

## **John Brown's Trial**

By Brian McGinty

Harvard University Press, Cambridge, MA,  
2009. 350 pages, \$27.95.

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REVIEWED BY HENRY COHEN

On Oct. 16, 1859, John Brown and 21 young men (five blacks among them) took over the federal arsenal in Harper's Ferry, Va. (today Harpers Ferry, W.Va.). Ten of Brown's men, including two of his sons, as well as four townspeople and one marine, were killed in action. Two days after the raid, on October 18, Brown was arrested, and, two weeks later, on November 2, a jury found Brown guilty of treason against the state of Virginia, first-degree murder, and conspiring with slaves to rebel. One month after that, on December 2, Brown was hanged. There is no doubt that Brown was responsible for the raid on the federal arsenal, but was he guilty of the crimes charged? Did he receive a fair trial? Brian McGinty, whose *Lincoln and the Court* was reviewed in the May 2009 issue of *The Federal Lawyer*, examines these questions in his engrossing new book, *John Brown's Trial*.

Before we get to these questions, let's look at Brown's raid on Harper's Ferry and its significance. McGinty writes that, "[i]n Brown's mind, slavery amounted to constant warfare against its victims. Slaves were held in subjugation only because of the constant violence that was inflicted on them. ... When a war is being waged, Brown reasoned, talk is not an adequate response; action is required." Brown decided to carry the war into the American South and to free the slaves. That was the purpose of his raid on Harper's Ferry.

Viewing his raid on Harper's Ferry as part of a war must have helped Brown to justify to himself the deaths that resulted from it, as killing is permitted in wars. And a case can be made that, as a contemporary of Brown's said, "Old John Brown threw the first bomb, discharged the first cannon, and thrust

the first bayonet" of the Civil War. The problem, of course, was that Brown, as a private individual and not the state, had no authority to start a war, and the Civil War did not officially start until a year and a half later. When Virginia authorities arrested Brown, they viewed him as a criminal, not as a prisoner of war.

Brown's plan was to cross from Maryland into Virginia, take over the federal arsenal, distribute the weapons among neighboring slaves, and foment a slave uprising in the South. Unfortunately, the slaves did not show up, as they were either unaware of what was happening or feared retribution if Brown's effort failed. Brown consulted Frederick Douglass before the raid. Douglass shared Brown's belief that violent action was necessary to defeat slavery, but warned Brown that Brown would be going into "a perfect steel-trap" and would never get out alive. Brown did not heed Douglass' warning, but perhaps Brown sensed that, even if his raid failed in the short run, it would succeed in the long run, and it seems that Brown was right.

McGinty quotes modern historians who agree "that Brown and Harper's Ferry were 'sparks' for the war, a 'trigger' for the great conflict, and that they 'did much to bring on the war.'" But McGinty says that it was not "the violence at Harper's Ferry that unleashed the forces that led to war," but the trial that followed. It was, McGinty writes,

the eloquence and courage that Brown exhibited during his trial, much more than the recklessness he displayed in the raid, that transformed his public image from that of a violent fanatic into one of a public hero. Without the trial, the violence at Harper's Ferry would have been dismissed (and generally condemned) as an aberrant exercise in criminality. The trial elevated the violence to a new level of purpose. In the courtroom, Brown exhibited bravery and selflessness, an idealism and altruism that excited admiration

and convinced many that he was probably more right than wrong about the future of slavery in the United States.

Awaiting execution, he wrote, "I John Brown am now quite *certain* that the crimes of this *guilty land*: will never be purged *away*; but with Blood."

After Brown's trial, the South began to equate moderate opponents of slavery—such as Abraham Lincoln, who sought merely to stop the spread of slavery to the territories—with abolitionists like John Brown. Lincoln believed that prohibiting slavery in the territories would eventually lead to the end of slavery in the South, as the addition of free states to the Union would shift the balance of power from the slave states to the free states. But this process might have taken decades. The South, however, panicked by Brown's actions and words, believed that it had to secede when Lincoln was elected. When its troops fired on Fort Sumter, the Civil War began. "If importance is measured by consequences," McGinty writes, "John Brown's trial was arguably the most important criminal trial in the history of the United States. ..."

