

remembering John Flynn

Twenty-five years after his death, John Flynn is remembered by many Arizona attorneys as the consummate trial lawyer. His accomplishments include his oral argument to the U.S. Supreme Court in *Miranda v. Arizona*, but that was just one highlight in a successful career.

Friend and former partner Tom Galbraith here shares stories and thoughts about Flynn.

Tom Galbraith now practices law with Meyer, Hendricks & Bivens in Phoenix. He can be reached at 3003 N. Central, Suite 1200, Phoenix 85012, and tgalbrait@mhb-law.com. The people who worked with John Flynn, including, among others, retired Arizona Supreme Court Justices Jim Moeller and Robert Corcoran, Mike Kimerer, Phil Goldstein, Andy Sherwood, Clark Derrick, Peter Baird, Tom Chandler, Bob Jensen, Richard Treon and Robert H. Allen have at various times shared equally colorful John Flynn anecdotes, which for a variety of reasons could not be included in this article. Mr. Galbraith invites anyone who would like to send him their John Flynn stories.



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John Flynn in the courtroom hallway after a not-guilty verdict in the Treadaway first-degree murder trial, 1978.

Today, most Arizona lawyers have no idea who John Flynn was. When he died on January 26, 1980, every lawyer in the state not only knew John's name, but also recognized that he was, hands down, the best criminal defense lawyer Arizona had ever seen. Trial lawyers are not known for their modesty. But 25 years after John's death, no criminal defense lawyer who saw John's courtroom work presumes to hold himself or herself out as Flynn's equal, or even his serious rival. We knew then that John's talents were extraordinary. The passing years have shown that our glowing assessment, if anything, seriously undervalued John's abilities.

My John Flynn experience began in 1952, when I was barely old enough to read *The Arizona Republic*. For weeks the front page of our then-small city newspaper was preoccupied with the 1950's Arizona crime of the decade. For Phoenix of that time, the abduction of Evelyn Smith, a member of the prominent, controversial family that owned Smith Pipe and Steel, was a local equivalent of the Lindbergh kidnapping. Ultimately, Evelyn's husband, Herbert Smith, delivered the ransom money in a briefcase to a designated, remote spot in the Superstition Mountains, and, unlike the Lindbergh villains, Arizona's kidnapper released his hostage. This front-page story was followed by another when the sheriff arrested an itinerant named Danny Marsin and charged him with the kidnapping, based on Mrs. Smith's eyewitness identification. Next, with the assistance of a water



This page and facing page: John Flynn (right) speaking with Burton Roberts, Bronx County D.A., 1969.

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witch who tied dollar bills to his wand, the Sheriff's Office found Herbert Smith's briefcase with the ransom money intact in the Superstition desert beside a discarded nickel-plated revolver.

The prosecutor was Bill Mahoney, who had narrowly defeated a young deputy county attorney named John Flynn for the Democratic Party's nomination for Maricopa County Attorney in 1952. In those days, believe it or not, winning the Democratic Party's nomination virtually assured election in November. Equally remarkable, the County Attorney himself actually tried cases.

Danny Marsin engaged John Flynn, and the case went to trial in the summer of 1953. Bill Mahoney, who planned to run for Congress, decided to reserve much of the prosecution's evidence for what he expected to be a theatrical, devastating cross-examination. But when Mahoney rested his case, so did Flynn. Desperately, Bill Mahoney begged the court to allow the prosecution to reopen, but, when asked for a reason, he was too honest to say anything more than, "I thought Flynn was going to put him on the stand." Motion denied.

As he would so many times in the years that followed, Flynn then made a compelling closing argument urging the jury to acquit because the State had failed to prove its case beyond a reasonable doubt. When the jury returned a not guilty verdict, it was again headline news.

At age 28, John Flynn's reputation was made. From the Marsin verdict until his death, John Flynn was the most sought-after criminal defense lawyer in Arizona. *State v. Marsin* was prophetic in another way: After his unexpected acquittal, Danny Marsin stiffed Flynn for most of his fee.

As I grew through adolescence, I read about more Flynn victories in the *Republic*, and from time to time I heard my stepmother complain about our outrageous neighbor who tricked juries into acquitting obviously guilty criminals, and who himself lived a dissolute life that included Las Vegas gambling and more that one arrest for drunk driving.

My first meeting with Flynn began as a disaster.

Each semester, the East Coast law school I attended sponsored a series of mock trials that took place on weekday evenings with prominent lawyers acting as judges, and mock juries supplied by community organizations. Near the end of each semester, we held a "prize trial" featuring the most accomplished student advocates. This was a big deal. It took place in the largest classroom in the law school on a Saturday, and most of the students came to watch.

In my third year, I was a member of the mock trial sponsoring board. We faced the daunting task of finding a prize trial judge with credentials comparable to the lawyers who had most recently filled that role—Melvin Belli and F. Lee Bailey. At the time, I was the only student at the school who came from Arizona. I proudly informed my mostly Eastern colleagues that we had a great criminal defense lawyer in my state who had argued the *Miranda* case in the U.S. Supreme Court (John Frank wrote the brief). *Miranda*, which had been decided in 1966, was hot stuff in 1968. The board voted to extend an invitation to John Flynn, and Flynn accepted.

On the morning of the prize trial, the two students who went to the airport to pick up Flynn came back without him. John Flynn was not on the plane. In a panic, we called every number we could think of. Nobody answered the direct line to Flynn's office. The

person we reached at his firm, Lewis and Roca, said that Flynn was somewhere on the East Coast. Then we called his home. I still remember his wife's exact words: "I don't know where the son of a bitch is."

The audience had already begun to gather, and we had started trying to find a faculty member to act as a substitute judge, when down the law school's neo-gothic grand hall walked an impeccably dignified silver-haired man wearing a three-piece, pin-striped black suit. On Flynn's right arm was a doe-eyed 19-year-old, whom he introduced as "Mrs. Flynn." In what was then a nearly all-male law school, my stock soared.

Flynn performed his judicial duties skillfully and was an enjoyable dinner companion. To top off the day, my roommate was chosen as the prize trial winner. (I later learned that though Flynn was expected to make the prize-winning selection, it had really been Flynn's young companion who had done so.)

When I next saw John Flynn, the doe-eyed young lady was two years older and she really was Mrs. Flynn. The fourth lady to claim that title, she worked as receptionist/bookkeeper of his newly formed law firm. Most in John's position would have named the firm "Flynn & Associates."

But that was not John's way. I became the first associate at Flynn, Treon, Kimerer & Thinnies on Pearl Harbor Day, 1970.

