



# American Board of Criminal Lawyers THE ROUNDTABLE



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26

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## Editorials

*(With a little bit of copy-editing by ABCL's Carl Poplar)*

# Judicial Independence

The Securities and Exchange Commission is tasked with the responsibility to investigate unlawful conduct of corporate America. If it is determined that regulated businesses have engaged in unlawful activity that has caused or contributed to the current depressed national economy, then they have a job to do.

On Oct. 19, the SEC filed two lawsuits in the Southern District of New York: one accusing Citigroup Global Markets Inc. of a substantial securities fraud and the other accusing an identified employee of involvement in that fraud. Based on four years of accumulated information, the SEC asserted that in early 2007, when the market for mortgage-backed securities was beginning to weaken, Citigroup created a billion-dollar fund that allowed it to dump questionable assets on misinformed investors by representing that the fund's assets were attractive investments. Citigroup included within the portfolio a substantial percentage of negatively projected assets and had taken a short position in the very assets that it helped select, the SEC contended.

While the suit against Citigroup alleged negligence, the suit against the individual employee set forth that Citigroup actually knew that placing the liabilities of the fund would be difficult if it disclosed to potential investors its intention to use the fund to short a hand-picked set of poorly rated assets.

Contemporaneously with the filing of those complaints, the SEC presented to District Judge Jed Rakoff a proposed consent judgment, represented to be the settlement between the SEC and Citigroup, not the individual employee.

The economic terms of the settlement were that Citigroup was to disgorge \$160 million in net profits realized from the transaction, plus \$30 million in interest, and to pay a civil penalty of \$95 million, for a total of \$285 million. When put into perspective, this sum of money is very small. Citigroup made a \$3.8 billion profit in the third quarter of 2011 alone. The investors, meanwhile, lost more than \$700 million.

The settlement provided that Citigroup would neither admit nor deny any of the allegations of the complaint and was enjoined from violating the securities law in the future.

Private parties have the right to enter into settlement agreements, whether or not they are fair and reasonable. But Rakoff refused to approve this settlement between a governmental agency and a regulated corporation without being provided any proven or admitted facts upon which he could exercise some independent judgment.

Who is Judge Rakoff? A graduate of Philadelphia's

college preparatory magnet Central High School, he was educated at Swathmore College, Oxford University and Harvard Law School. After a Third Circuit Court of Appeals clerkship, he was for seven years an assistant U.S. attorney in the Southern District of New York, for a time as chief of the Business and Security Fraud Section. He was then in private practice with larger New York law firms, defending large corporations who were accused of crimes and sued administratively and civilly for business malfeasance. He has thus experienced both sides of the corporate battleground. His skills as a lawyer have been recognized by his peers: He is a fellow of the American College of Trial Lawyers and of the American Board of Criminal Lawyers. He has authored four books, more than a hundred published articles, and, since his appointment to the bench in 1995, in excess of 424 judicial opinions.

It appears to have been the government's and Citigroup's intention to walk into court and have their agreement rubber-stamped. Rakoff recognized that substantial deference was due the SEC but correctly observed that he had to exercise independent judgment to determine the settlement to be fair, reasonable, adequate and in the public interest. The government took the extraordinary position that the SEC is the sole determiner of what is in the public interest regarding consent judgments in its cases. But as Rakoff pointed out, that is not the law.

Rakoff needed some knowledge of the underlying facts to avoid being a "mere handmaiden to a settlement privately negotiated on the basis of unknown facts, while the public is deprived of ever knowing the truth in a matter of obvious public importance." He was critical of a consent agreement wherein there was no admission of the underlying allegations. Not only did the settlement bring no benefit to the defrauded investors; the consent judgment would have absolutely no evidentiary value in any claim or suit an investor might thereafter lodge.

Many judges would have acquiesced and approved the settlement. The SEC claims it is devoted to the protection of the investors as well as to assisting them in the recovery of their losses. That appeared a fiction to Rakoff, who stated that "in any case like this that touches on the transparency of financial markets whose gyrations have so depressed our economy and debilitated our lives, there is an overriding public interest in knowing the truth." Instead of approving the consent judgment, he consolidated both cases for trial next July.

Rakoff's decision underscores the need for an independent judiciary. Our compliments to the court.