So let us turn to the trial—the first trial in American history, according to McGinty, "to receive massive attention from national media, the first trial in which an accused defendant appealed to a 'higher law' to justify violent crimes, [and] the first trial in American history in which a defendant was executed for treason against a state." Brown was prosecuted by the state of Virginia, although a federal prosecution might have been more appropriate, because the arsenal was on federal property. Some of Brown's victims, however, were shot outside the federal enclave, and, if they were shot in Virginia (this wasn't clear; they may have been shot in Maryland), then Virginia too had jurisdiction. In any event, Virginia had Brown in custody and wanted to try him, and, as McGinty explains, "no provision of the U.S. Constitution gives the federal government authority to demand the surrender of prisoners properly held by a state."

The federal and Virginia laws relating to the case were nearly identical, but McGinty notes a difference that proved significant: “If Brown and his fellow raiders were tried in federal court, the judge could allow both the prosecution and the prisoners enough time to prepare their cases. The Virginia courts, in contrast, were subject to a severe time constraint, for the applicable Virginia statute provided that when an accused person was indicted for a felony, he had to be arraigned and tried at the same term of the court in which the indictment was found, ‘unless good cause be shown for a continuance.’” Brown was arrested on October 18 and had to be tried by November 10, unless good cause were found to delay the trial, in which case it could be held the following April. But that would mean that Brown would have to be held for six months, with troops on hand to guard against both rescue attempts by Northerners and lynching attempts by Southerners. Virginia elected to proceed at once. The court assigned local (slave-holding) attorneys to represent Brown, and would not wait for Brown to procure out-of-state attorneys.

There were problems with all three of the charges of which Brown was found guilty. To start with treason, Brown was not a citizen or a resident of Virginia, so he had no duty of allegiance to the state; how, then, could he commit treason against it? The state had a couple of answers. Under the Virginia statute, treason included, among other things, “levying war against the state,” and Brown’s attempt to undermine the system of slavery that was one of the bulwarks of Virginia’s legal order and a foundation of its social and economic institutions constituted “levying war.” In addition, as a citizen of the United States, entitled under Article IV, section 2 of the U.S. Constitution “to all Privileges and Immunities of Citizens in the several States,” Brown, according to Virginia, owed a duty to every state, including Virginia.

As for the charge of first-degree murder, there was little evidence that Brown personally killed anyone, and he had not planned to kill anyone. At most, he might have been guilty of felony murder. As for the charge

of conspiring with slaves to rebel, Brown simply did not do that: he had conspired with his own men to incite a slave rebellion, but not with any slaves. But these legal difficulties were never addressed. In Virginia at the time, the jurors in a criminal case were the judges of the law as well as the triers of fact, and the jurors—more than half of whom were prosperous slave owners—took only 45 minutes to reach a guilty verdict, with no explanation of how they applied the law. Brown’s attorneys filed an appeal with the Virginia Supreme Court of Appeals—the highest appellate court of Virginia—and, one day later, the court affirmed the jury’s verdict. It issued no written opinion, despite the mandate of the Virginia Constitution that “when a judgment or decree is reversed or affirmed by the Supreme Court of Appeals, the reasons therefor shall be stated in writing, and preserved with the record of the case.”

Before he was sentenced to hang, Brown was permitted to address the court. He said, “Now, if it is deemed necessary that I should forfeit my life in furtherance of the ends of justice, and mingle my blood further with the blood on my children and with the blood of millions in this slave country, whose rights are disregarded by wicked, cruel and unjust enactments, I say let it be done.” McGinty concludes, “John Brown held Harper’s Ferry for thirty-six hours, and paid for doing so with his life. [Robert E.] Lee and [Stonewall] Jackson ... held Harper’s Ferry on and off for four bloody years and were rewarded for their efforts with monuments in public squares throughout the South. Brown was a traitor to Virginia. Lee and Jackson and the others who made war against the United States in the uniform of Confederate soldiers were heroes.” **TFL**

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*Henry Cohen is the book review editor of The Federal Lawyer. He reviewed John Brown: Abolitionist, by David S. Reynolds, in the Sept. 2005 issue of The Federal Lawyer.*

## ***Federal Judges Revealed***

By William Domnarski

Oxford University Press, New York, NY, 2009.  
231 pages, \$65.00.