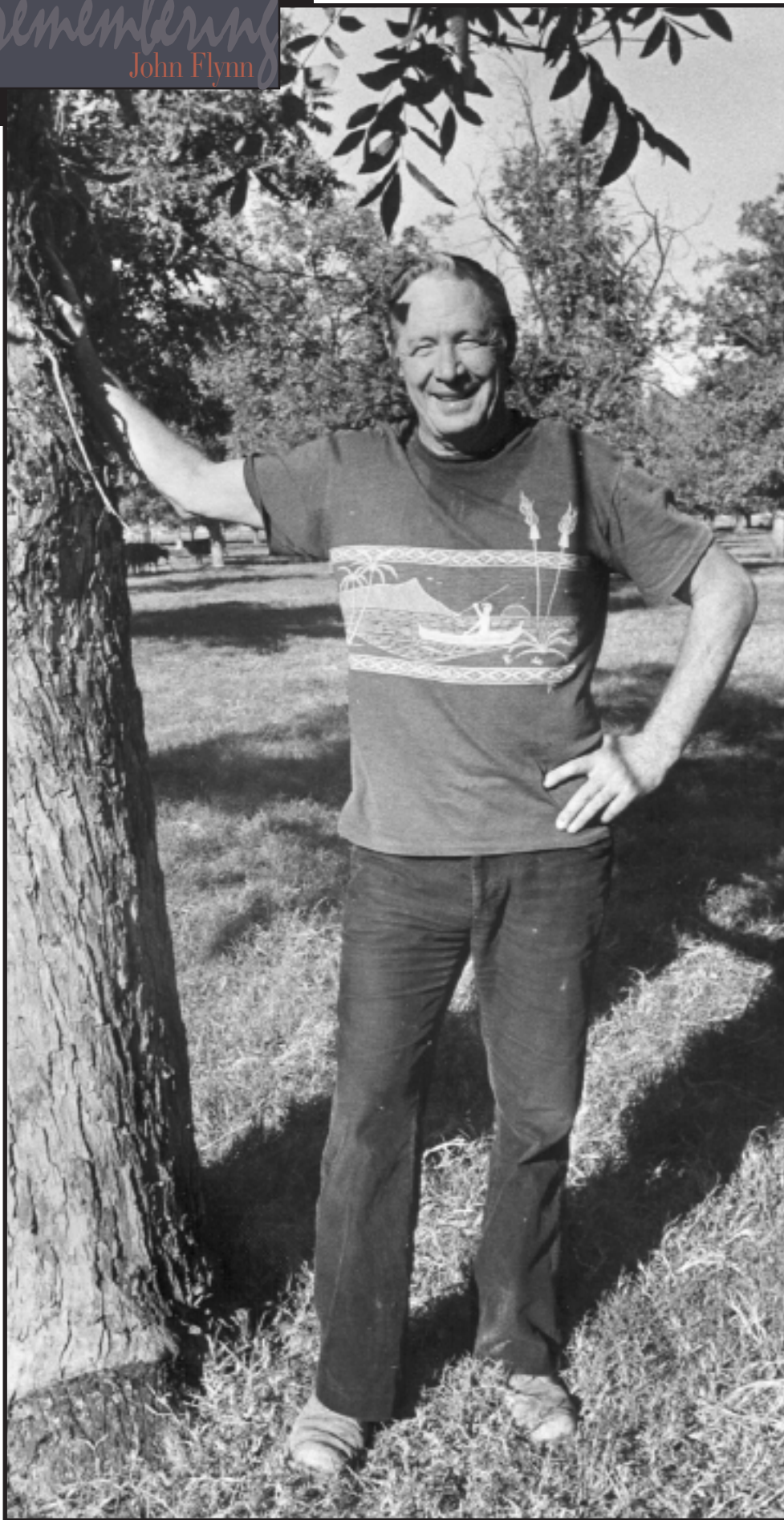
My track to partnership was shorter than what some associates experience. I had been at the firm for six weeks and had completed one long memo that Flynn apparently liked. John stopped by my office to tell me that Dick Treon had left the partnership, and he asked whether I would like to become a partner. A week later, the Flynn firm's new letterhead read "Flynn, Kimerer, Thinnies & Galbraith," and my annual income more than doubled. My next four years, spent at FKT&G, supplied me with more anecdotes than the rest of my 35 years of practice. I include only a few of them here.

At the Flynn firm we lived lives of constant excitement, most of which came from the work. Everybody, it seemed, knew where to come if they had a truly serious problem. If I heard a radio news report about a high-profile arrest on my drive home, it was virtually certain that one of us would be called to work on getting bail that night, or that a family member of the accused would be in our waiting room the next morning.

As a very young lawyer, I met with many of the most prominent lawyers in town, either because they had been hired by the opposition in a civil case, or because they or, more often, a family member had a sensitive problem that required John Flynn's special assistance. Among other things, I learned that extremely conservative people often become unrealistically expansive civil libertarians when someone close to them faces a possible criminal charge.



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Our mainstay was criminal defense work in Arizona and nearby states, but the Flynn firm did an assortment of oddball civil litigation. Especially, we did *divorce* cases, not “marital dissolutions” or “family law.” Those were the primitive days when lengthy trials decided who was at fault for making a marriage intolerable. Maricopa County furnished courtrooms and judicial resources for lengthy, barbaric inquiries into whether, for example, a marriage failed because the wife was frigid or the husband secretly preferred men. Sometimes there was a race to hire Flynn. Routinely spouses who hated each other glared across our conference table. I can still hear Flynn barking the instruction, “Subpoena the girlfriend.” Not all the changes in superior court practice have been for the worse.

Our remaining ragtag collection of civil litigation defies categorization. Flynn could try anything. While at Lewis and Roca, he won a products liability case for Westinghouse that was, at the time, the state’s largest commercial case. Westinghouse wanted to hire John to head up its products cases nationally, but Flynn found a way to avoid that opportunity. He preferred to represent people with beating hearts. Our collection of cases included some State Bar defense, fraud cases, probate disputes, contract spat, a smattering of P.I., and one or two of almost anything else, ranging from alienation of affection to jockey license revocations to representing Burt Reynolds at a coroner’s inquest to dog kennel zoning. Perhaps

because some people feel strongly about such animals, an abnormal percentage of our civil cases involved dogs—real dogs, the four-legged kind.

We also had figurative dogs—cases nobody, not even Flynn, could win. Any time a lawyer claims that he or she has never lost a case, I learned that the bragging lawyer either has little trial experience or settles anything that looks like a loser. The other kind of dogs we collected in abundance were clients from whom we could not collect at all, much less in abundance. When he set his mind to it, Flynn could bring in a money tidal wave, but money was never foremost in John's mind. He spent what he made, and borrowed from pals to make ends meet when he ran out. The toughest of trial lawyers was the softest of soft touches when it came to collecting fees.

Our involuntary *pro bono* (and sometimes *pro malum*) contributions were staggering. I learned that a sure sign of a bad receivable-in-the-making was a client bearing gifts. Only recently was I able to bring myself to give away one client's token of appreciation, a now much too small denim jacket. The grandest gown at the Heart Ball is a bargain by comparison. Its price was \$30,000 worth of writeoffs—in 1973.

We did deliberate *pro bono* too, plenty of it. Judges would call to ask us to represent indigent defendants in high-profile or death penalty-potential cases. John never turned them down. His loyalty to Ernesto Miranda, not the world's most admirable character, led our firm to represent Miranda in even his later, unrelated criminal difficulties. To assure fairness, in his last case the court ordered that Miranda be tried under a pseudonym. Tom Thinnies did the trial work and, to quote Tom, "We finished second." Unable to keep the secret any longer, the trial judge told the jurors the true identity of the man they had just convicted. All were relieved, and some delighted.

