "merely speculated with respect to whether the designed wall was required to comply with the provisions governing the construction of fire walls." The architect's expert submitted a contrary affidavit, which the court found created issues of credibility that cannot be resolved on a motion for summary judgment. As a result, the ruling against the architect was reversed.

The case is *Swormville Fire Co., Inc. v. K2M Architects P.C.*, 46 N.Y.S.3d 348 (N.Y. App. Div. 2017).

MEMBER PROFILE: BILL ERWIN, AIA, ESQ.

The Chapman Firm
Austin, Texas

William L. "Bill" Erwin says he fell into architecture "by happy accident." He was originally medical school bound, but on a whim he enrolled in an architecture studio (against his better judgment, he says) and he was hooked. "For once something came naturally to me," Bill said, "I had a pretty good eye, was strong in math and physics – but most importantly - I could really draw. For me, architecture struck a perfect balance between art and science, and I felt like it was my calling. There was no turning back." He soon began working for a large A/E firm while attending Texas A&M, and upon graduation he moved to Ft. Worth to continue with that firm while pursuing a Masters Degree in Architecture at the University of Texas at Arlington. "I managed to pick up my future wife along the way," he added. Soon after graduation from UTA, Bill and Lea Anne got married and moved to Austin to be a little closer to family in Central Texas.

As to his wife, Bill said: "I figured if she could survive all those years of architecture school, she was a keeper."

Like many successful architects, Bill found that as his professional career developed, "I found myself less and less at the drafting table, and more and more at the negotiating table. Sometimes I felt more like a referee, than an architect!" When he opened his own architectural practice almost 10 years ago, he found himself wrestling with corporate formation, risk management, and the host of other legal issues that come with running a small company. His experiences with attorneys were expensive and frustrating. "The lawyers typically struggled to grasp the issues, and were often nothing more than a huge bottleneck in the construction process. It dawned on me that someone with my unique perspective and background in design and construction might be able to provide real value to the land development and construction industries from a legal standpoint." Law school seemed like a logical choice. Bill spent years toying with the idea, but his architectural practice was always so busy, that he thought he'd never have time to go back to school. Enter the recession of 2009 and the construction slow down presented the perfect opportunity to take some time off and go back to school. Bill chose the University of Texas at Austin for law school because he and

The Erwin Family: (left to right) Bill Erwin, holding older daughter Birdie Lea (age 4); wife Lea Anne holding Penny Belle (age 2). Bill says, "We each have a mini-me," of the two darling girls.

Wind-surfer Bill Erwin, AIA, Esq. was named a "Rising Star" by Super Lawyers in 2017.

Lea Anne had already been living in Austin for 7-plus years, and had established careers locally. "Being from a family of non-lawyers, who are die-hard Texas Aggies, everyone loves to harass me about going to UT, that *other* school. Fortunately, I've maintained a sense of humor, and gotten used to all their Longhorn lawyer jokes." During law school, Bill says, "construction litigators found me pretty quickly. I was assisting on complex construction cases and appeals as soon as my first year of law school. I was pegged as a litigator and trial lawyer right away, and that was the bulk of my practice for the first few years. I've first and second chaired jury trials, and taken cases to arbitration. Gradually, through years of enforcing and breaking contracts, I've learned how to write them. Today construction transactions and procurement make up a bulk of my construction law practice."

Bill is a partner in an Austin-based construction law boutique called The Chapman Firm where he loves being able to draw upon everything he has learned over both of his professional careers to provide value to his clients before, during, and post construction. "I can understand the language my clients are speaking, and I can typically spot the issues quickly because I've walked a mile in their shoes. It is rewarding to know that all of those years of education and experience can be drawn upon to solve someone's problem on a construction project efficiently and effectively. My vision going into law school played out just as I hoped it would."

Bill and Lea Anne have two beautiful daughters, Birdie Lea, age 4, and Penny Belle, age 2. The girls each take after a different parent. "We each have a mini-me," and Bill enjoys coming home to his sweet girls at the end of a tough day. "My wife is extremely patient and supportive," he says. "We have been married for 15 years, but we started dating while I was still at A&M. She stuck it out through graduate school in architecture, and then again seven years later when I decided to go to law school. While everyone was telling me I was crazy for going back, she did not. I couldn't have gotten through all of that without her."

When not playing with his kids or working, Bill enjoys most watersports – particularly those involving wind power. "I was exposed to sailing at a young age, and I've been windsurfing and kiteboarding for almost thirty years. Give me some decent wind, and I'll show you some fun." He is chair-elect of the Austin Bar Association's Construction Law Section and in 2015 was named "Top 20 under 40" by Engineering News Record as a top young construction professional.

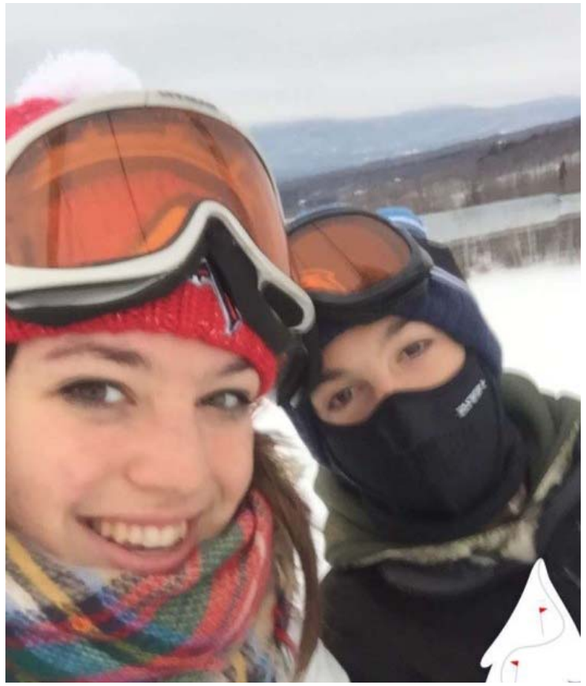
TJS Member Bill Erwin with his lovely wife Lea Anne, who he met in College Station at A&M.

MEMBER PROFILE: WARREN G. FELDMAN, AIA, Esq.

Jonathan Nehmer + Assoc., Inc.
Rockville, MD

Unlike most TJS members, Warren Feldman is a lawyer who chose to practice architecture rather than law. He is the CEO of Jonathan Nehmer + Associates, Inc., an award-winning firm in the nation's capital that offers architecture, construction project management, and design services specializing in the hospitality industry. Founded in 1989, the firm also provides litigation support and mediation services in addition to pre-construction services, and CADD animation support. Although his day – to - day job is running an architectural firm, Warren maintains his membership in the Maryland Bar. His career involved a significant phase working for contractors, so Warren has a good feel for the industry from both sides. He got his two architectural degrees from Washington University in St Louis, both a bachelor and masters of architecture. He chose Wash U because it provided him with an excellent combination of a Top Ten architectural school and the ability to play sports on the school basketball and soccer teams. Those years on the court and field took their toll, however, and a total knee replacement last year has left Warren with more time for coaching and cheering for his two children.

Warren's first job out of architecture school was designing corporate office buildings with the firm of Raymond Maritz and Sons, a St. Louis-based firm. His projects included office buildings for the Maritz Corporation and A.G. Edwards. He later moved into project management at Hess Construction Co., where he managed several $5 to 10 million projects. From 1988 to 1994, he worked as an associate with the firm of Grimm and Parker, P.C., where he was responsible for the architecture and construction administration of projects up to $22 million. It was a frustration in those years working with lawyers who did not understand architecture that drove him to enroll in law school, he told us. "I found that when working with lawyers on E&O claims for our architectural firm, they really did not understand what we do as architects." "They did not know the way things really got built, and how to properly and fully represent the architectural profession. I wanted to use my experience to provide better representation for architects." So it was off to law school at Georgetown University, which offered him the chance to attend night classes while continuing his career growth with a day job as a general contractor and then, later, as an owner's rep.