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REVIEWED BY EMILY JUDGE

*Federal Judges Revealed* could have hardly been released at a more apt moment. As Justice Sonia Sotomayor’s South Bronx upbringing captured the public imagination throughout her nomination, confirmation, and appointment to the U.S. Supreme Court, interest in the origins of judges and the forces that influence them seems to be at a high. William Domnarski’s book will satisfy, and perhaps feed, the curiosity felt by many in the legal community and the public about the backgrounds of this country’s jurists. To enrich the reader’s experience, the book provides some additional insight into the themes and events, such as the Great Depression and World War II, which affected many of the federal judges appointed in the 1960s, 1970s, and 1980s and thereby changed the shape of the bench.

Domnarski has done us the great favor of painstakingly reviewing approximately 100 oral histories of Article III judges and organizing the information according to topics such as “Judicial Appointments Recounted” and “Judges on Lawyers and Other Judges.” Our normal encounters with federal judges focus on their opinions, information about their professional backgrounds, and perhaps some impressions of their perceived sympathies toward one cause or another. By cataloging and presenting these oral histories, *Federal Judges Revealed* gives us the type of insider information that is so rarely available beyond a judge’s inner circle. By the end of the book, the reader has the impression of having clerked, if only for a short time, for these judges and has a new appreciation for the spectrum of judicial personalities.

Appropriately, the book starts with a chapter on “Life Before Admission to the Bar.” Although this chapter contains some accounts of what many may

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imagine to be the typical privileged upbringing of a federal judge, many of the stories do not fit this stereotype, as the judges whose histories are included in the book reveal a diversity of experiences. Hubert Will (N.D. Ill. 1961–1995) recounts growing up above the family drugstore and shares the secret ingredient of Will's Cough Syrup, as well as tips on unusual ice cream sundaes, such as caramel sauce on peach ice cream. Others judges share stories of the collective effort of the community harvest in a small Indiana town, the strength of a childhood friendship with a hunting dog, the pain of accepting welfare during the Depression, and the triumph of returning to work with a WPA job. Laughlin Waters (C.D. Cal. 1976–2002) discloses his personal experience at Normandy on D-Day. The judges' stories of law school, both humbling and triumphant, remind us that academic scholarship does not come naturally to all judges. The judges' tales of triumph over adversity can also inspire the reader.

The chapter entitled "Judicial Appointments Recounted" illuminates the dynamics of the nomination process from the usually unpublicized point of view of the nominee. Nominations take a variety of paths, involving various levels of effort from the nominees themselves. We see lawyers, who will go on to be impartial Article III judges, act out their final and perhaps greatest overtly political roles. Albert Wollenberg (N.D. Cal. 1958–1981) leveraged his relationship with Earl Warren to influence a California senator originally appointed by Warren to nominate him. On the opposite end of the spectrum, other future judges received phone calls offering nominations that surprised no one more than them. June Green (D.D.C. 1968–2001) tells of how a mysterious invitation to meet Deputy Attorney General Warren Christopher evolved into an invitation to the bench that was all the more to her credit because of her relative lack of political connections. The oral histories provide insight into the experiences of those who were nominated as a result of direct connections with the President, those who relied on the support of high-ranking of-

ficials in the administration, those who were recruited with little effort on their own part, those who were championed by senators, and those who owed their nominations to governors and other state officials. In exploring these varied paths to the bench, Domnarski provides us with insights into the motivations of many judges, while also offering a unique glimpse into one of the most private parts of the American political process.

*Federal Judges Revealed* also focuses on judges on the job. We learn of the process of transitioning to the federal bench, and of the nature of the job, including judges' experiences in chambers, in court, and in getting along with others. The book also explores the topic of judicial opinions and gives us insight into the reactions of lower court judges upon being reversed on appeal. The judges' feelings on this topic run the gamut—from Prentice Marshall (N.D. Ill. 1973–1996), who accepted being reversed and was troubled by the lengths to which some of his colleagues went to avoid reversal, to Stanley Harris (D.D.C. 1983–2001), who felt compelled to write even stronger opinions on remand if he believed that he had been wrongly reversed. Some judges seem satisfied to act in a prescribed role as a part of the larger structure of the Article III courts, whereas others see themselves engaged in a more personal endeavor.