I cannot remember the official name of the citizens group for whom we undertook our grandest *pro bono* engagement. Amongst ourselves, we referred to it as "Kooks Against Freeways." This law reform opportunity came to us when John found out that his children's preschool would have to close because it was in the path of a planned new freeway. Tearing away at the veils of time and denial, I remember the group's leader as a slightly less manic version of the eccentric scientist in the *Back to the Future* movies. At a time when cash flow was a trickle and our small firm's resources were stretched near to busting, a benighted congregation of enemies to progress convinced Flynn that his firm should become, free of charge, the new lawyers in their suit to enjoin construction of a planned freeway where the 202 and I-10 now loop, east and north of downtown Phoenix.

Our new associate, Clark Derrick, drew the point man assign-

ment, and so had an opportunity to learn lessons about dealing with the press not taught in law school. He may be still recovering from that experience. In fairness, the proposed freeway had one bad feature. Where Margaret T. Hance Park now sits, the plans would have bisected the city with a virtual roller coaster of above-ground freeways and flying cloverleaves. In the end, the lawsuit our little firm could ill afford played an important role in delaying construction until the political process could bring the unsightly freeway down to earth, and, ultimately, under it. If you like Margaret T. Hance Park, a tip of your hat to John Flynn and Clark Derrick is in order.

My law upbringing was unsheltered in other ways. The Flynn firm did not present in-house CLE programs. John carried a crushing workload. From time to time, he'd pass on a tidbit of trial wisdom on the drive back from the courthouse or over an evening Schlitz. I learned by watching him, but mainly by doing. I took my first deposition when John failed to show for the one I was scheduled to watch in order to learn how to take a deposition. I gave my first speech at the State Bar Convention to a disappointed audience as Flynn's last-minute stand-in. I found out that I would have my first trial against an accomplished senior lawyer two days into an extraordinarily ugly divorce case when Flynn informed Judge Strand that he had a court appearance in California the next day and "my partner, Tom Galbraith, will be taking over."

The first three jury trials I tried solo were either court appointments or cases taken on a reduced fee to give me trial experience. As the largest owner of the firm, the lion share of the cost of my education came from John's pocket. I doubt John gave a moment's thought to the financial impact my learning experiences inflicted on his wallet, but if he did, he instantly placed my welfare as a lawyer ahead of his own monetary needs.

In one of those cases, a high-profile murder case, I had called a Phoenix homicide detective as a witness to testify to the various investigation techniques the FBI agent in charge of the case should have used to eliminate questions about the killer's identity. Under the prevailing FBI ethos of the day, there was no greater insult I could have inflicted on the agent. After the trial was over (I finished second), the agent seized upon a pretext and instituted a criminal investigation of me. As a part of it, the agent summoned me for a sworn statement before a court reporter. The case was specious, but Flynn insisted that he personally be present for my sworn statement. When the agent read me my Miranda rights, I had the pleasure of responding that, yes, my lawyer who had won the case that required him to recite those rights had advised me about each of them.

I let John down on several occasions. The most notable was when I accidentally picked up his trial notes as I was heading back

to Phoenix from Denver at the close of evidence, leaving Flynn to reconstruct a long trial from memory for his closing argument. But the only time John spoke to me with anger in his voice began as an apparent compliment. “Tom,” he said, “I get great reports on you from the judges. They tell me that your written work is excellent and you are always completely prepared at argument. That would be fine ... but *I am drowning*.”

Those words were my rite of passage. From that hour forward, I took on as much work as I could do, and sometimes more. By necessity, I started to worry more about getting things done than about achieving perfection. Welcome to the real world of an efficient, imperfect adult lawyer. Only I was still a law adolescent. High on adrenaline, I careened along the ragged edge of my competence, and once or twice perhaps beyond. But, oh, what I got to see and do.



John Flynn had all the natural gifts the gods could bestow on a trial lawyer. Good looks don’t hurt, and John had them. I was reminded of this recently through what for me was a disturbing, eerie movie. From several camera angles in *Chicago*, Richard Gere is a dead ringer for John Flynn. My sense of entering a twilight zone was heightened by the boisterous behavior and name of the lawyer whom Gere played—Jimmy Flynn. During trial in one of John’s cases, an attractive woman juror asked to speak with the judge privately. “Your honor,” she blushed, “I cannot sit as a fair and impartial juror in this case. I’ve fallen in love with Mr. Flynn.” The judge dismissed the juror and granted a mistrial.

Unlike some lawyers who project one persona or excel at part of the process, John had unlimited range: from statesman to rogue, and everything in between. When circumstances required, John could be gentle, endearing, dignified, boyish or brutal.

Of course, Flynn could do Irish charm. A few minutes after my disapproving stepmother finally met John at our firm’s first open house, she exclaimed, “Oh, you are not at all like what I expected.” Laughing, John replied, “I know. You were looking for horns and a tail.”

John’s direct examinations were short and to the point. His voice was resolute, his diction clear. Once a witness started to waver on cross, John’s questions shot out with machine-gun speed, leaving the victim no time to regroup unless, as sometimes happened, the court reporter called a timeout because she could not keep up.

His presence was dynamic. Witnesses and, most of the time, judges gave him deference that did not come so readily in my direction. The point was impressed upon me one afternoon in a

trial when Judge Craig refused to permit me to pursue the same line of questioning I watched him allow John in analogous circumstances a few months before.

In a way I cannot entirely explain, John was persuasive. During brainstorming sessions, I found myself John’s foil as I spun out all of the conventional reasons why a plan he was considering would not work. There was something about John—I don’t know what—that made you want to agree with him.

The characteristic other accomplished lawyers most admired about Flynn was his uncanny intuition about people. Somehow, John instinctively understood non-obvious flaws in the character of opposing witnesses. He asked questions nobody else thought of, and often they would bring unexpected answers that broke a witness or a case. Once, during a CLE talk, Roger Kaufman described how, as a young lawyer, he was cross-examining a surprise witness, a gardener, whose well-worded testimony about events the evening the testator changed his will perfectly supported the claim of an eleventh-hour beneficiary in a probate case. The beneficiary’s case came apart after Roger asked the gardener if the beneficiary’s lawyer happened to be at the testator’s house that night. Roger did not identify the older lawyer who had passed him a note telling Roger to ask that question. He did not have to. I knew it had to be Flynn.

How Flynn acquired his uncanny insight into human behavior, the rarest of his skills, remains a mystery. Elsewhere I have written: “We attributed it variously to John’s devout Catholic childhood and later apostasy; his outsider upbringing; his zestful, tumultuous way of living; or just plain genius. It was probably a combination of all of these.”

Flynn was a quick study, and he possessed a near photographic memory. I’d spent the better part of a year and a half preparing the file for a two-month securities fraud criminal case in federal court in Los Angeles, and was beyond distressed that, due to unexpected entanglements in another case, Flynn could only turn his attention to it a few days before trial started. “In a long trial,” he assured me, “There’s plenty of time to catch up.” At first I spoon-fed him, but after two weeks John had more than caught up; he had passed me. I realized this when he impeached a major prosecution witness based upon the initials of a secretary who had typed a critical letter. Needless to say, the importance of those initials had escaped my attention during my 18 months with the file before trial.