## TIDBITS

### Parental Bragging Rights

And the winner is:

Said to have "freed more people than Lincoln" and to have "saved more lives than the Red Cross" **Jon Paul Rion** has been chosen by the Southern Christian Leadership Conference (SCLC) to be honored at the annual Martin Luther King birthday celebration in recognition of his efforts representing people. In addition, he has been asked to be the keynote speaker at this event. Jon Paul Rion is honored and humbled by this tribute and makes his parents proud.

Warmest New Year Wishes,

John H. Rion

**Rion, Rion, & Rion, L.P.A., Inc.**

### Research Gem of the Month

**Ron Meshbesh** shares the following opinion he came across doing his usual thorough research recently: In an opinion issued Dec. 22, 1911, in the case of Gutman v. Klimek, 133 N.W. 475, the Supreme Court of Minnesota found no abuse of discretion in the trial court's refusal to grant a new trial on the ground of improper conduct based upon remarks of counsel that "these Jews can take care of themselves," and referring to the defendants as "these poor German boys," the Court finding that there was no further showing in the statement as to the connection in which the remarks were made."

### **"Wonder Dog:**

#### **A Golden Retriever Reaches a Raging Boy."**

**Don Samuel's** wife, Melissa Fay Greene, has written the above-titled article which appeared in NEW YORK TIMES SUNDAY MAGAZINE of 2/4/2012. You may want to read and share this touching story with others.

<http://mobile.nytimes.com/2012/02/05/magazine/wonder-dog.xml>

## **Airman cleared in shooting death**

Alamogordo Daily News - By Duane Barbati, Staff

Posted: 01/20/2012 09:16:50 PM MST

Holloman Airman 1st Class Erik M. Wilhelm was cleared Thursday by a military court martial in the death of his roommate and fellow airman Sean McGinnis. Wilhelm was accused of one charge and one specification of an inherently dangerous act of murder under article 118 of the Uniform Code of Military Justice; one charge and one specification of manslaughter under article 119 of the UCMJ; and one charge and one specification of negligent homicide under article 134 of the UCMJ.

Wilhelm was represented by his civilian Las Cruces attorney **Michael Stout** and U.S. Air Force Maj. Wes McConnell in his five-day trial that began Jan. 13. Stout said he believes Wilhelm's plans are to move back to Ohio where his family lives.

"Wilhelm was very upset and depressed by this tragedy, but he was not responsible for it," he said. "This has been a cloud over Wilhelm's head for two years. This verdict helps lift the cloud, but he still misses his friend. The evidence was clear that McGinnis chambered a round (in a pistol), pulled the trigger and shot himself. Wilhelm was shocked beyond belief because he did not see it coming."

The stumbling blocks in the case of McGinnis' death, for the government and defense, is the evidence surrounding McGinnis' manner of death and Wilhelm's statements after the shooting incident.

In an Article 32 investigation at Holloman Air Force Base on May 27, 2011, it was disclosed in testimony that the New Mexico Office of the Medical Investigator determined McGinnis' death was caused by a single gunshot wound. An Article 32 investigation, or proceeding, is equivalent to a civilian grand jury.

During testimony, New Mexico Associate Medical Investigator Dr. Ian Paul stated that McGinnis' manner of death was undetermined. An undetermined manner of death means an autopsy could not determine if the death was caused by homicide or an accidental shooting.

Stout said Wilhelm's military court martial lasted five days. He said the jury was made up of eight officers and enlisted men who deliberated for about three hours before acquitting Wilhelm on Thursday.

In a prior and unrelated shooting incident June 2, 2009, at the Alamo Apartment complex, McGinnis had been shot. According to an article published in the Daily News on June 4, 2009, ADPS officers responded to McGinnis' apartment and found him with a single gunshot from a handgun.

ADPS never disclosed the name of McGinnis' roommate who called 911 on June 2 immediately after the shooting occurred. No one has been charged in the 2009 shooting incident.

## **NEWS**



**Heroic Pit Bull  
Journeys 2,000 Miles  
To Attack Owner**



**Free-Thinking Cat  
Shits Outside The Box**



## NEWS IN BRIEF

## Area Man Finally Sees Enough Images Of Bare Breasts For Entire Lifetime

■ 98,344th Pair Leaves 32-Year-Old Man Entirely Sated

BOISE, ID—With what he described as "a deep sense of satisfaction," local man David Glean closed his laptop Tuesday after viewing his 98,344th pair of naked breasts, telling reporters he had seen enough bare bosoms in his 32 years to last him the rest of his life. "Well, I guess that's that," said Glean, letting out a contented sigh more than two decades in the making. "As soon as I locked eyes on that last set, something clicked in my head and I said to myself, 'Dave, if you don't see another pair of nude breasts again, you'll be fine.' I had never felt that way before." Glean estimated he could still watch another 1,446 ejaculated-upon female faces and at least three more Filipino dwarf fistings.