Warren's two children, Nicole and Nathan, at a family ski trip to Vermont.

After graduating from Georgetown Law, Warren became a partner at Jonathan Nehmer + Assoc., Inc., leading the Project Management division there. Today, as CEO of that same firm, Warren enjoys "the ability to combine all my different areas of expertise into all the different aspects of my clients' projects."

Warren has been married for 24 years to his beautiful wife, Cynthia, and the couple has two children and two dogs, Smokey and Tudor. Their daughter Nicole is a sophomore at Christendom College in Front Royal, Virginia, while son Nathan is a high school junior at the Heights School. The Feldmans live in Potomac Maryland, right outside of Washington, D.C. He is active in the local AIA, currently serving as a director of the Potomac Valley Chapter, where he has been a member since leaving the St Louis Chapter in 1988.

Warren lists the High Museum of Art in Atlanta as his favorite building, and says that he is inspired by the work of two inspirational architects, Richard Meier and Le Corbusier.

Warren and his wife of twenty-four years, Cynthia.

When asked if he had any advice for a young architect thinking about law school, Warren said: "I would explain that the time commitment to Law School is extreme and that unless you are a driven person who really wants to learn and enjoys reading and analysis, you should probably not pursue it. But if this describes you, then I would make sure that you take classes that apply to the architectural areas of the law (construction and contract law, insurance and surety law, zoning codes) and take classes from adjunct professors who really practice in these areas."

The beautiful home of Warren and Cynthia Feldman.

OFFICIAL NOTICE – MEMBERS ONLY

The Jefferson Society Annual Meeting

Date and Time: Weds., April 26th, 6:30 – 9:30 p.m.

Location: The Castle Hotel, 8629 International Drive, Orlando, Fla.

Cost: $75 per person (Members Only); check to "The Jefferson Society" mailed to Donna Hunt, 110 Payson Road, Brookline, MA 02467

Schedule: Cocktails 6:30-7:30 p.m.; Dinner 7:30 p.m. with Annual Meeting and Elections to follow

RSVP to: Donna M. Hunt, AIA, Esq. by April 12th
donna.hunt@ironshore.com

TJS Annual Meeting & Dinner

Join us for the 5th Annual Meeting and Dinner at the Castle Hotel in Orlando. The Castle is a boutique hotel that boasts of stately Bavarian architecture (lots of antlers), and original artwork. We will enjoy a social hour over wine or cocktails, sponsored by RIMKUS, followed by dinner with your fellow and sister members of TJS. After dinner will be the Annual Meeting and election of Officers and Directors. This year we will have seven directors whose terms expire, but we are transitioning to a smaller 9-member Board, with 3-year staggered terms. We have a new Secretary position to fill. The Treasurer is now a 2-year term, with a 1-year Treasurer-elect to be elected during the second year of the Treasurer's term. We will not be electing a new President until next year, as we have moved to a 2-year term for that office. Please join us!

The AIA has announced the lineup of keynote speakers for the 2017 Conference on Architecture: Day 1 is titled "Anticipate Need: Design That Cares," with four speakers: Michael Murphy, co-founder of Mass Design Group; Elizabeth Diller, of the firm Diller Scofidio + Renfro; Alejandro Aravena, 2016 Pritzker Prize winner; and Francis Kere, of Kere Architecture. Day 2's keynote is titled "Anticipate Challenge: Design That Overcomes," with NASA visual strategists Dan Goods and David Delgado, along with artist Michael Bierut. Day 3 brings "Anticipate Change: Design That Evolves," with TED-talk presenter Amy Cuddy, a social psychologist, whose body language talk ranks as the 2nd most popular TED talk ever.

Thurs., April 26, will feature A Conversation with Former First Lady Michelle Obama from 12:50 to 1:45 p.m.

There are a few legal programs scheduled: EL135, Five Legal Cases Every Architect Should Know; FR307, Getting Paid: Don't Forget Your Lien Rights; FR216, Corruption and Bribery; WE113, Documents 101; FR315, Ethics in Architecture; and WE109, Risk Management.

New York: No Copyright Infringement by Knock-Off Home

A husband and wife (the Fortgangs) sued two architecture firms and their clients (the Schwartzs), alleging that their similar architectural designs violated the plaintiff-homeowners' copyright on the custom design of their home. The Fortgangs had obtained ownership of the copyrights from their architect, and registered the same with the U.S. Copyright Office. The Schwartzs got a copy of the Fortgangs' design from the original architect, with the help of the Schwartzs' two architects (Pereiras and Friedman). The Schwartzs then used that design to create a similar design for their own home. When the Fortgangs learned of this, they hired lawyers to send cease-and-desist letters to the Schwartzs and their architects. Despite these facts, the architects and their clients moved to dismiss for failure to state a claim. Surprisingly, that motion was granted by the trial court because the plaintiffs failed to sufficiently allege that the infringing architectural design copied protectable architectural elements, as required to state a claim for copyright infringement.

The lawsuit focused exclusively on the home's external façade, including color photographs and a side-by-side comparison of the homes' exteriors. *(See below).* The plaintiffs alleged that they would suffer irreparable harm if the defendants were not restrained from building the Schwartzs' home with an exterior façade that is substantially similar to theirs. While the trial court agreed that the two homes did share some similarities, the complaint spoke only in generalities about allegedly original, copyrightable elements of the plaintiffs' home, and failed to specifically identify any protectable design elements that can give rise to a claim of infringement. The defendants argued that the aesthetic features of the original home are "staple building components" and other recognized styles from which architects typically draw, which are not entitled to copyright protection. The court agreed, finding that "elements taken from standard building designs, such as "neoclassical government buildings, colonial houses, and modern high-rise office buildings," are not protected, pursuant to the doctrine of *scenes-a-faire*, since those represent "recognized styles from which architects draw." This includes standard configurations of spaces, and individual standard features, such as windows, doors, and other staple building components." The court said that while the two homes share the same color scheme, as the exteriors of both homes feature prominent obtruding columns of beige stucco with black window frames and a black or dark brown roof, and have other similar features, this is where the similarities end. "Accordingly, since the similarities concern only non - copyrightable elements of the plaintiffs' work, dismissal at the pleading stage is appropriate."

The case is *Fortgang v. Pereiras Architects Ubiquitous LLC*, 2017 WL 280713 (E.D.N.Y. 2017).

Ohio: Project Owner Loses Right to Use Architect's Copyrighted Documents Due to Non-Payment Under AIA Clause

Here is another copyright case, but not a residential project. This one relates to a 12-bed hospice inpatient facility for which an architectural firm (Eberhard) was hired by the owner/client (Lifecare) under an AIA-type contract which granted Lifecare a non-exclusive license to use the architect's instruments of service in connection with the project. The agreement further provided that any failure on the part of Lifecare to make payment due would result in a termination of the license. Eberhard obtained a copyright on its design for the project. Subsequently, Lifecare breached the agreement by failing to make the required payments. Eberhard notified Lifecare that it was in breach and, as such, terminated the non-exclusive license. Nonetheless, Lifecare continued with construction using Eberhard's plans. The architect sued not only Lifecare, but all of the contractors and subs on the project, alleging copyright infringement and breach of contract due to use of the firm's copyrighted instruments of service after the owner's nonexclusive license was terminated. The contractors and subcontractors moved to dismiss, or to bifurcate the case.