John’s concentration was ferocious. He began each day’s trial preparation with a pot of black coffee at 4:30 in the morning. From that point on, John bore on with maximum effort until the court recessed at the end of the day. John did not chitchat with opposing counsel while waiting outside judicial chambers. He worked. During trial, lunch was half a sandwich and a Coke, consumed while reviewing documents or revising a witness outline. By the end of a trial day, the areas around both armpits of John’s suit were dark from perspiration.

a life in brief

John Joseph Flynn was born on January 24, 1925, in Tortilla Flat, Arizona. John's father was a union organizer who had served a prison term for cattle rustling. His mother died when he was 10 years old.

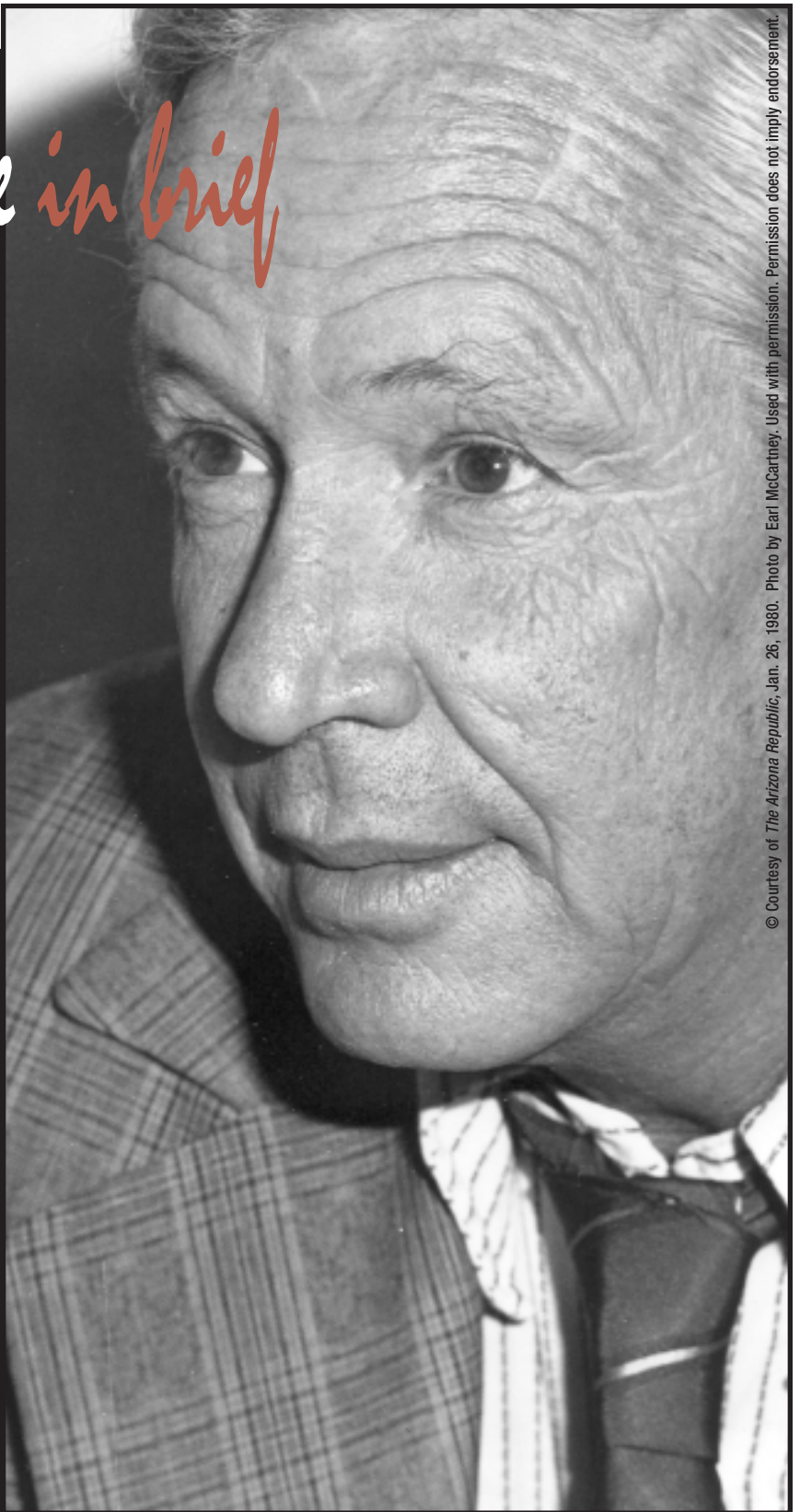
When John Flynn graduated from St. Mary's High School in Phoenix in June 1942, he lied about his age in order to join the Marine Corps without waiting until his 18th birthday. He saw combat in several campaigns in the Pacific and was seriously wounded twice.

After the war, Flynn married and enrolled in the University of Arizona, where he completed his undergraduate and law school educations in three and a half years, compiling a straight-C average while working three jobs to support his young family. Upon passing the bar in 1949, Flynn joined the Maricopa County Attorney's Office and quickly rose to be Chief Trial Deputy. He entered private practice in 1952 and maintained an active private practice in Phoenix until his death on January 26, 1980, at the age of 55.

John Flynn was the recipient of numerous professional recognitions and awards. In his book *Miranda: The Story of America's Right to Remain Silent*, Gary Stuart describes one of them:

Indeed, [John Flynn's] influence on the Supreme Court during the oral argument phase of the *Miranda* case was so great that in 1994, American Heritage's *Our Times* magazine, in profiling the previous four decades, gave Flynn the credit for "winning" the case, naming him on its list of "ten people who changed the way you live but you have never heard of any of them."

To listen to a recording of John Flynn making that historic argument, go to www.oyez.org/oyez/resource/case/251/.



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Photos this page courtesy of St. Mary's High School, Phoenix, from the 1942 yearbook.

Above: "Jack" Flynn (fifth from right) poses with his teammates from the 1942 St. Mary's High School basketball team, where he was one of that season's leading scorers.
Below: Flynn's 1942 graduation photo.

Creative? In one of my first cases I assisted John with the defense of a Bar disciplinary case brought against a lawyer who was accused of abetting a statutory rape and contributing to the delinquency of a minor. He had been among a group of men watching a 17-year-old girl while she was filmed performing a series of sex acts with a masked male partner. When the case came to the Board of Governors for a *de novo* hearing, Flynn moved to suppress the Bar prosecutor's main evidence, the 16-millimeter movie that showed the sexual activities and, briefly, the back of a dark head that allegedly resembled our client's. Flynn argued that Bar counsel could not show the film and the governors could not watch it without violating a criminal statute that required prosecutors to destroy pornography once related criminal prosecutions were completed, as our client's had been, and which made it a misdemeanor offense to make any use of such material after that time.

Some losses are less painful than others. I was not entirely disappointed when the all-male Board decided it was duty-bound to view the evidence. I tried, really tried, to watch the grainy black-and-white activities on the screen through the eyes of a lawyer intent on gathering points for closing argument. The best I could do were two non-defenses: (1) Gosh, she sure *looked* older than 17, and (2) Based on her performance, no further corruption of this minor remained unaccomplished by the time the film was made.