## Report: Syria Running Dangerously Low On Civilians To Oppress

DAMASCUS—Noting that without the brutal subjugation of its masses a totalitarian state is effectively meaningless, Syrian officials announced this week that the country is experiencing a severe shortage of civilians to tyrannize. "After a year of continuously putting down popular uprisings with increasingly extreme violence, the regime is now running very low on people to crush beneath its iron fist," said Prime Minister Adel Safar, later adding that the government would need to seriously reevaluate its approach to indiscriminate slaugh-

ter, with an eye toward rebuilding a healthy population of oppressible citizens. "Effective immediately, we will focus more on murdering the sick and the old, while placing reasonable limits on the execution of pregnant women in the streets." The Syrian government is also reportedly looking into the possibility of importing roughly 50,000 people from Iran, which has long enjoyed a surplus of citizens to brutalize.

## Area Man Thinks It's Nice They Didn't Put The Prettiest Girl Scouts On The Cookie Box

STAMFORD, CT—Local CPA Adam Hober told reporters Wednesday he was pleased to see the Girl Scouts of America had chosen not to feature the most conventionally attractive girls on boxes of their trademark cookies. "They could have put the prettiest girls on the there and maybe sold some more cookies, but they didn't, and I really appreciate that," Hober said while munching on a "Samoa"-style baked treat. "It's just nice to see what an inclusive organization they are, and it's really great they gave those Plain Janes a chance to shine." Mr. Hober later added that the wheelchair-bound Hispanic Girl Scout on the side of the box was perhaps a bit much.

## Study Reveals Majority Of Suicides Occur While Trying To Put Fitted Sheet On Bed

BALTIMORE—According to a study published Monday in *Psychological Bulletin*, more than 83 percent of suicides take place when an individual is faced with the task of putting a fitted sheet onto a mattress. "In the majority of these cases, people end their lives after trying in vain to get the short side of the sheet onto the long side of the bed, and

at least one-third kill themselves after struggling with the final corner only to realize it is their own body weight preventing the sheet from stretching far enough," said Johns Hopkins University psychologist Dr. Khalil Mazarhi, adding that suicide victims are usually discovered in close proximity to fitted sheets that are either partially covering a mattress or balled up in a corner of the room. "The tragic irony of this phenomenon is that a significant number of people will actually use the sheet to hang themselves." The study concludes with a recommendation that, for personal safety, fitted sheets only be handled when a second person is present.

## Time Traveler From The Year 1998 Warns Nation Not To Elect Newt Gingrich

WASHINGTON—Saying he came bearing an important message from the past, a stranger from the year 1998 appeared on the Capitol steps Thursday and urged voters not to elect Newt Gingrich president in 2012. "In the late 20th century, Newt Gingrich is a complete disgrace!" said the time-traveling man, warning Americans that 14 years in the not-so-distant past, Gingrich becomes the only speaker in the history of the House of Representatives to be found guilty on ethics charges, and is later forced to resign. "In my time, he shuts down the federal government for 28 days because his feelings get hurt over having to sit at the back of Air Force One. Gingrich gets our president impeached for lying about marital infidelities when, at the same time, Gingrich himself is engaged in his own extramarital affairs. And for God's sake, he divorced his first wife after she was diagnosed with cancer. Won't anyone listen to me?!" When asked about Donald Trump, the time-traveler said he had no information on the man, as no one from 1998 cared about a "washed-up fake millionaire." ☞

## Nothing To Lose But Our Illusions

an interview with DAVID EDWARDS

David Edwards: It's not enough to just sit there and have compassionate thoughts. Your compassionate thoughts need to be reflected in what you do. How can you aspire to compassion and yet work for an arms manufacturer? You need to help other people.

Derrick Jensen: What do you say to people who feel they are busy struggling to get by and don't have time to help others?