The book ends with a chapter entitled, "Judges on Lawyers and Other Judges," which gives the judges a stage on which to criticize, praise, and offer advice to lawyers. A common theme in the judges' advice is to focus on preparation, a deep understanding of the law and the facts, and one's ethical duties as a lawyer. Comments such as those from Milton Schwartz (E.D. Cal. 1979–2005) remind the reader that judges are not fooled by lawyers who present the appearance of being cooperative in court but engage in petty disputes with opposing counsel outside of court. By contrast, Harold Ryan (D. Idaho 1981–1995) tells of a Coeur d'Alene solo practitioner who won a securities suit against a well-represented panel of defendants, illustrating that success

is possible with diligence, preparation, and an even temper.

*Federal Judges Revealed* offers a captivating look inside the personal and professional lives of judges as well as insight into the workings of the federal judicial system as a whole. Domnarski has done the legal community a service by collecting this information and organizing it into a cohesive and readable whole. **TFL**

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### **Franz Kafka: The Office Writings**

Edited by Stanley Corngold, Jack Greenberg, and Benno Wagner; translations by Eric Patton with Ruth Hein

Princeton University Press, Princeton, NJ, 2009.  
404 pages, \$45.00.

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#### REVIEWED BY JEFFERSON M. GRAY

Even many well-read attorneys are probably unaware that Franz Kafka was a lawyer. The question of Kafka's occupation rarely comes up when undergraduates are struggling to understand his short story, "The Metamorphosis," and—with the exception of his novel, *The Trial*, and, to some extent, the short story, "In the Penal Colony"—none of his better-known works involves legal themes.

And yet Kafka was an attorney, and a highly able and talented one at that. He graduated from Charles University in Prague with his law degree in June 1906, spent a year handling cases for the indigent in the city's Provincial and Criminal Courts, and then endured nine months of drudgery working for the local office of a large Italian insurance company. In summer 1908, at the age of 25, he changed jobs and signed on as an assistant legal secretary with the grandly named Austrian Imperial and Royal Workmen's Accident Institute for the Kingdom of Bohemia, the workers' compensation agency responsible for the largest and most industrialized region of the Austro-Hungarian Empire.

The institute set and collected insurance premiums from employers based on the risk of accidents their operations presented and also processed, reviewed, and paid claims received from injured workers.

For the next 14 years, Kafka worked for this institute and its successor under the Czechoslovak Republic, rising to the position of chief legal secretary (the equivalent of a modern general counsel) before a deteriorating case of pulmonary tuberculosis compelled him to take early retirement in 1922. He died two years later, at the age of 40.

Kafka's work for the institute was diverse. During his first years there, he rotated among its three main departments—actuarial, accidents, and appeals—familiarizing himself with different aspects of the institute's operations. He also effectively functioned as a special assistant to the institute's director, Dr. Robert Marschner, and to Eugen Pfohl, the head of the actuarial department, drafting speeches for both men and lengthy analytical pieces for the institute's annual report. Less frequently, Kafka acted in a litigation capacity, preparing the agency's response to a weaving mill's appeal of its risk classification, or serving as agency counsel in the criminal prosecution of a quarry owner who was particularly recalcitrant about paying the necessary premiums to insure his workers. Over time, Kafka increasingly focused on accident prevention measures, producing lengthy reports on the benefits of equipping wood-planing machines with cylindrical safety shafts or analyzing the safety issues that affected rock quarries in Bohemia.

Given their administrative nature and sometimes highly technical character, it is not surprising that Kafka's office writings attracted little scholarly attention for nearly 80 years after his death. That changed in 2002, when two German scholars—one of whom, Benno Wagner, is among the editors of this volume—produced a two-volume compilation of Kafka's surviving work for the institute as part of the Frankfurt critical edition of Kafka's works. *Franz Kafka: The Office Writings* contains 18 selections drawn from that larger collection, each of which is preceded by a brief introduction and followed by a

longer commentary. The volume also includes a more extended essay from each of the three editors.

The editors' individual contributions differ greatly in character and utility. Benno Wagner's explication of the historical background and institutional context of the writings helpfully summarizes Austria's efforts to develop an effective compensation regime for victims of industrial accidents, outlines the history of the Bohemian Institute and of Kafka's own role within it, and explains how the human wreckage produced by World War I served to greatly expand the institute's responsibilities.