When the lights came on, Flynn triumphantly announced, "This proves that the Bar prosecutor's only identification witness, the young woman, lied when she said that she saw the respondent present during the filming. She never once looked in the direction where Bar counsel says he was standing." I think it was at that moment that I first realized that John Flynn practiced my new profession at a level that, no matter how hard I tried, I could never obtain. Reflecting back on the incident, it later occurred to me that Flynn probably knew the actual location of the star's gaze did not matter. It was a safe bet that none of the Board members could contradict him, because their focus was elsewhere.

Recently I learned that an apocryphal story about a dramatic use of demonstrative evidence was based on a real John Flynn trial. Cross-examining the arresting officer in a manslaughter/DWI trial, a young John Flynn elicited an irritated denial to his accusation that, no matter what the true facts were, the officer routinely scribbled a litany of "poor sense of balance, slurred speech, and bloodshot eyes" on his arrest reports. Smarting at the disbelief implied by the tone of Flynn's questions, the angry officer vigorously affirmed that he had conducted a careful examination and both the defendant's eyes were severely bloodshot. No further questions. Instead, Flynn turned and nodded at his client, who reached up and removed the glass orb from his left socket. Flynn placed it on the jury rail. The acquittal was instantaneous.

To say that John had a competitive streak would be profound understatement. He found a contest—no matter what—irresistible. Arm wrestle a construction worker half his age? Where’s a table? At 1:00 a.m. during a firm party at Mike Kimerer’s house, I took over for Mike’s young son, who had been playing chess with John. I am not good at that game, but Flynn was worse. When I finally beat him, it was quarter past two. Without pause, Flynn proposed another game with each of us allowed 20 seconds per move.

Translated to professional life, John’s competitive zeal compelled him to try to find ways to win where none appeared possible. Most lawyers zealously prosecute their strongest cases but have a tendency to postpone focusing on their weak ones. Some compound the problems inherent in difficult cases by pushing those files to the farthest recesses of their back minds and their calendars. Flynn was the opposite. If a case was going too well, he got bored. What did it need him for? But Flynn would come alive when I walked into his office shaking my head, saying, “John, there is no way we can win this one.”

Flynn was fearless. During one trial that I second-chaired, Flynn considered accusing a vengeful, manipulative federal judge of outright bias. He deliberated on the pros and cons of this desperate strategy without any thought about the possible consequences to himself.

Compared to what Flynn had seen as a young man, the worst punitive measures in the arsenal of any judge were less than nothing.

John did not talk about what he did during World War II. The only exception in my experience happened one evening at his home. John was morose. He told me he had just received word of the death of one of the other three members of his original 33-man platoon who had survived the War. Others told me that Flynn participated in some of the bloodiest Pacific campaigns; was a member of the World War II equivalent of today’s Navy Seals, the Second Marine Raider Battalion, called “Carlson’s Raiders”; and was seriously wounded twice.

These legends both over- and significantly understate John’s Marine Corps record. In preparing this article I learned from the United States Marine Raider Museum that PFC John Joseph Flynn joined the First Marine Battalion, “Edson’s Raiders,” in January 1944, shortly before the Raider Battalions were integrated into the Fourth Marine Division as reconnaissance units, and that Private Flynn was wounded on Okinawa on April 6, 1945, while doing something for which the Corps awarded him the Silver Star. A bullet from that engagement remained lodged in John’s left cheekbone for the rest of his life.

The Raider Museum has no record of John’s service before he joined the Raiders, or what he had done to qualify for that elite fighting unit. Until the time he died, I have learned, John would sometimes wake up thrashing and sweat-soaked from nightmares of combat in the Pacific. When I blanched at crime-scene photos of a mangled body found in a mineshaft near Kingman months after a murder, Flynn did not share my reaction. He had marched

past piles of burned bodies rotting in the tropical sun, and he had seen his friends become disemboweled, mangled corpses.

John could keep a poker face like nobody I’ve met. Once, during one of our rare firm meetings, John let slip that the previous weekend he had gone to the Kiva Theater and seen *The Stewardesses*, a pornographic movie by the standards of the day. Sensing that Flynn was for once at a disadvantage, Thinnies, Kimerer and I all pounced. Without a blink or a twitch, Flynn responded to our locker-room comments by explaining that he saw the show by accident. He had thought he was going to the new comedy, *Airplane*.

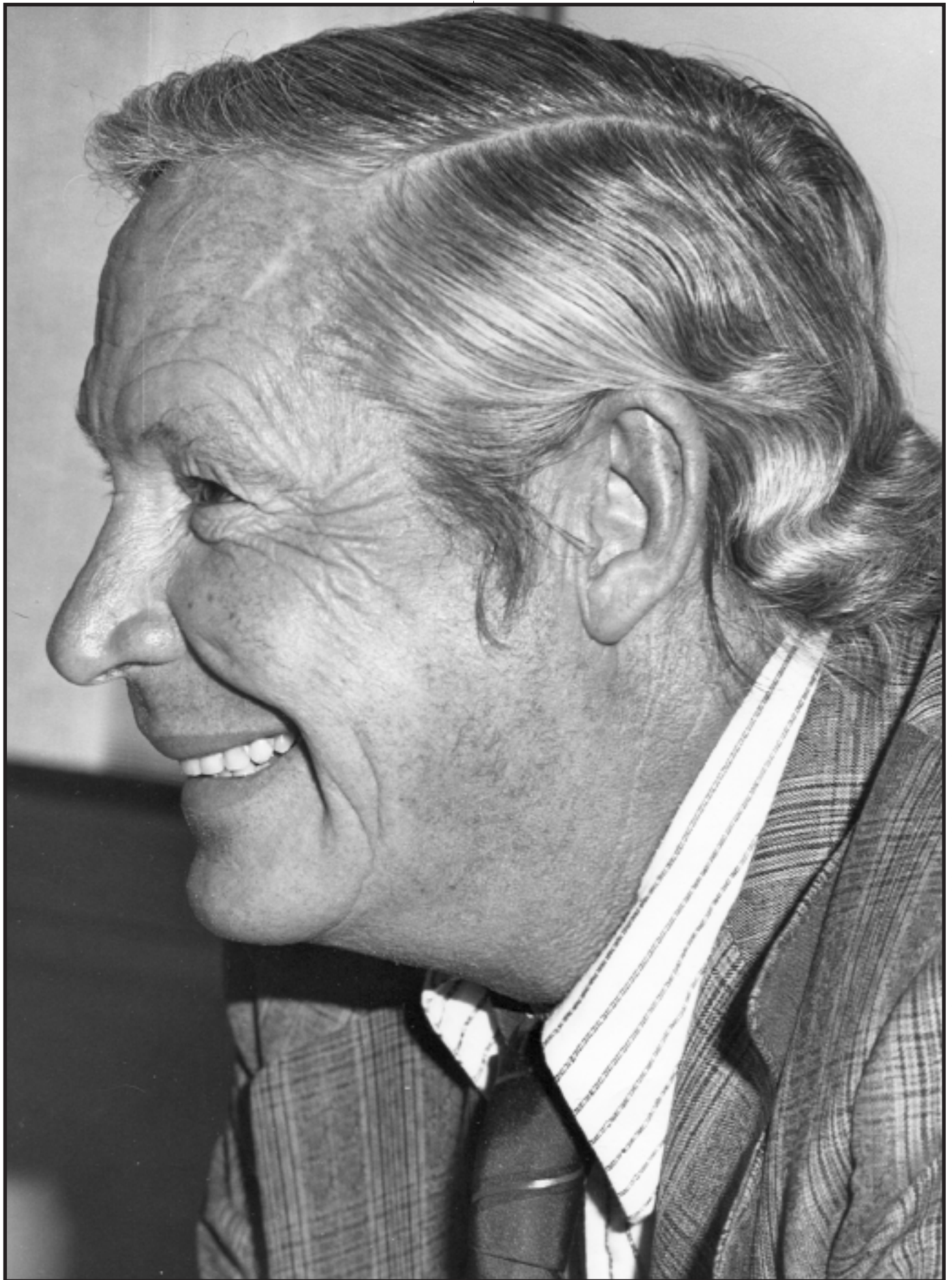
John maintained the same unflinching composure when, shortly before trial, the wife of a lawyer who had been John’s enemy from childhood asked John to substitute in as her divorce lawyer. Even though her husband had represented Flynn’s previous wives in their divorces from John, Flynn’s face was taut and his tone all business. But, my, was there a gleam in his eyes.