Edwards: Once you start to see through the myth of status, possessions, and unlimited consumption as a path to happiness, you'll find that you have all kinds of freedom and time. It's like a deal you can make with the universe: *I'll give up greed for freedom.* Then you can start putting your time to good use.

Jensen: And if someone says, "But the problems are so big, what can one person do?"

Edwards: Once you realize that helping others is also helping yourself, the size of the overall problems becomes irrelevant. You're not a one-man or one-woman army out to save the whole world. You help simply because it does good and it feels good.



First they came for the socialists, and I did not speak out—  
because I was not a socialist.  
Then they came for the trade unionists, and I did not speak out—  
because I was not a trade unionist.  
Then they came for the Jews, and I did not speak out—  
because I was not a Jew.  
Then they came for me—and there was no one left to speak for me.

— Martin Niemöller



## **EX-DUQUESNE CONSTABLE ACQUITTED OF COCAINE CHARGES**

December 09, 2011 - By Rich Lord, Pittsburgh Post-Gazette

A former Duquesne constable charged with conspiring to sell cocaine was found not guilty in U.S. District Court today following a week-long jury trial.

Prosecutors had painted him as a sworn law-enforcement officer who provided safe haven for his cocaine-dealing friends. But Mr. Cobb, 30, testified Thursday that although his brothers, friends, and even the mother of his son got mixed up with drugs, he chose a different path, signing on as a city firefighter from the age of 17 and then getting jobs in private security.

In 2006, he went to state constable school and took that post, which involves serving warrants but not making arrests. He said he was labelled "a nerd."

In Duquesne, he said, "All I see is these guys out there indulging in drug activity. ... I told my friends, do this for me: Respect me. When you come to my house, I don't want to you bring any cocaine, crack or heroin." He did, however, smoke marijuana, and had around five ounces under his mattress that he would share with lady friends.

"Police would say, 'You're living on both sides,'" he said, adding that they wouldn't socialize with him. He wouldn't turn his back on his people, he said.

His best friend, Dewayne Joseph, pleaded guilty in October to selling cocaine, but before that signed an affidavit saying that Mr. Cobb had nothing to do with the drug trade.

Assistant U.S. Attorney Amy L. Johnston, though, attacked his credibility, noting that he had confirmed Mr. Cobb's involvement at his plea hearing. She also played recordings of cell phone conversations, captured in the FBI wiretap, in which he referenced Mr. Cobb while apparently talking about cocaine.

"He don't have nothing to do with it," Mr. Joseph maintained.

FBI Special Agent Minh Truong said that on Dec. 14, when Mr. Cobb was arrested, firearms were seized from numerous places throughout his house in addition to the marijuana was found under his mattress.

He said Mr. Cobb offered him a digital device that held video from a camera posted on his house. "I declined his offer," Mr. Truong said.

Mr. Cobb's attorney, **William L. Summers**, made much of the decision not to seize the footage, saying the video would have exonerated the former constable, but had since been automatically taped over. "Have you ever heard the saying that a picture speaks a thousand words?" Mr. Summers asked Mr. Truong.

"Yes, sir," said Mr. Truong.

"What's a video speak?" Mr. Summers asked.

"I don't have the video," Mr. Truong said.

"You should," said Mr. Summers.

Mr. Cobb was among 42 people charged following a 2010 FBI investigation. His trial was the first, though numerous defendants have pleaded guilty.

## **NC judge orders new trial for novelist Michael Peterson, who was convicted of killing his wife**

By Associated Press, Published: December 14

DURHAM, N.C. — Novelist Michael Peterson will get a new trial in the death of his wife because a key prosecution witness misled jurors about the strength of bloodstain evidence, a judge ruled Wednesday. Peterson, 68, was convicted of first-degree murder in the 2001 death of Kathleen Peterson, who was found at the bottom of a bloody staircase in the couple's mansion. Peterson has maintained his wife died in an accidental fall after drinking alcohol and taking Valium.

Peterson's attorney, **David Rudolf**, said it will likely be Thursday before his client can be released on the \$300,000 bond set by the judge. "I think it's a very sad thing when an expert called by the state of North Carolina, who's supposed to be impartial and present technical information to help the jury, becomes an advocate who misrepresents facts and conclusions," said Rudolf, who also represented Peterson in his 2003 trial.