The trial court held that under the architect's contract, the firm had adequately alleged termination of the nonexclusive license due to non-payment. As to the license, the court held that, "A copyright owner who grants a nonexclusive license to use copyrighted material cannot later sue for copyright infringement, provided the use falls within the scope and duration of the license." However, under this contract, including the construction contract, the license terminated for non-payment. The court said, "if the payment provision constitutes a condition precedent and the condition is not satisfied, an infringement claim may lie. This is because the failure to fulfill a condition precedent results in no license having ever been granted by the licensor and no authority exists for the licensee's use of the copyright." The court found that payment of fees is "a covenant between the parties," and not a "condition precedent to the existence of the nonexclusive license." Citing the AIA-type language that: "Upon execution of this Agreement, the Architect grants to the Owner a non-exclusive license [and] If the Architect rightfully terminates this Agreement for cause as provided in Section 9.4, the license granted in this Section 7.3 shall terminate," the court said that according to the complaint, Eberhard "rightfully terminated the agreement and, therefore, the parties agreed that the license would be revoked. Any use of the copyrighted materials thereafter constitutes an unlicensed use." The contractor and subcontractor motions to dismiss were denied, as was a motion for judgment on the pleadings. See *Eberhard Arch. v. Bogart Arch., Inc.*, 314 F.R.D. 567 (N.D. Ohio 2016).

> "§ 7.3 Upon execution of this Agreement, the Architect grants to the Owner a nonexclusive license to use the Architect's Instruments of Service solely and exclusively for purposes of constructing, using, maintaining, altering and adding to the Project, provided that the Owner substantially performs its obligations, including prompt payment of all sums when due, under this Agreement. The Architect shall obtain similar nonexclusive licenses from the Architect's consultants consistent with this Agreement. The license granted under this section permits the Owner to authorize the Contractor, Subcontractors, Sub-subcontractors, and material or equipment suppliers, as well as the Owner's consultants and separate contractors, to reproduce applicable portions of the Instruments of Service solely and exclusively for use in performing services or construction for the Project. If the Architect rightfully terminates this Agreement for cause as provided in Section 9.4, the license granted in this Section 7.3 shall terminate."

Michigan: Engineer Denied Coverage Under Contractor's CGL Policies Due To Professional Services Exclusion

The Village of Dexter, Michigan hired an engineering firm (OHM) to oversee upgrades to its wastewater treatment plant's sludge - handling system. During the construction phase, OHM was responsible for "contract administration, construction engineering, construction observation, and construction staking." Among other duties, OHM agreed to provide daily observation of "significant construction work or testing," prepare daily field reports, and check completed work for "compliance with contract documents." Under the prime construction contract, the contractor had to maintain commercial general liability (CGL) insurance to protect the village and OHM as additional insureds. However, the contractor's CGL policy contained an additional insured endorsement which excluded coverage for claims "arising out of the rendering of, or failure to render, any professional architectural, engineering or surveying services." During construction, one worker was killed and another injured when sparks from a cutting torch ignited methane gas inside the digester tank and caused an explosion. Two suits were filed, each naming OHM as a defendant and alleging negligence as an engineer. Even though OHM's professional liability insurer defended the two suits, OHM filed a separate declaratory judgment action against the contractor's insurers for defense and indemnity. The parties filed cross-motions for summary judgment, disputing whether OHM is covered as an additional insured under either policy and, if so, whether the policies' professional services exclusions bar coverage. The trial court granted summary judgment for the insurers and the engineer appealed.

The 6th Circuit Court of Appeals affirmed, finding that the CGL policies' "professional services" exclusions barred coverage, and that application of exclusions did not render coverage "illusory." The engineer argued that the professional services exclusion does not bar coverage because some of the underlying allegations implicate "general project operations and work place safety" concerns for which OHM was not responsible under its contract with the village.

However, when looking at the allegations of the lawsuit, the court asked "whether any of the underlying allegations against OHM could fall outside these exclusions by implycating non-professional acts or omissions." In answering that question in the affirmative, the Court held that Michigan courts have generally interpreted professional services exclusions broadly. Whether the engineer had safety obligations under its contract was not the point, according to the Court. Both lawsuits alleged that OHM, as the project's consulting engineer, was negligent in its duty to supervise construction operations, provide adequate safety supervision, and to include in its project plans ways to ensure the safe removal of the digester lids. "These acts are predominantly intellectual in nature, and both insurance policies exclude coverage for liability 'arising out of' an engineer's or architect's failure to prepare or approve drawings and specifications, other 'supervisory, inspection, architectural or engineering activities,' and indeed 'any other professional services'." The Court said that the insurers "provided *general* liability policies that were never intended to cover professional negligence claims. Indeed, plaintiff's *professional* liability insurer defended it in both underlying tort actions. OHM may dispute that it owed or breached the duties alleged in the underlying actions, but there is no dispute that if the underlying plaintiffs can prove their allegations, OHM's liability is excluded from coverage under the [CGL] policies." The case is *Orchard, Hiltz & McCliment, Inc. v. Phoenix Ins. Co.*, 2017 WL 244787 (6th Cir. 2017).

Have You Moved Or Changed Jobs?

Congratulations! Let us know so we can update our membership roster, website listing and help you spread the news!

Email changes to: Donna Hunt at Donna.Hunt@ironshore.com

Congratulations to Eric O. Pempus, FAIA, Esq.!

TJS member Eric Pempus, an instructor at Kent State University, College of Architecture and Environmental Design in Ohio, has been honored by the AIA College of Fellows by admission to the 2017 Class. Mr. Pempus will be inducted in Orlando at the AIA Conference on Architecture. He has taught at Kent State for nearly 30 years and earned his Masters of Science in Architecture from the University of Cincinnati, after receiving his bachelor's degree from Miami University in Oxford, Ohio.

Eric O. Pempus, FAIA, Esq.
Kent State University

Calif: Engineer Can Be Sued By Subcontractor Absent Privity for Economic Losses

This suit involved the $7.3 mil. renovation of a building for the U.S. Navy in Monterey, Ca. Under the project's design quality control plan Alpha Mechanical (a design-build sub), was to submit its design-build plans to the architect and the design-build contractor (Bilbro Constr.) for review and approvals at 35%, 75% and 100% design completion. At each stage, Bilbro, the architect and its acoustical consultant (Sparling), all gave input to Alpha. However, during construction, Sparling issued a memorandum which noted a potential issue with noise levels, and recommended eight mechanical units required enclosures to meet the Navy's noise level requirements. Sparling reviewed and approved the sketch of the enclosures and the materials for Alpha to proceed. However, after work was completed, the Navy rejected 23 of the rooms as too noisy, none of which had ever been noted as a potential problem by Bilbro, the architect or Sparling. Sparling was then hired by Bilbro to assess the noise problem and make recommendations. Alpha then implemented the Sparling suggestions, but the noise levels in the 23 rooms did not decrease. As a result, Alpha had to purchase new equipment, remove prior installations, install new materials, purchase additional supplies and to re-mobilize its crew at least on four separate occasions. To make matters worse, Bilbro then terminated its subcontract with Alpha and withheld $323,352.

In the ensuing litigation, Bilbro sued Alpha which triggered a counterclaim by Alpha against Bilbro, and the project architect and its consulting engineer Sparling. Alpha's counterclaim included a cause of action for negligence against Sparling for $1.1 million. The architect filed a motion to dismiss Alpha's negligence counterclaim, and both Alpha and Sparling filed motions to dismiss their respective claims against each other. The trial court denied the architect's motion to dismiss, but granted the motion filed by Sparling. As to the latter, the trial court found that Alpha had not alleged sufficient facts to establish that Sparling owed Alpha a legal duty of care. Alpha was granted leave to file an amended counterclaim, but Sparling moved to dismiss that as well.

Alpha alleged that Sparling breached its duty to Alpha by failing to meet the applicable standard of care due in performing professional services, adding that the main basis for its claim against Sparling was the fact that Sparling was hired for the second time directly by Bilbro to assess the noise problem and tell Alpha how to fix it, knowing that Alpha was the only mechanical contractor on the project. Applying California law, the trial court said that to establish a claim for negligence, duty is the "threshold element." Noting that the claim was for pure economic loss, and that there was no privity between Alpha and Sparling, the court said that in California, "where a special relationship exists between the parties, a plaintiff may recover for loss of expected economic advantage through the negligent performance of a contract although the parties were not in contractual privity." That "special relationship" depends on six factors.