The only time I saw John lose his composure—and it was just for a moment—occurred after a hearing in a bitter divorce case. In the hall outside the courtroom, a furious husband, who may have known about John’s difficult childhood, screamed, “Flynn, I know you, and you’re still shanty Irish.”

There’s one other incident I learned about recently. Flynn had just come in as new counsel for the wife of a prominent businessman a few days before her long-scheduled deposition. Question to wife: “Did you recently hire someone to kill your husband?” Answer: “Yes.” That surprise was too much, even for Flynn. His chin nearly hit the table.

John was an intense listener. He had a remarkable ability to absorb and internalize the perspective of the client. This may explain at least part of his ability to get a jury to see and feel from that same perspective. This talent showed itself in highest relief in the hardest defense for a criminal defense lawyer to sell. To obtain an acquittal for a crime the client had indisputably committed on the grounds of temporary insanity is a once-in-a-lifetime goal few lawyers ever obtain. Flynn did it on three occasions that I know about. I’m sure there were others among John’s 125 first-degree murder defenses, but Flynn only mentioned past cases if they presented an amusing story or illustrated a point he wanted to make. He never bragged.

John won a temporary insanity acquittal for an indigent, autistic son, Tony Atwood, who killed his wealthy father in Tucson, and for Leo Black, a Kingman real estate entrepreneur,



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who emptied a pistol into his wife. John's last trial was for a local union boss, Glen Ross, who shot an international union official in the back four times in front of four witnesses as he left Ross' office after a confrontational meeting. As a further complication to the defense, the victim lived and took the stand as an additional witness against Ross. In those days, there was no mandatory confinement for psychological evaluation after a successful insanity defense. Atwood, Black and Ross all walked out of the courtroom as free as if they had never been charged.

Atwood deserves a detour. Indisputably, when Tony Atwood and his mother, Rachel, came to the father's door, either Rachel or Tony fired the fatal shot. Initially, the court found Tony mentally incompetent to stand trial; so the State proceeded against Rachel, who testified that without her foreknowledge, Tony suddenly pulled out a gun and pulled the trigger. When Tony was later found competent, the same zealous deputy county attorney, Horton Weiss, prosecuted him. When his lead witness, Rachel, suffered an emotional breakdown on the stand, Weiss eagerly agreed that she could be excused, and then read the damning first trial testimony of this newly unavailable witness.

Weiss apparently did not anticipate the flip side of his tactical coup. When Flynn read from Weiss' own earlier, highly skeptical cross-examination of Rachel, Weiss got angry. He screamed and hurled his pencil at Flynn. As a result of this and similar incidents, Robert Royston, the calmest of judges, found Horton Weiss in contempt five separate times and sentenced him to 15 days in jail.

After the jury acquitted Tony Atwood, Mike Kimerer, John's second chair, heard Weiss mutter as he left the courtroom, "One of them killed him and *I'm* going to jail." After raising a raft of procedural objections in a series of appeals, which he would have decried as a prosecutor, Horton Weiss served his 15-day sentence. Almost certainly, John Flynn is the only lawyer who ever won an acquittal for a client who had killed someone and put the prosecutor in jail.

John was, in today's biz speak, an excellent "team builder," though he never would have used the word or been conscious of an alternative way of behaving. I surmise that Flynn got his education in group dynamics from the Marines. He, and we, had no time for hidden personal agendas, hoarding firm resources, or CYA memos to the file. Our job was to win the contest at hand. Flynn's dedication to our clients was exceeded only by his personal loyalty to each of us, and that was absolute. My conjecture about the source of John's "management style" finds

support in descriptions of the Marine Raider ethos. The *Encyclopedia Britannica* says this about the Second Battalion's Evan Carlson:

His leadership was characterized by extraordinary personal courage and unusual democratic discussion within the ranks. The morale of his men was among the highest in the armed forces; to friends he referred to his group as the Kung-Ho ("Work Together") or Gung-Ho.

If these words were a glove, the fit would be perfect.

John spent about 30 seconds each year, if that, on verbal head patting. We got enough positive reinforcement just by being associated with him. Nowhere was this more gratifying than at that sublime institution, the Rooster Bar.

The Phoenix legal community suffered an irreparable loss in 1975 when the Rooster Bar was demolished to make place for the unimaginative vertical lines of the Arizona Bank Building (now the 101 North Building) on First Avenue between Monroe and Van Buren. The Rooster was not a dark, sinister haunt, like the Ivanhoe, neither was it a clean, well-lighted place. There was just enough naughtiness in its air to be interesting. In the Rooster's muted lamplight you could watch a visiting, out-of-county judge downing the third martini he would not

consume at home, and the secretaries and court personnel who flirted with the bachelor, recently divorced, and soon-to-be-separated lawyers who were among its regulars.

It was a trial lawyer's Golden Age. Lawyer advertising was still in its teetering infancy, several developmental stages away from multimillion-dollar ad campaigns that reel in customers by likening lawyers to feathered or furry predators. Mediation was unheard of. Pretrial statements did not consume forests. Feebly enforced disclosure rules did not create advantage for lazy or devious lawyers, because those rules did not exist. Motions for sanctions were rare as bald eagle teeth. Judges had meaningful sentencing discretion. Criminal penalties were designed to fit the crime, not to give prosecutors crushing plea bargaining leverage. Lawyers did not solicit votes or engage manipulative games to boost their ratings in local magazines. The courts were not jammed. Lawyers tried cases. There was no call for courses on professionalism. We usually knew our opponents, and—with a few universally recognized exceptions—we could count on the other (almost always) guy to behave honorably. Law was still a profession. There were only hints that it would soon become a business, ruled by the Almighty Billable Hour.

At the Flynn firm we
lived lives of constant
excitement, most of which
came from the work.

Right and below:
Flynn's 50th birthday,
"50 beers for 50 years."