In contrast, Stanley Corngold's essay, which attempts to relate Kafka's office writings to his literary oeuvre, is likely to prove frustrating, even maddening, for most lawyers. Corngold is a distinguished Kafka scholar at Princeton University who has prepared new translations of many of Kafka's works. But his contributions suffer from the jargon-ridden and pretentious modes of writing and analysis characteristic of modern literary criticism, with too many passages like this:

In this fragment of Kafka's deepest imagination, the figures of (1) writerly being and (2) participation in a social-political organization are brother phantasms of fear and desire, tangled together at the beginning in a poetological dream navel. At the outset of Kafka's writing career, we find the deep mutual involvement of the radically solitary, monstrous other and the sought-after protobureaucratic ministry as figures of writing.

The final essay, by famous civil rights litigator and Columbia Law School professor Jack Greenberg, is largely a modest and sensible attempt to identify the broader thematic threads that emerge from the diverse writings included in this volume. Eventually, however, Greenberg's essay veers off into an attempt to relate the concept of the "Kafkaesque" to the litigation history of the desegregation movement in general and the Supreme Court's doctrine of "all deliberate speed" in particular. Many observers might suggest

that more contemporary and compelling examples of official double-speak and hide-the-ball, hollow facsimiles of due process, and judicial procedures designed to yield foreordained litigation outcomes, can be found in America's treatment of terrorism suspects and detainees in the years since the Sept. 11 attacks. These recent episodes remind us that we should not feel too much of a sense of superiority when reading Kafka's nightmarish fable of arbitrary, opaque, and inscrutable judicial authority, *The Trial*.

But why should anyone other than a workers' compensation specialist want to read a volume that includes highly technical discussions of the operations of wood-planing machines, the comparative safety risks presented by cotton-weaving and wool-weaving looms, or the characteristics of the wooden toy manufacturing industry in northern Bohemia on the eve of World War I? The editors' answer is that "Much of Kafka's greatness as an analyst of modern life—of the fusion of bureaucracy and technology as its governing principle—is owed to his office job," because he "worked at the turbulent intersection of the new legal, social, political, technical, and publicistic developments that constitute industrial modernity." The editors contend that Kafka's "daily job routine provided him with a trove of themes and images" that still possess "the power to rouse us a century later." His office writings are thus, in their view, "an integral part of his literary oeuvre," whose impact on his stories and novels should not be underestimated.

Unfortunately, despite the editors' diligent effort in the commentaries accompanying each selection, the book fails to sustain these claims. The vast majority of the correspondences they discern between Kafka's office life and his literary writings relates to a mere handful of his works—the novels *Amerika* (also known as *The Man Who Disappeared*), *The Trial*, and *The Castle*, together with the short stories "The Metamorphosis," "In the Penal Colony," and "The Great Wall of China." Even in these cases, many of the supposed references the editors discern are too

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generic to be fully persuasive or particularly useful.

For example, the editors include a short analysis that Kafka prepared for one of the institute's annual reports that considered whether automobile owners who employed a driver should be included in the compulsory insurance program—a piece that the editors themselves acknowledge constitutes “a marginal contribution to Austrian workmen's accident insurance.” The editors then relate this article to a passage in *Amerika* in which Kafka's hero is astonished by the pressing mass of automobiles trying to make their way past the entrance to a hotel in an American city. But this image could more plausibly be attributed to Kafka's having seen a photograph of the crush of cars in some American metropolis than to his precise legal analysis of the status of car owners and chauffeurs under Austria's Accident Insurance Law.

Similarly, the editors tout a lengthy piece on safety problems associated with rock quarries as “itself a quarry for images scattered across Kafka's literary work,” and Greenberg's essay suggests that this report may be the source for the final scene of *The Trial*, where Josef K. meets his end atop a square block of stone near the wall of a quarry. But, although Greenberg is correct that Kafka's report makes reference to a similar block of stone in one of the quarries he visited, it was hanging dangerously from a quarry wall, not lying on the quarry floor. Moreover, in Kafka's Prague there was an old unused quarry behind the Laurenziberg Park on the west side of the Vltava River whose locale closely matches that of the quarry described in *The Trial*, which was within walking distance of Josef K.'s urban boarding house. It seems equally possible that this was the real-world inspiration for *The Trial*'s last scene.