The court found that Sparling's agreement with Bilbro supported an inference that Alpha was an "intended beneficiary of Sparling's recommendations and advice," with it being foreseeable that Alpha would suffer harm based on any negligent recommendations by Sparling. Sparling also had knowledge that its actions could injure Alpha. When all six factor were taken into consideration, the court found that Alpha had alleged sufficient facts that weighed in favor of imposing a duty of care absent privity, on the basis of a "special relationship." As a result, Sparling's motion to dismiss the amended counterclaim was denied. See, *U.S. for Use of Penn Air Control Inc. v. Bilbro Constr. Co., Inc.*, 2017 WL 733415 (S.D. Cal. 2017).

Florida: Geotech Engineer Cannot Sue Subcontractor For Negligence or Common Law Indemnity for Pure Economic Losses

A hospital entered into two consulting agreements with an engineering firm (PSI) for geotechnical services and an underground fuel tank assessment for a project. Under the agreements, PSI was to analyze the existing soil conditions at the site, develop recommendations as to the type of foundation system for the site improvements, and supervise and monitor the auger cast pile installations. PSI issued a report, recommending an auger cast pile system, and including information regarding potential sinkhole development. Based on PSI's recommendations, the project was designed by an architect and structural engineer utilizing auger cast piles. A subcontractor (GFS) was hired to install the auger cast piles, which work was supervised and inspected by PSI. However, during construction, major problems arose when the ground surface collapsed due to sinkholes. The foundation experienced settlement, and installation was stopped. As a result, it became necessary to design and implement repairs to the project and add stabilization to the building.

The hospital sued PSI for breach of contract and professional negligence arising out of delays. PSI joined the installer, GFS, into the case and asserted claims for negligence and common law indemnity. Both PSI and GFS moved for summary judgment on that claim. By bringing GFS into the case, PSI essentially contended that the sub was responsible for any damages the hospital suffered as a result of PSI's breach of contract or its professional negligence. Assuming, for purposes of the motions, that GFS was negligent in its auger pile installation and that its negligence caused the settlement and damage to the existing structure, GFS argued that it simply "owed no duty to PSI, contractually or otherwise, pointing out that there was no privity between it and PSI." In response, PSI argued that GFS's contractual duty to the general contractor to perform its work in a non-negligent manner extends "to anyone who could foreseeably be injured by GFS's negligence, including PSI."

In rejecting PSI's theory, the trial court noted that, "While PSI's contention may, as a general proposition, be accurate in the context of a personal injury or property damage caused by faulty or defective work, . . . PSI cites no authority extending a subcontractor's contractual duty owed to its contractor to a supervising engineer hired by an owner, whose only damages are those claimed by the owner for professional negligence or breach of contract … No duty flowed from GFS to PSI." The court said that, ***"it was not foreseeable that PSI, an engineering firm hired as a consultant by the owner, could be damaged economically by GFS's negligent performance as a subcontractor. There was no privity between the two, and GFS had no economic, supervisory, or other control over PSI."***

Summary judgment was given to GFS on the negligence claim as well as on the claim for common law indemnity, in part because there was "no special relationship" between PSI and GFS.

The case is *Univ. Cmty. Hosp., Inc. Prof'l Serv. Indus., Inc. v. Geotechnical Found. Sys., Inc.*, 2017 WL 740998 (M.D. Fla. 2017).

MEMBER PROFILE: SCOTT R. FRADIN, Esq.

Much Shelist, P.C.
Chicago, IL

It was a childhood love for buildings and construction and a family history that led Scott into architecture. His father and grandfather were both interior designers and Scott began drafting plans for them at age 12. In fact, his 7th grade wood-shop project was a drafting table. His high school offered an architectural drafting class which Scott took. "To this day," he says, "I relish the smell of a construction site. I was always building models, forts, go carts, etc. My first summer job was with an architectural firm. And some of my favorite books were the coffee table architecture books that my parents had." Growing up, Scott's favorite architect was Frank Lloyd Wright and, since he lived in Chicago, he was able to visit Wright projects in Oak Park, Kankakee and Spring Green. "My parents also took me on an architectural tour in Columbus, Indiana. So when it came time to choose a major, architecture was a natural fit. In fact, I don't think I ever considered another career," Scott said.

Scott and his daughter Emily (a junior at Wisconsin, if you could not tell), harnessing up for a skydiving adventure at Skydive Midwest.

Scott got his BSAS and M. Arch. from the Univ. of Illinois and earned his law degree from IIT Chicago Kent, where he graduated with honors. "As an architect, I worked for many developers and I became interested in exploring a move to that side of the business. I realized that simply having a Masters in Architecture would not set my resume apart from many other architects who, in the early 90's were looking to make a career move."

Scott's uncle persuaded him to get his J.D. instead of an MBA. "He said that I would never have to practice law, but having a J.D. would set me apart from the other architects." Scott's initial plan was to simply use his law degree as a way to work for a developer. "However, I am intrigued by both the intellectual and creative side of both law and architecture," Scott said.

After graduation from IIT Chicago Kent, Scott went to work for the law firm of D'Ancona and Pflaum, but only for a short time. That led to a job with Steve Stein at Stein Ray & Conway (which in now Stein Ray, LLP). Today, Scott Fradin is the co-chair of the Construction Group at Much Shelist in Chicago. There, he enjoys being able to work on a project from acquisition to completion and then, if necessary, claims resolution. "So I become an integral part of a development team and am able to provide clients with counsel throughout the construction process. This integration into the process has allowed me to build many relationships with my clients which have developed into close friendships."

Scott has been married to his wife Gail, an event coordinator, for almost 27 years. "She is a truly wonderful woman," Scott says, "because she actually has put up with me for that long!" Scott and Gail have four children, Emily, 21, Sam, 18, Alec, 16 and Jilly, 12. Emily is a Junior at the Univ. of Wisconsin and is studying to take the MCAT in April; Sam is a senior in high school who looks to play varsity baseball in college for either a Big 10 or MAC 10 school; Alec is a high school sophomore, active in high school musicals and gymnastics; and Jilly is in 7th grade, and who Scott says is "the oldest 12 year old you will ever meet." She wants to be either a school teacher or a lawyer and is convinced that she will be attending Yale.

(Above) The Fradin family: Sam, Scott and Gail (back row); Alec, Jilly and Emily (front row). (Below) Scott, a self-described sports enthusiast and coach, with his son Sam at a high school football game for Deerfield High School.

We have a saying, "You call it chaos, we call it family!" Scott says, adding, "I am an avid fan of my kids. I enjoy heading up to Wisconsin to visit Emily and to catch either a football or basketball game or just to hang out on Lake Mendota and enjoy a beer. I spent the last four years traveling around the country with my son Sam attending various baseball tournaments. For several years we traveled around the Midwest with Alec for gymnastics competitions and now I try to attend as many of his high school events as I can. Jillian is a competitive dancer and I truly enjoy watching her compete (although I could do without the drama)." When not following his kids to their various events, Scott is active in the Chicago Bar Association's Mechanics Lien Subcommittee and is currently the President of the Illinois Society of Construction Attorneys. He is passionate about Chicago and lives in Deerfield (a suburb about 30 miles north of the City). "Because my office is in the city I still get to spend a fair amount of time there. Not only does Chicago have spectacular architecture, but the culture is amazing, energetic, and the food is great! While the pace is hurried (some may say frantic), it is a quality that I am drawn to." His favorite building is the Salk Institute in La Jolla, by his favorite architect, Louis Kahn.

For any young architect thinking about law school, Scott says, "Do it if you are truly interested in it and are not doing it just to make money. Law can be a truly creative endeavor, but I would imagine it would be a grind if you didn't enjoy what you were doing. Stay focused in the area of construction law since an architectural degree will set you apart from the others."