Judge Orlando Hudson ruled that former State Bureau of Investigation agent Duane Deaver misled jurors at Peterson's trial when he testified that his analysis of blood spatter showed beyond any doubt that Kathleen Peterson died after being struck by her husband three times with a blunt object.

The state agency fired Deaver in January after an independent audit found problems in 34 cases where he either misreported test results, withheld results that could have helped the defendant or overstated the strength of the evidence to help prosecutors. In one of those cases, a man spent more than 17 years in prison before being released after a state innocence panel exonerated him. Deaver was a crucial witness at Peterson's trial, which was carried live on cable television and became a documentary film and a made-for-TV movie.

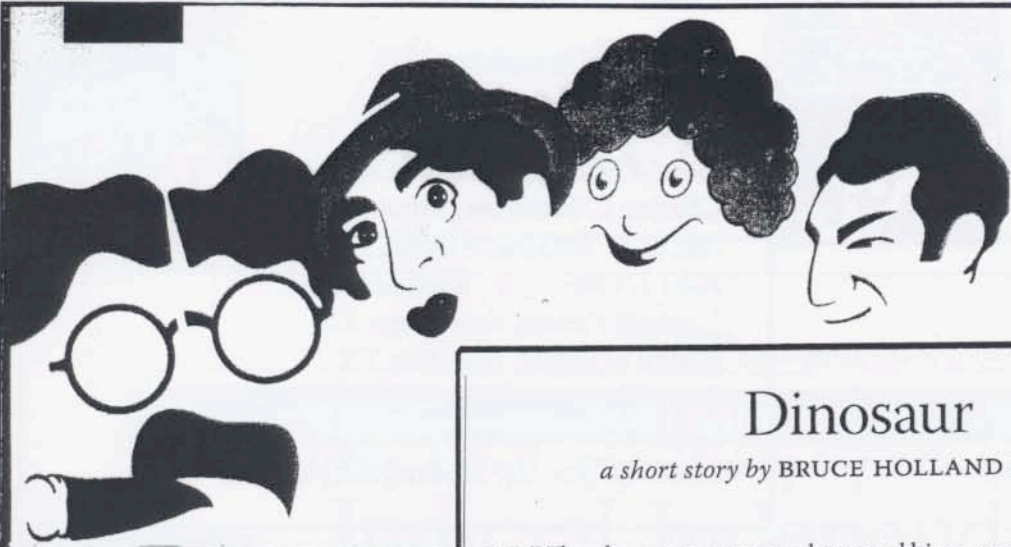
Over the last week, Rudolf presented witnesses to cast doubt on Deaver's credibility, including three of the agent's former colleagues. Nationally recognized experts in bloodstain pattern analysis also testified that Deaver used antiquated techniques and gave opinions before the jury that could not be justified through a scientific examination of the evidence.

"You have a right not to be tried with fabricated evidence," he told the judge. "There is no way to sugarcoat it. Deaver lied to this court and this jury multiple times."

Peterson enlisted in the Marine Corps during the Vietnam War. His novels include the 1990 "A Time of War," an in-the-trenches look at the war, and a 1995 sequel, "A Bitter Peace." Peterson was also a regular columnist for the Durham Herald-Sun and mounted an unsuccessful campaign to be the city's mayor.

Once released, Peterson will have to wear electronic monitoring while awaiting his new trial. He will live at a friend's home in Durham. Clayton Peterson, one of Peterson's sons, said his family is looking forward to a second trial. He offered up his house to help secure his father's bond. "We are confident he will be found innocent," Clayton Peterson said.





BARBIE MAGUIRE

# Dinosaur

a short story by BRUCE HOLLAND ROGERS

'It is our duty to prevent soldiers from risking their health just for the sake of a quick adventure.'