Another instance in which the editors' hunger to find some correspondence between one of their selections and Kafka's literary works leads them astray can be found in their analysis of Kafka's “Risk Classification and Accident Prevention in Wartime” from 1915. The introduction to this selection

argues that it “employs imagery remarkably similar to that of “In the Penal Colony,” which was written (in three nights or fewer) at about the same time, around mid-October 1914.” But, because this report includes references to events occurring as late as Aug. 30, 1915, it must actually have been written about a year after Kafka composed “In the Penal Colony.”

In the end, the editors' quest to find sources and explanations for Kafka's striking images and surrealistic fables in the prosaic world of a workers' compensation bureaucracy seems to have been fundamentally misconceived. In his biography of Kafka, Max Brod, Kafka's close friend and literary executor, wrote that, “when it came to the point of choosing a profession, Franz postulated his job should have nothing to do with literature. That he would have regarded as a debasing of literary creation. Breadwinning and the art of writing must be kept absolutely apart. ...” Brod further indicated that, for Kafka, the institute's principal attraction from an employment standpoint was that it was one of the few offices in Prague that would allow him to work a “single shift” from 8 a.m. until 2 p.m. (six days a week, with no break for lunch), thereby affording him more uninterrupted time each day for writing. And, although Kafka appreciated the fact that his employment at the institute “doesn't demand all my strength,” he nevertheless complained incessantly about his work there to his friends, to his longtime fiancée, and to his diary.

Given Kafka's attitude toward his day job, it would be surprising if his office work exercised the degree of influence upon his literary writings that the editors suggest. Rather, Kafka sought inspiration primarily from what he called in his diary, “[t]he tremendous world I have in my head!,” asserting that releasing that world “is what I am here for, of that I am quite clear.” It is Kafka's dreamlike inner life, coupled with his difficult relationship with his father and his frustrating, dysfunctional relationships with women, that can best be looked to for the sources of his inventive, occasionally

disturbing, and at times nightmarish fictions. And to understand those influences, you are better off reading an excellent biography—such as Reiner Stach's *Kafka: The Decisive Years*; Louis Begley's concise and incisive study, *The Tremendous World I Have Inside My Head: Franz Kafka, a Biographical Essay*; or James Hawes' provocative *Why You Should Read Kafka Before You Waste Your Life*—than struggling through the selections in *Franz Kafka: The Office Writings*.

But if Kafka's office writings provide no Rosetta Stone to help interpret his literary creations, is there another reason to read them? I suggest there is. The Kafka who emerges from most biographies can be a difficult and often unsympathetic figure: deeply neurotic, obsessed with health fads, haunted by some unnamed sexual compulsion or dysfunction, a tomcatting man-about-town who was commitment-phobic and often cavalierly dishonest in his relations with women.

In contrast, the writings collected in this volume present Kafka in a far more attractive light. For all the disparaging comments and complaints he made about his job in his diary and correspondence, he emerges from these pages as both an impressively capable young professional and a passionately idealistic social reformer. The selections assembled here show him as an ardent campaigner for improved safety measures for workers and for adequate psychiatric facilities for soldiers traumatized by the horrors of the Great War, as a scrupulous and careful analyst of highly technical safety problems, and as a talented publicist with a real flair for public advocacy and education. These writings reveal Kafka the man at his best. For that reason, *Franz Kafka: The Office Writings* makes a significant contribution to understanding the enigmatic Franz Kafka—it just happens to be a different contribution from the one its editors intended. **TFL**

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## **Nonprofit Law for Religious Organizations: Essential Questions and Answers**

By Bruce R. Hopkins and David O. Middlebrook

John Wiley and Sons, Inc., Hoboken, NJ, 2008.  
350 pages, \$45.00.

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### REVIEWED BY DAVID M. ACKERMAN

*Nonprofit Law for Religious Organizations: Essential Questions and Answers* deserves a place on the bookshelf of anyone who holds a position of responsibility in a religious organization or advises such an organization on the practicalities and legalities of its organizational life. Bruce Hopkins and David Middlebrook are both attorneys whose practices have focused on nonprofit organizations, and both have extensive experience in this area. Although much of *Nonprofit Law for Religious Organizations* is useful for nonprofit organizations generally, it emphasizes how nonprofit law applies to religious organizations. The book is comprehensive in scope, accessible in organization, and eminently readable.