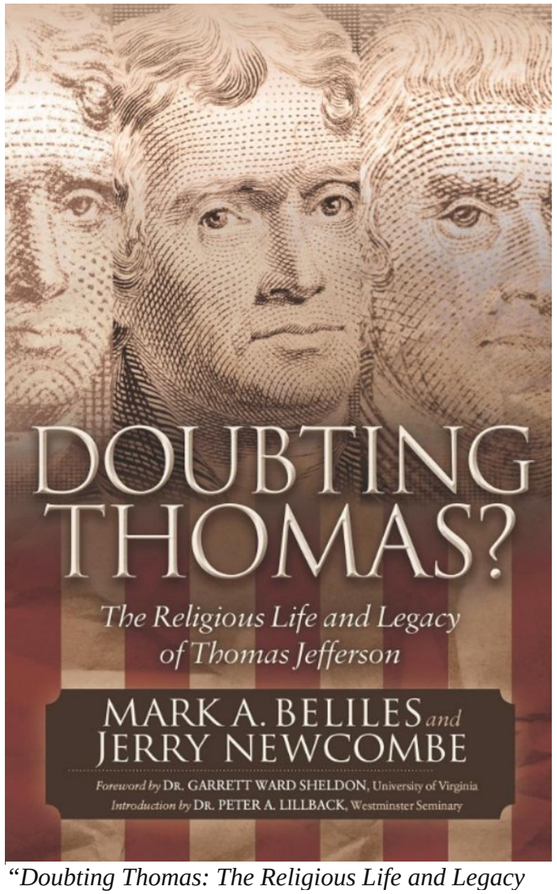
Freedom of Religion According to Thomas Jefferson

By Christopher Rollston
Religion Scholar, George Washington Univ.
Professor, Lecturer
(abridged from *Huffington Post*, Feb. 14, 2017)

Much blood has been shed during human history in the name of religion. Thomas Jefferson (1743-1826) knew this all too well. Here are Jefferson's very words: "Millions of innocent men, women, and children, since the introduction of Christianity, have been burnt, tortured, fined, and imprisoned," ("Notes on the State of Virginia, Query XVII," 1781-1782). * * * Thomas Jefferson was the first Secretary of State of the United States, the second Vice President of the United States, and the third President of the United States (1801-1809). Of course, he was particularly proud of the Declaration of Independence (1776). For this reason, at Jefferson's Monticello (just outside of Charlottesville, Va.), the following words are chiseled deeply into an obelisk as the opening of his epitaph: "Here was buried Thomas Jefferson, author of the Declaration of American Independence." The words of the Declaration are powerful, moving. Jefferson was so very justified in the pride that he felt as its author.

But that is not the conclusion of his epitaph. Here are the words that immediately follow: Author of "the Statute of Virginia for Religious Freedom." This document was drafted the year after the Declaration of Independence (i.e., in 1777). It is a particularly powerful, moving document as well. Here are some of the most poignant and direct words from that foundational document: "Be it enacted by General Assembly that no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever, nor shall be enforced, restrained, molested, or burthened in his body or goods, nor shall otherwise suffer on account of his religious opinions or belief, but that all men shall be free to profess, and by argument to maintain, their opinions in matters of Religion, and that the same shall in no wise diminish, enlarge or affect their civil capacities." Obviously, Thomas Jefferson believed that someone's religious beliefs were a matter of conscience, and he believed that coercion should never be part of the equation.

Jefferson fleshed out his views about religious freedom in even more concrete form just four or five years later. Here are some of his most candid statements: "It does me no injury for my neighbor to say there are twenty gods, or no god. It neither picks my pocket nor breaks my leg," ("Notes on the State of Virginia, Query XVII," dating to 1781-1782). I have long marveled at those two sentences. After all, with those words, Jefferson proclaims that polytheism and atheism, and everything in between, are all acceptable positions for the citizens of Virginia. For Thomas Jefferson, religion is a matter of conscience and so long as it is not "injurious to others" (a phrase he uses in the same context), religion is not something with which the government should be concerned.



"*Doubting Thomas: The Religious Life and Legacy of Thomas Jefferson*," by Mark A. Beliles and Jerry Newcombe (Morgan James Pub.) New York, 2015.

The Constitution of the United States was penned some five years later, and the First Amendment to the Constitution has language that embraces Jefferson's stance on the freedom of religion. Here are those immortal words: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof" (1787). Later, after being elected to the Presidency of the United States, during Thomas Jefferson's First Inaugural Address (on March 4, 1801), he uttered these potent words: "It is proper that you should understand what I deem the essential principles of our Government, and consequently those which ought to shape its Administration." Then, within the list of essential principles are the words "freedom of religion." Similarly, in Jefferson's discussions of the University of Virginia (which he founded, which is the third notation of his epitaph), he notes that the Constitution of the United States "places all sects of religion on an equal footing" (Aug. 4, 1818).

It will come as no surprise that Thomas Jefferson was criticized in his own day for his views of religion, including his belief in the freedom of religion. For example, at one point a certain Mrs. Samuel H. Smith wrote a letter to him about such matters. She was someone whom he knew from societal events in Washington as well as from a prior visit of hers to Monticello. From Jefferson's letter of response to her (sent from Monticello, and dated Aug. 6, 1816), it is apparent that she had heard something about Jefferson's views of religion that disturbed her and she seems to have suggested in her letter that his later views are different from his earlier views. Jefferson's letter of reply is warm, but he seems to bristle slightly at times in his response. He tells her that there have been no changes. Then he writes: "the priests indeed have heretofore thought proper to ascribe to me religious, or rather anti-religious sentiments, of their own fabric, but such as soothed their resentments against the act of Virginia for establishing religious freedom. They wished him [i.e., Jefferson] to be thought atheist, deist, or devil, who could advocate freedom from their religious dictations." He goes on to state that: "I have ever thought religion a concern purely between our God and our consciences, for which we were accountable to him ... I never told my own religion, nor scrutinized that of another." And then he states that, "I have ever judged of the religion of others by their lives....For it is in our lives, and not from our words, that our religion must be read."

For President Thomas Jefferson, therefore, freedom of religion means freedom for all religions, not just his, not just mine, not just yours, but all religions. And Jefferson believed that polytheism, monotheism, and atheism should all be placed on equal footing in the eyes of the government. None of these is to be privileged by the government and none is to be penalized by the government. All are to be equally acceptable in the eyes of the law. Finally, and of paramount importance, Jefferson believed that the measure that is to be used for all of us is our lives, not our words. Ultimately, at the end of the day, "the Sage of Monticello" still has much to teach us.

Jefferson on Religion:
"It does me no injury for my neighbor to say there are twenty gods, or no god. It neither picks my pocket nor breaks my leg."
"I have ever thought religion a concern purely between our God and our consciences, for which we were accountable to him ... I never told my own religion, nor scrutinized that of another."

"If rationality were the standard, *the government could* — based on its disagreement with the message being conveyed — *easily tell architects that they cannot propose buildings in the style of I.M. Pei,* or general contractors that they cannot suggest the use of cheaper foreign steel in construction projects ..."
11th Circuit Court of Appeals (2017) in *Wollschlaeger v. Governor of Fla.*

Florida: Court Says Government Cannot Tell Architects They Cannot Design In the Style of I.M. Pei !

This case (which has nothing to do with design professionals), deals with issues of freedom of speech. A group of physicians and physician interest groups sued Florida state officials, alleging that the state Firearm Owners' Privacy Act (FOPA), which was directed at maintaining patients' privacy rights regarding firearm ownership within context of doctor-patient relationship, violated the First and Fourteenth Amendments. The trial court granted a motion for preliminary injunction and the parties filed cross-motions for summary judgment. On appeal of those rulings, the 11th Circuit Court of Appeals sided with the physicians, noting that record-keeping, inquiry, and anti- harassment provisions of FOPA constituted "speaker-focused and content-based restrictions on speech," and were thus subject to First Amendment protection. The Court found that some of FOPA's provisions regulated speech on the basis of content, restricting (and providing disciplinary sanctions for) speech by doctors and medical professionals on the subject of firearm ownership.