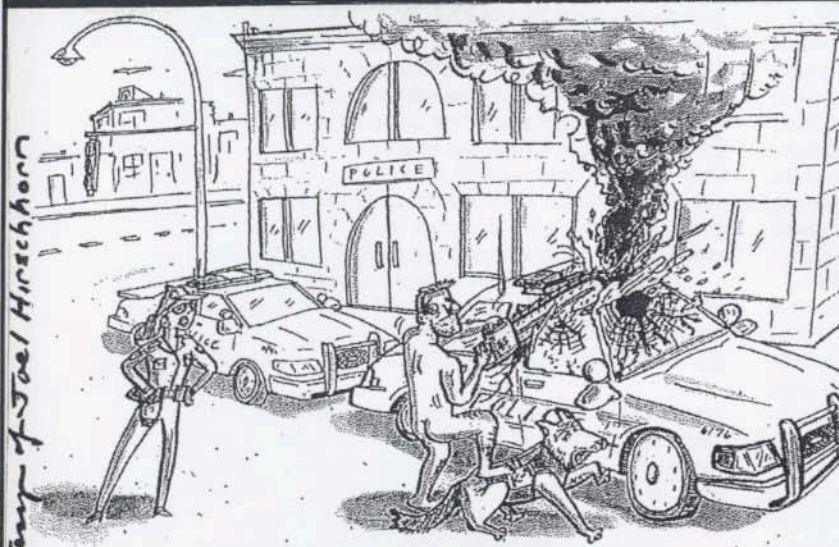
HEINRICH HIMMLER, SS chief; a new book discloses how top Nazi officials sanctioned the distribution of sex dolls to German soldiers in World War II to keep them from sleeping with prostitutes



When he was very young, he waved his arms, snapped his massive jaws, and tromped around the house so that the dishes trembled in the china cabinet. "Oh, for goodness' sake," his mother said. "You are not a dinosaur! You are a human being!" Since he was not a dinosaur, he thought for a time that he might be a pirate. "Seriously," his father said to him after school one day, "what do you want to be?" A fireman, maybe. Or a policeman. Or a soldier. Some kind of hero.

But in high school they gave him tests and told him he was good with numbers. Perhaps he'd like to be a math teacher? That was respectable. Or a tax accountant? He could make a lot of money doing that. It seemed a good idea to make money, what with falling in love and thinking about raising a family. So he became a tax accountant, even though he sometimes regretted it, because it made him feel, well, small. And he felt even smaller when he was no longer a tax accountant, but a retired tax accountant. Still worse: a retired tax accountant who forgot things. He forgot to take the garbage to the curb, to take his pill, to turn his hearing aid on. Every day it seemed he forgot more things, important things, like where his children lived and which of them were married or divorced.

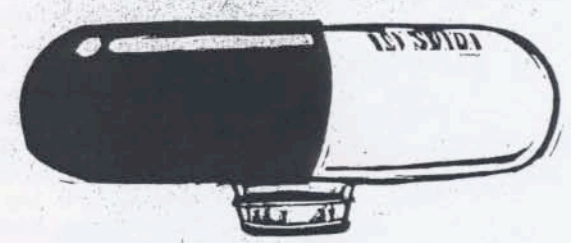
Then one day, when he was out for a walk by the lake, he forgot what his mother had told him. He forgot that he was not a dinosaur. He stood blinking his dinosaur eyes in the bright sunlight, feeling its familiar warmth on his dinosaur skin, watching dragonflies flitting among the horsetails at the water's edge.



companion of Joel Hirschhorn

"You are breaking so many laws right now I don't even know where to begin."

## THE GOODMOOD BLIMP





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### The RoundTable

Steve LaCheen, Editor

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### Future Meetings

June 22-24, 2012: Broadmoor Resort, Colorado Springs

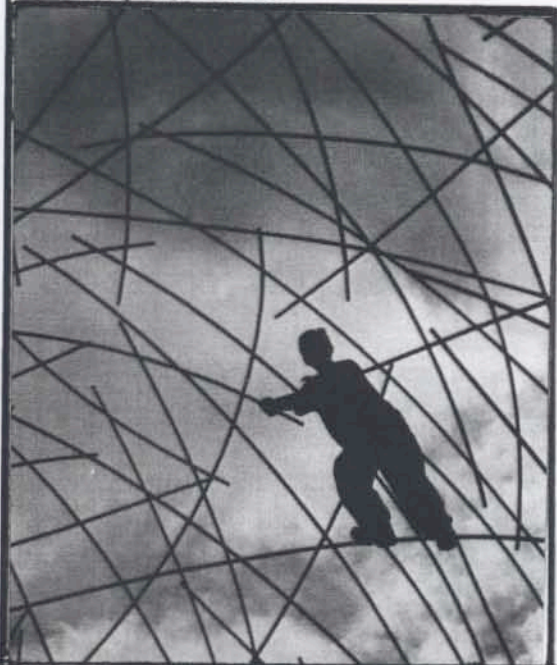
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### The RoundTable

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