Trial people gathered at the Rooster after work to drink, relax and exaggerate. John was first in the Rooster's pecking order. When Flynn came in, the warm hum of conversation paused, and then resumed, often changed to a new subject, the latest John Flynn story. There was nothing—absolutely nothing—to compare with walking into the Rooster Bar with Flynn after he had just won an acquittal in a first-degree murder case. Taking a victory lap with Lance Armstrong as a member of the U.S. Postal Team could not be half as heady.

I watched most of the Senate Watergate Hearings with Flynn. Based on our work in white-collar defense and experience with the criminal mind, we were certain from the beginning that the White House upper levels, including Nixon, were guilty. But it remained to be seen whether the Committee could muster proof of what we already knew. Flynn watched with a combination of fascination and horror as the evidence spilled out, often in spite of maladroit questioning. Senator Montoya of New Mexico did not listen or adjust to the answers his questions elicited. Ineffectual Sam Dash, lawyer for the majority, did not know how to ask a question. John Flynn, the master craftsman, sat in agony on history's sidelines. He would have given anything to have had Dash's job.

Nixon's self-righteous hypocrisy, misuse of power and lies were for John a hyperbolic embodiment of everything he hated when he encountered a cop who fudged the facts or a prosecutor who misused the State's power. For the first time since his 42-vote loss to Bill Mahoney, Flynn considered running for public office. His plan was to run for Congress against the powerful Republican incumbent, John Rhodes. Flynn intended to make his campaign a referendum on one issue: Richard Nixon is a criminal who should be impeached.



Courtesy of Tom Galbraith.



Courtesy of Tom Galbraith.

As a voice of conventional wisdom, this time I had overwhelming ammunition: "Flynn, you're broke. You cannot afford to run for office. You have no time. Your trial schedule will not permit it. You have young children." And: "Can you imagine what the newspapers will write about your personal life?"

In the end, Flynn settled for a less demanding form of political protest. When Nixon came to Phoenix in November 1973, we put together some handmade signs and joined the crowd protesting his visit. My favorite photograph of Flynn comes from that event. The young lady at his side in the photo was, for a time, a recurring feature in Flynn's personal life.

John's ability to put himself in the other person's shoes was not confined to his cases. He did not expect others to conform to his way of being. John Frank, Orme Lewis and Paul Roca—none of whom lived lives vaguely resembling Flynn's—were among the people he most admired. I decided to leave our firm at the end of 1974 because I was getting married and I did not think that the way we lived at the Flynn firm was conducive to staying married. John understood that my priorities were different than his and, although he made a flattering effort to convince me to stay, in the end he accepted my decision gracefully. We remained close friends, and, through a stroke of luck, I was able to help him later on parts of the *Treadaway* murder case at my new firm. John's acceptance of my decision to leave also may have been influenced by one of the few parts of his life about which John expressed regret. He had been a mostly absentee father for his older children, and it haunted him. He did his best not to make the same mistake with his new young son and daughter.

John was a Lancelot without moral pretension. The Camelots



John Flynn and friend protest President Richard Nixon's visit to Phoenix, 1973

Courtesy of Tom Galbraith

he established were fated to be short-lived. His marriage to the doe-eyed young lady unraveled in the summer of 1973. Flynn, Kimerer, Thinnies & Derrick dissolved in May 1977. John finished his career in partnership with his old friend and often-times opponent, Phil Goldstein, and as husband to his fifth wife, Kathy, Mike Kimerer's sister-in-law.

I have heard appellate lawyers and specialists who worked with John comment that although he was no scholar, John always managed to make a perfect record to preserve the important issues for appeal in areas of substantive law that were unfamiliar to him. This talent to know what the key legal issues should be may be part of the same strong intuitive moral sense that gave John his remarkable insights into human nature. But, perhaps because I was a cub at the time, I suspected that scholarly lawyers found it comforting to underestimate John's knowledge of substantive law.

If he was not a book lawyer by nature, by the time I knew John he had lived a lot of law. On numerous occasions, Flynn pointed me to non-obvious sections of the A.R.S. for quirky statutes that impacted our cases.

John taught me an indelible lesson about Civil Rule 41(a). He was uneasy about the way in which his own divorce had started. Pending trial, the court had placed custody of John's two young children in each parent on alternative weeks. During one week in which John had custody, he handed me a Rule 41(a) notice of dismissal with instructions to file it just before the clerk's office closed that afternoon. In the evening, John packed and left with the children on an airplane for Alaska. Because Mrs. Flynn's

four months later, for good reasons that had developed in his absence, the court placed custody of the children—first temporarily, then permanently—with John.

During John's protracted visit to Alaska, the police arrested Jonathan Treadaway for what was without doubt metropolitan Phoenix 1970's crime of the decade. A serial murderer had sodomized, then strangled, five children as they lay in their own beds before disappearing into the night. There was panic in the westside neighborhoods where the killings had occurred. Vigilante groups patrolled the streets at night, hoping to apprehend the killer. After months without a suspect, the police arrested Jonathan Treadaway when they found his palm print on the bedroom window of the most recent victim, a 6-year-old boy. The following morning, Treadaway's father came to our office to hire Flynn. "John's gone," we had to say, "And we don't know when he will be back."

Mr. Treadaway hired a different lawyer, a flamboyant man whom John had successfully defended in the Arizona Supreme Court against a recommendation that the lawyer be disbarred for punching an opposing party at a deposition. Without his client's consent, the lawyer decided to support an application for reduced bail with a copy of an otherwise privileged letter from Jonathan Treadaway. In the letter, Treadaway said that he was a homosexual and serial burglar, but he denied committing the crime. The defense lawyer read the letter at Treadaway's trial, and the prosecution used it as evidence of propensity. The jury returned a guilty verdict. Treadaway was sentenced to death.

After John Flynn returned to Phoenix, he teamed again with John Frank for the Treadaway post-trial motions and appeal. Because I was working with John Frank, Flynn and I were able to have another one of our dialogues, this one about whether Frank should raise incompetence of counsel in the post-trial motions. To do so was problematic under the governing “farce and mockery” standard governing challenges to the competence of criminal defense counsel. Despite the fact that his former client’s life was at stake, I predicted that Treadaway’s trial counsel would vigorously defend his own competence and might try to retaliate against Flynn. Neither objection carried any water. I did not expect them to. Unless the conviction was reversed, the State would execute Jonathan Treadaway. If an unsuccessful competence of counsel challenge might cause the Arizona Supreme Court to look more closely at other appellate arguments, it was worth making.

The trial court rejected the competency challenge, but John Frank’s briefs devoted 11 pages to the evidence Flynn developed in the hearing on his post-trial motions. What role, if any, this largely *ad hominem* presentation played in the decision we will never know. The Supreme Court reversed Treadaway’s conviction on the technical grounds that the trial court had improperly admitted evidence of Jonathan Treadaway’s earlier, nonviolent homosexual incident with an adolescent without expert testimony that the incident was probative of Treadaway’s propensity to sodomize and kill a young boy.

After the post-trial motions, someone persuaded *The Arizona Republic* that it should ask the superior court to unseal the records of Flynn’s recent divorce. The ultimate result was a *Republic* story about how Flynn and the 19-year-old woman he later married had “dashed” without paying for a restaurant meal in New York, swiped a painting from a hotel room, and experimented with marijuana. The Arizona Supreme Court censored Flynn for these acts on December 27, 1978.