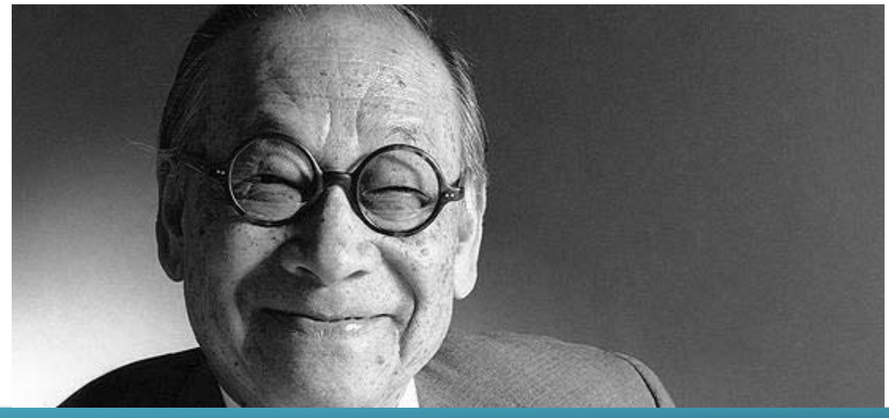
"As part of their medical practices, some doctors routinely ask patients about various potential health and safety risks, including household chemicals, drugs, alcohol, tobacco, swimming pools, and firearms," the Court said. In an effort to prevent and reduce firearm-related deaths and injuries, particularly to children, the AMA "encourages its members to inquire as to the presence of household firearms as a part of child-proofing the home and to educate patients to the dangers of firearms to children." In 2011, the Florida Legislature learned that a pediatrician in Ocala had reportedly told a mother that he would not treat her child because she refused to disclose information about firearm ownership in the family home. The pediatrician explained that he asked all of his patients the same questions "in an effort to provide safety advice in the event there was a firearm in the home." The Legislature also learned about five other incidents in which patients complained that doctors and medical professionals had asked unwelcome questions or made purportedly improper comments regarding their ownership of firearms. In reaction, the Legislature enacted the FOPA, preventing such inquiries of patients, with violations punishable by a fine of up to $10,000 per offense, a letter of reprimand, probation, suspension, compulsory remedial education, or permanent license revocation.

The Court found that it was undisputed that the individual plaintiffs, as doctors, wish to say and do what they believe the FOPA prevents them from saying and doing.

Due to provisions of FOPA, and in order to avoid discipline by the licensing board, the doctors engaged in "self-censorship," no longer asking patients questions related to firearm ownership, no longer using questionnaires with such questions, and/or no longer maintaining written records of consultations with patients about firearms.

State officials argued that the First Amendment is not implicated because any effect on speech is merely incidental to the regulation of professional conduct, relying on Justice White's framework for evaluating the speech of those who are engaged in a profession, that "regulations of so - called professional speech receive only rational basis review." The Court of Appeals rejected this approach, stating that the U.S. Supreme Court has never adopted or applied White's "rational basis standard" to regulations which limit the speech of professionals to clients based on content. In rejecting this argument, the Court said: "In sum, we do not think it is appropriate to subject content-based restrictions on speech by those engaged in a certain profession to mere rational basis review. ***If rationality were the standard, the government could*** — based on its disagreement with the message being conveyed — ***easily tell architects that they cannot propose buildings in the style of I.M. Pei,*** or general contractors that they cannot suggest the use of cheaper foreign steel in construction projects, or accountants that they cannot discuss legal tax avoidance techniques, and so on and so on." The Court of Appeals concluded that since part of the FOPA violated the First Amendment, those parts could be severed without voiding the entire act. The district court's judgment was affirmed in part and reversed in part, and the case remanded.

The case is *Wollschlaeger v. Gov. of, Florida,* 2017 WL 632740 (11th Cir. 2017).



N. Car.: Builder's Risk Insurer Improperly Joined in DJ Action by Engineer

After two pedestrian bridges collapsed on a college campus in Raleigh, N.C., suit was filed by the College against the prime A-E firm (Clark Nexsen), the bridge engineer (Stewart), and the CM (Skanska). Skanska asserted a claim on its builder's risk policy issued by Zurich, and then made a claim against the bridge's engineer for $4.8 million. Zurich took over Skanska's claim against Stewart under the theory of subrogation, under the builder's risk policy. Stewart reported the suit and claims to its professional liability insurer, (CNA) who informed Stewart that the policy only provided $3 mil. of coverage for any claims arising out of the collapse of both bridges. Stewart disagreed, and argued that CNA had an obligation to indemnify it up to the aggregate policy limit of $5 mil. Stewart then sued CNA for declaratory judgment and breach of contract, arguing that CNA was obligated to defend and indemnify Stewart for the claims asserted by Zurich and others. Stewart named Zurich, Clark Nexsen, and Skanska in that lawsuit. After the court dismissed Clark Nexsen, Zurich moved to dismiss, claiming that it had no dog in that coverage fight. The trial court agreed with Zurich, stating that the coverage dispute was solely between Stewart and CNA, and dismissed Zurich. There was no ruling on the underlying dispute over coverage on Stewart's professional liability policy. *Stewart Engin'g, Inc. v. Continental Cas. Co., et al.,* 2017 WL 432792 (E.D.N.C. 2017).

UVA/Monticello Announce Recipients of 2017 Thomas Jefferson Foundation Medals

(from UVA Today, Feb. 28, 2017)

On April 13, the University of Virginia and the Thomas Jefferson Foundation at Monticello will present their highest honors, the 2017 Thomas Jefferson Foundation Medals in ***Law, Citizen Leadership, Global Innovation and Architecture,*** respectively, to:

Law: Loretta Lynch, the first African-American female attorney general in U.S. history, known for her impressive career prosecuting cases involving narcotics, violent crimes, public corruption and civil rights.

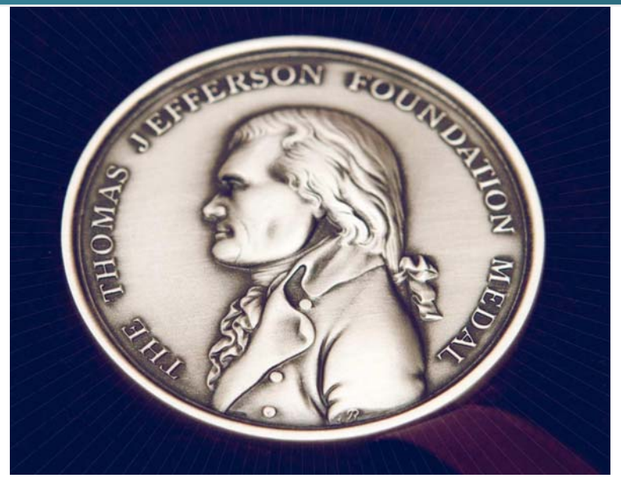
Citizen Leadership: Alice Waters, founder of the Edible Schoolyard Project, chef, author, food activist, founder and owner of Chez Panisse Restaurant in Berkeley, California, who has championed local, sustainable agriculture for more than four decades.

Global Innovation: N.R. Narayana Murthy, Indian entrepreneur and visionary leader who founded and grew Infosys into an information technology powerhouse through the design and implementation of the global delivery model for outsourcing services.

Architecture: Yvonne Farrell and Shelley McNamara, Irish founders and directors of Grafton Architects, renowned for their creative and visionary academic and educational buildings.

The Thomas Jefferson Foundation Medals recognize the exemplary contributions of recipients to the endeavors in which Jefferson – the author of the Declaration of Independence, the third U.S. president and the founder of the University of Virginia – excelled and held in high regard. "This year's medal recipients represent a remarkably broad range of human endeavor. The common denominator is that all of them have ascended to significantly high levels of achievement in their respective fields," said UVA President Teresa Sullivan. The medals are the highest external honors bestowed by the University, which grants no honorary degrees.

The awards are presented annually on Jefferson's birthday, April 13, by the president of the University and the president of the Thomas Jefferson Foundation, the independent, nonprofit organization that owns and operates his home, Monticello. April 13 is known locally as Founders Day, celebrating Jefferson and his founding of UVA in Charlottesville in 1819. "This year's medalists embody Jefferson's vision of global citizenship and his relentless dedication to human progress and innovation," said Leslie Greene Bowman, president and CEO of the Thomas Jefferson Foundation.



The Thomas Jefferson Foundation Medal, given on April 13, 2017 (his birthday) to leaders in Law, Citizen Leadership, Global Innovation and Architecture at Monticello, Virginia.

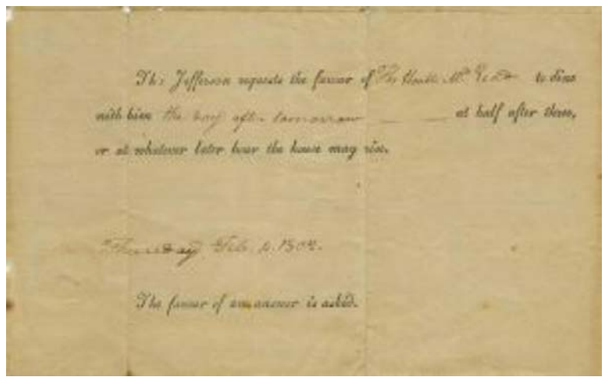
Bowman and Sullivan will present the medals, struck for the occasion, to the recipients at a luncheon in in the Dome Room of the Jefferson - designed Rotunda at UVA. The medalists in Architecture, Law, Citizen Leadership and Global Innovation will each give a free public lecture at UVA, and will be honored at a formal dinner at Monticello. The Citizen Leadership medalist, Alice Waters, will also be the featured keynote speaker at Monticello's commemoration of Jefferson's 274th birthday on April 13 at 10 a.m. on the West Lawn of Monticello. The celebration is free and open to the public. The ceremony will be live streamed online. This year's medalists join a distinguished roster of past winners, including architects Ludwig Mies van der Rohe, I.M. Pei, Frank Gehry, Toyo Ito and Zaha Hadid.

Rare Historical Document Shows How Thomas Jefferson Invited People To Dinner

(From *Forbes* magazine, Feb. 15, 2017)

Thomas Jefferson, more than George Washington or John Adams before, and perhaps more than any other subsequent President, used invitations to dinner at the White House to advance his agenda, get to know Members of Congress, and make official Washington more social. The conversations were typically not business or government related. He wanted people to get to know each other. And he was diligent in his approach, even keeping lists later in his Presidency to make sure he had gotten to the right people enough times. Tales of the finest wines, cheeses and desserts flowed from attendees.

A few of these accounts survive, which is how we know details of these dinners. Manasseh Cutler wrote of one in his journal, "Dined at the President's... Rice soup, round of beef, turkey, mutton, ham, loin of veal, cutlets of mutton or veal, fried eggs, fried beef, a pie called macaroni, which appeared to be a rich crust filled with the strillions of onions or shallots, which I took it to be, tasted very strong, and not agreeable... Ice-cream very good, crust wholly dried, crumbled into thin flakes; a dish somewhat like a pudding – inside white as milk or curd, very porous and light, covered with a cream sauce – very fine." So how did Jefferson invite people in the early days of his Presidency? A handful of documents from his first term survive that show us. One, pictured here, was recently sold by The Raab Collection. (See insert)


Th: Jefferson requests the favour of ... to dine with him ... at half after three, or at whatever later hour the house may rise.

... Feb. 9. 1804.

The favour of an answer is asked.

(above) An original invitation to President Thomas Jefferson's White House, filled out by explorer Meriwether Lewis, recently discovered.

Okla: Coating Manufacturer Wins on ELD

When a new coating system began to blister on the clarifiers of a water treatment plant, the coating contractor (Midwest) had to make repairs to two of the clarifiers. Midwest then sued Sherwin - Williams Company for negligence and for products liability. Sherwin - Williams filed a motion to dismiss the suit based upon the economic loss doctrine (ELD), arguing that the doctrine bars recovery in tort and requires dismissal of the manufacturer's products liability and negligence claims. The trial court agreed with Sherwin-Williams, citing to the U.S. Supreme Court's decision in *East River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858 (1986), that "whether stated in negligence or strict liability, no products-liability claim lies ... when the only injury claimed is economic loss." The Oklahoma Supreme Court adopted the doctrine in 1990, holding that, "that "no action lies in manufacturers' products liability for injury only to the product itself resulting in purely economic loss."

The trial court noted that the only damages claimed by Midwest were "economic injury to the product and consequential harm flowing from that injury. Because, a manufacturer has no duty under either a negligence or strict products - liability theory to prevent a product from injuring itself," both the products liability and negligence claims were dismissed.

That did not necessarily leave Midwest without a remedy, however. In a footnote, the trial court also stated, "Damage to a product itself is most naturally understood ***as a warranty claim,*** because the maintenance of product value and quality is precisely the purpose of express and implied warranties. Therefore, a claim of a nonworking product can be brought as a breach – of - warranty action," citing to *E. River S.S. Corp*. The case is *Midwest Coatings, Inc. v. The Sherwin-Williams Co.*, 2017 WL 377942 (W.D. Okla.).

MEMBER PROFILE: KATE ENOS FROWNFELTER, Assoc. AIA, Esq.

Bethesda, MD

Kate knew around the time that she was 14 years old that she wanted to become either an engineer or architect. Her dad is a ceramic engineer and growing up, she recalls blue prints laying around the house from his various work projects. “I was fascinated by them,” she said. “I took all the drafting classes that my local high school offered. When deciding on a college major, my dad and I had lots of talks about what I thought I wanted to do for a career. Eventually I decided that architecture was the choice best suited for me.” Kate chose The Catholic University of America in Washington, D.C. to get her two degrees in architecture. Being from a small town in West Virginia, she was excited to attend college in a major city. Catholic University’s School of Architecture, fit the bill and was within four hours of her hometown.

The idea of law school came to Kate during her Architectural Practice Management Class. “I was intrigued by the legal and business concepts in the practice of architecture, so I sat for the LSAT in my fifth year.” She decided to take some time in making this important decision, so Kate worked for a year for a small architectural firm after graduation to make certain that she really wanted to attend law school. She returned to her W. Va. home town and worked for a firm that did K-12 schools, hospitals and light commercial pro-jects. “It was during some lean years of the profession (the early 90’s) and everyone was happy just to have a pipeline of work.”

Kate and her husband, Mark, live in Bethesda, Md., with their three children, twins Erin and Colin, (age 9) and Aidan, (age 6).

“After that year of discernment, I decided law school would be a good fit for me,” Kate recalled. She chose a college in her home state, and enrolled at West Virginia University College of Law. While in law school, Kate continued to work as an architectural intern during her first and second years, and returned to work at the same firm during her third year but as a Legal Intern. In that role, she helped the firm to manage a large arbitration dispute.

Armed with her law degree, Kate was hired as a Federal law clerk for Hon. Irene M. Keeley, U.S. District Court, Northern District of West Virginia. “It was one of the most interesting and busy times of my life,” Kate says. “In addition to some typical criminal and civil issues, the court managed a trial involving profound civil rights violations, a federal tax evasion case involving significant damages and a disegard of state and federal sovereignty. We also handled a case where the prosecutor was seeking the death penalty for two criminal defendants.”

Her professional career has included two years at Travelers as the Director of Risk Management. Prior to that, Kate spent 14 years as a Managing Director at Victor O. Schinnerer, overseeing their Construction Professional Liability and Property and Casualty Programs.