Despite this and other misfortunes, it was widely held in the Phoenix legal community that Flynn, like the fictional sea captain Jack Aubrey, was blessed with preternatural good luck. With one exception, I put these claims in the same basket as the newspaper reports that made Flynn’s victories seem miraculous. (We loved these stories because they were good for business, but even John did not perform miracles.)

According to one definition, luck occurs when preparation and opportunity coincide. Based on that definition, John was lucky when he obtained a not-guilty verdict in a cocaine sale case that was so hopeless that the client did not appear when John did the trial merely to preserve a Fourth Amendment question for appeal. By the same measure, John was lucky when, after a guilty verdict, the last juror the court polled at Flynn’s request caused a mistrial by announcing that, come to think of it, he did not agree with his fellow jurors.

Just a bit of another kind of luck may have been at play when the forensic fingerprint expert Flynn employed for the Treadaway retrial happened to be knowledgeable enough about pneumonia to suggest that it may have been the real cause of the victim’s death. It is probable that John would have found the same defense after more pretrial investigation, but the expert’s unlikely, early observation was invaluable. At a trial presided over by future Arizona Supreme Court Justice Robert Corcoran, John Flynn persuaded the jury that the State had not proved that Jonathan Treadaway, rather than pneumonia, had caused the boy’s death.

Although *State v. Treadaway* was among Flynn’s greatest triumphs, it nearly put

Flynn in the poorhouse. Even for a first-degree murder case, the amount of preparation time required had been inordinate. And, as you might guess, the father Treadaway did not come through with the balance of John's fee. John tried the case working as a court-appointed counsel for \$15 an hour.



There was one incident in which preparation played no part in Flynn's luck. In fact, it involved an outrageous lack of preparation.

Shortly after I had left the firm, Flynn finished second in defending federal charges against a man who was widely regarded as the leader of Arizona's scandalous land fraud industry. Clark Derrick, the partner working with Flynn on the appellate brief, assigned the first draft to a personable new associate who had an outstanding law school record. The young associate said that he needed more time, so Flynn obtained several extensions of the opening brief deadline from the Ninth Circuit. The order granting the last one said that the court would not grant any further extensions under any circumstances.

Clark told me that the young associate continually gave detailed reports on his progress, including insightful discussions of the cases and the opening brief's arguments. But as each deadline approached, he prevailed upon Clark for just a few more days in which to polish his draft before he showed it to him. Finally, the associate promised that the brief, which was now nearly perfect, would be ready for Clark's approval on Saturday morning, just before Monday's final filing deadline.

When Clark arrived early Saturday morning to inspect the masterful brief, he found instead an affidavit signed by the associate. In it, the associate confessed that he had never started writing the brief and that he had repeatedly lied to Flynn and Derrick in order to mislead them into

thinking that the brief would be ready for filing by the extended deadline. The affidavit said that the associate alone was responsible for the fact that the brief did not exist and that the lies he told the partners were part of a pattern of deceit that pervaded the associate's life. "My whole life has been a fraud," it said. If the Ninth Circuit believed the affidavit, it might grant an extension, and the associate would inevitably face Bar discipline.

In acute distress, Clark telephoned Flynn. Flynn drove to the office, read the affidavit, and without the slightest hesitation he tore it up. "Now," Flynn said, "let's figure out how to deal with this."

John Flynn's life had many defining moments, but to my mind none more definitive than this. The luck angels must have approved. When John and Clark looked at the transcript, they found it so full of errors that it was nearly impossible to understand. The Ninth Circuit instructed the court reporter to prepare a new transcript and extended the opening deadline by three months.

In law school, nobody explains that trial work requires a high level of energy. Flynn had energy to burn. But the demands of an overwhelming trial calendar were not enough to extinguish that energy.

Gambling does not entertain me, so I never witnessed John at the tables for 24-plus straight hours in Las Vegas, but many who worked with him did.

With his wife, Kathy, her two children, and his two youngest, John made 18-hour driving trips in the family van to her house in Fort Bragg in northern California.

John went to Ecuador to prospect for emeralds. He came back with photographs of paintings by European masters that an elderly priest had obtained from a secretive German immigrant. (That adventure came to an end after I located an appropriate expert who identified the paintings as "colonial copies, but very good ones.")

After the first of his trips to Alaska, bursting with even more enthusiasm than usual, Flynn persuaded all of us to borrow money in order to invest in an airline there run by a friend and client. The merciful passing of time has erased my recollection of how much money each of us lost in that fiasco.

One evening I drove out to see John at the pecan farm in Gilbert (Phil Goldstein called it "the Nut Farm") that Flynn and Goldstein bought in 1978. I was visibly exhausted and depressed. John looked at me and said, "Tom, you have a problem. What can I do to help?" I gazed back at a man who was two decades older and who still worked harder than I ever had. "John," I said, "I came for a transfusion."

The weekend before his death, John branded cattle at Glen Ross' ranch. Seven days later, John, now 55 years old, went to the Snow Bowl with his young family to try skiing for the first time. John did not get a chance to start this new adventure. He was still in the Snow Bowl parking lot when his heart blew out. All of John Flynn, the remarkable energy, towering talent, hard-won knowledge, gaping imperfections, courage and charisma ceased to exist before his body hit the pavement.

In those days, Jordan Green and I took a break from our usual Saturday work to have lunch together in the Hyatt coffee shop. Phil Goldstein telephoned us there with the news. Jordan and I have never returned to the Hyatt.

It fell to me to find a eulogist for the funeral. John Frank, the primary author of the *Miranda* brief, was the logical choice, but I was hesitant to call because there had been a recent flap between the two old friends. "Are you kidding?" Peter Baird asked. "John is waiting by the phone."

As usual, Peter was right. John Frank's eulogy, delivered to a crowd that overflowed into the A. L. Moore & Sons' parking lot, was a masterpiece. I did not adequately appreciate one typically elegant line at the time. Prophetically, John Frank said, "It is a sad reality that the trial lawyer writes in water."

The Veterans Administration supplied the flag that draped the coffin. Beneath it, open and empty, we placed John's battered and stained leather briefcase. The electric organ played "The Halls of Montezuma" as the crowd filed out.

Flynn himself did not attend funerals. He never read the obituaries. When Mike Kimerer and Tom Thinnies proposed that our firm buy key-man life insurance, John rejected the idea, forcefully. Despite the young children in his care, John did not purchase life insurance. I was not surprised that Arizona's best lawyer died without a will. Kimerer and Mick LaVelle represented John's widow concerning custody of John's two small children. My last piece of Flynn *pro bono* work was to act as personal representative for John's estate.

Two memories from that dreary engagement stand out. One was a call from a woman in Las Cruces, New Mexico, who identified herself as John's second cousin. She asked how old John was when he died. When I said 55, she responded without surprise. "None of us Flynn's live to be 60," she said. "There's something wrong with our hearts." Flynn must have known this. If so, it may partly explain why John burned the candle from the middle as well as at both ends, and why he tried, at times past the point of foolishness, to deny the inevitability of the early death awaiting him.

My final chore was to hire Andy Sherwood to collect the balance of the fee Glen Ross had refused to pay after John died. 