Today, Kate is on sabbatical from working full time, devoting more time to her three children, especially a daughter with dyslexia. “We have been doing extensive early intervention tutoring and it has made all the difference for her. She and her brothers are thriving in school.”

Kate occasionally teaches Architectural Practice Management as a visiting lecturer at Catholic University. “I really enjoy teaching students about the realities of professional practice, especially the legal, business and practical aspects of the architectural profession. This is quite often the first time these students have exposure to the contractual, negotiation and business aspects of being an architect. We concentrate on the business skills that are many times not the primary focus for design students.” She tells her students to enjoy architecture school, and if law school is something they want to do, they will be prepared for it.

(above) Kate and her family enjoying a Washington National’s baseball game; (below) a pilgrimage to Monticello, home of Thomas Jefferson.

These days you’ll find Kate running in 5K races, which she started last year. “Having not run with any great regularity since high school, I have found a new joy in hitting the road running!”

Kate admires the East Wing of the National Gallery of Art in Washington, and says, “As a child, I was profoundly struck by the architecture of I.M. Pei. It was so unique and different from many of the buildings found in my life up to that that point that it truly resonated with me. I continue to enjoy visiting it periodically.”

Trump, the Press, the First Amendment, and Thomas Jefferson

By David Post
(abridged from the *Washington Post*, March 1, 2017)

And while we're on the subject, what is particularly galling to me, and to anyone who calls him/herself a "Jeffersonian" as I do, is the way that Trump has enlisted Jefferson's support in his attacks on the press. For instance, at a Florida rally last week, he said: "They [the press] have their own agenda and their agenda is not your agenda. In fact, Thomas Jefferson said, 'Nothing can be believed which is seen in a newspaper.'" "Truth itself," he said, "becomes suspicious by being put into that polluted vehicle," that was June 14, my [Trump's] birthday, 1807." * * * It is certainly the case that Jefferson had a very rocky relationship with the press, and said some very uncomplimentary things (as in the 1807 letter to John Norvell from which Trump was quoting) about them, and about what he called elsewhere "the putrid state into which our newspapers have passed and the malignity, the vulgarity, and mendacious spirit of those who write for them. . . . These ordures are rapidly depraving the public taste and lessening its relish for sound food."

But Jefferson — unlike some presidents I am aware of — understood very well the difference between his private disputes with the press and his personal views about press activity expressed in his private correspondence, on the one hand, and his statements and actions taken in his *public* capacity and his public writings on *the other*, in which he was quite possibly the strongest supporter of a free and unfettered press that this country has ever had.

He rode into office in 1800, of course, on the wave of public indignation about the Adams administration's Sedition Act, which made it a federal crime punishable by up to two years in prison to criticize the government — to "write, print, utter, or publish," any "malicious writings against the government of the United States, or either House of Congress, or the President," or anything that would "bring them into disrepute." * * * Scores of newspaper editors had been tossed into jail, and it was Jefferson, along with James Madison, who led the fight to declare the act unconstitutional. The Virginia Resolution, passed by the state assembly (and co-authored by Jefferson and Madison) declared that the Sedition Act (along with its sister statute, the Alien Act) was unconstitutional.

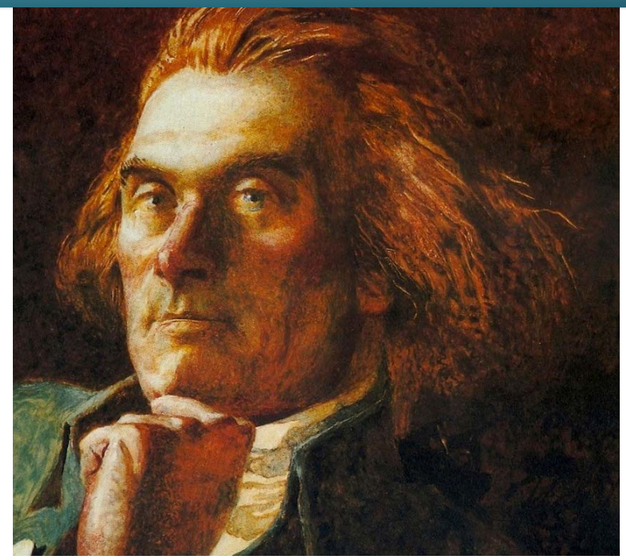
* * *

A wonderful anecdote (possibly anecdotal) from Jefferson's presidential years captures his attitude well. "In 1804, the celebrated traveler, Baron Humboldt, called on the President one day, and was received into his office. On taking up one of the public journals which lay upon the table, he was shocked to find its columns teeming with the most wanton abuse and licentious calumnies of the President. He threw it down with indignation, exclaiming, "Why do you not have the fellow hung who dares to write these abominable lies?" The President smiled at the warmth of the Baron, and replied: "What! Hang the guardians of the public morals? No sir, rather would I protect the spirit of freedom which dictates even that degree of abuse. Put that paper into your pocket, my good friend, carry it with you to Europe, *and when you hear anyone doubt the reality of American freedom, show them that paper, and tell them where you found it.* Sir, the country where public men are amenable to public opinion; where not only their official measures, but their private morals, are open to the scrutiny and animadversion of every citizen, is more secure from despotism and corruption than it could be rendered by the wisest code of laws, or best formed constitution. Party spirit may sometimes blacken, and its erroneous opinions may sometimes injure; but, in general, it will prove the best guardian of a pure and wise administration; *it will detect and expose vice and corruption, check the encroachments of power, and resist oppression; sir, it is an abler protector of the people's rights, than arms or laws*."

"But is it not shocking that virtuous characters should be defamed?" replied the Baron. "Let their actions refute such libels," continued the President. "Believe me, virtue is not long darkened by the clouds of calumny, and *the temporary pain which it causes is infinitely overweighed by the safety it insures against degeneracy in the principles and conduct of public functionaries*. When a man assumes a public trust, he should consider himself as public property, and justly liable to the inspection and vigilance of public opinion; and the more sensibly he is made to feel his dependence, the less danger will there be of his abuse of power, which is that rock on which good governments, and the people's rights, have been so often wrecked." [from Sketches of the Life, Writings, and Opinions of Thomas Jefferson (1832), B. L. Rayner].

Jefferson truly believed — and acted always in accordance with the belief — that free speech and a free press were the two *indispensable* conditions for maintaining our freedom in the face of abusive governmental power.

"Our liberty cannot be guarded but by the freedom of the press, nor that be limited without danger of losing it…. Where the press is free and every man able to read, all is safe. To preserve the freedom of the human mind and freedom of the press, every spirit should be ready to devote itself to martyrdom; for as long as we may think as we will, and speak as we think, the condition of man will proceed in improvement. No experiment can be more interesting than that we are now trying, and which we trust will end in establishing that man may be governed by reason and truth. Our first object should therefore be to leave open to him all the avenues to truth. The most effectual agent hitherto found is the freedom of the press. It is, therefore, the first shut up by those who fear the investigation of their actions. An executive strictly limited, the right of war vested in the legislative body, a rigid economy of the public contributions, and absolute interdiction of all useless expences, will go far towards keeping the government honest and unoppressive. *But the only security of all is in a free press.* The force of public opinion cannot be resisted, when permitted freely to be expressed. The agitation it produces must be submitted to, for it is necessary to keep the waters pure." So if Trump is channeling any historical figure in calling out the press as the "enemies of the people," it is Joseph Stalin, or possibly Robespierre, not Thomas Jefferson.



> "It is so difficult to draw a clear line of separation between the abuse and the wholesome use of the press, that as yet we have found it better to trust the public judgment, rather than the magistrate, with the discrimination between truth and falsehood. Considering the great importance to the public liberty of the freedom of the press, and the difficulty of submitting it to very precise rules, the laws have thought it less mischievous to give greater scope to its freedom than to the restraint of it." [Thos. Jefferson, Feb. 5, 1803].