*Nonprofit Law for Religious Organizations* is not a critical analysis of the judicial interpretation of the First Amendment's religion clauses; nor does the book deal in depth with the hot-button issues of church and state that have convulsed the body politic during the past several decades, such as prayer in the public schools and public aid to private religious schools. Instead, the book addresses the practical legal issues that confront every nonprofit religious organization in the United States. The authors discuss whether and how to incorporate a religious organization, how to acquire tax-exempt status, what civil rights obligations a religious organization has, and whether a religious organization can be held liable for the acts of its volunteers. In addition, the book deals with the need for insurance coverage, the intricacies of the unrelated-business income tax, lobbying and political activity by religious organizations, the legal framework governing charitable fund raising, and much, much more. Indeed, it is difficult to think of a practical legal question about religious organizations

that the book does not address.

*Nonprofit Law for Religious Organizations* consists of 26 chapters and is divided into four parts: (1) "Creation of a Nonprofit Organization," (2) "Ministers, Employees, and Volunteers," (3) "Operation of a Religious Nonprofit Organization," and (4) "The Constitution, Religious Freedom, and Interaction with the Government." What makes the book so useful and accessible is that every chapter is organized in a question-and-answer format, and every question the book addresses is set forth in its table of contents. Thus, for example, a minister, officer, or adviser of a religious organization who encounters an issue concerning the organization's liability for the acts of its employee (such as sexual abuse of a child) only needs to turn to the table of contents, find the chapter entitled "Liability of Religious Organizations," examine the 17 questions listed in the chapter to find the ones that are most pertinent to the particular case, and then turn to the appropriate pages of the book for a thorough discussion of the issue. Equally important, the book's organization makes it easy for a minister, officer, or adviser of a religious organization to identify an issue and see what the organization needs to do *before* legal problems arise.

*Nonprofit Law for Religious Organizations* generally sets forth its information in an objective manner, but the authors also express opinions that reflect their extensive experience in advising religious organizations and the practical wisdom that the authors have acquired about the pertinent laws, regulations, and court decisions. Thus, where appropriate, the authors do not hesitate to say that "the law on this point is particularly vague" (discussing the tax doctrine of private benefit), that "one of these elements ... is particularly galling" (discussing the commerciality doctrine), or that one should act "carefully and courteously" (discussing the way exempt organizations should cope with IRS personnel during an audit). At all times, both the information imparted and the authors' opinions are intended to be practical and useful—and they are.

No book is perfect, of course, and *Nonprofit Law for Religious Organi-*

*zations* is no exception. For instance, many churches in recent years have been burdened by restrictive regulations related to land use regulations when they have sought to build, expand, or renovate their properties, but the book has only a brief chapter on the topic, entitled "Real Property and the Religious Nonprofit," and deals only cursorily with these issues. Moreover, neither in that chapter nor elsewhere do the authors demonstrate any awareness of the Religious Land Use and Institutionalized Persons Act, which was enacted in 2000 after the U.S. Supreme Court struck down the Religious Freedom Restoration Act as it applied to the states. The 2000 act provides substantial legal leverage for religious institutions affected by onerous land use regulations, and, in *Cutter v. Wilkinson*, 544 U.S. 709 (2005), the Supreme Court upheld its constitutionality. It should have been discussed in this book.

Moreover, this reader, at least, found the absence of case names and legal citations in the book to be frustrating. The authors clearly do not want to confound (or bore) the reader who is not an attorney by larding the book with case names and citations to codes and regulations. But even a lay reader might have appreciated knowing that the extensive quotations from the Supreme Court that the book uses in answering the question, "What is the definition of religion?" came from a case called *Torcaso v. Watkins*, 367 U.S. 488 (1961), or that the same case is also the source of the authors' answer to the question, "To qualify as a religious organization, must the organization propagate a belief in God or the existence of a Supreme Being?" The authors often mention statutes and regulations by name, but rarely do they provide a legal citation. Case names and statutory and regulatory citations would have made the book even more useful to attorneys.

Nonetheless, given the general excellence of the book, these criticisms are little more than quibbles. *Nonprofit Law for Religious Organizations* provides a depth of legal expertise and practical wisdom invaluable for any-

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one who advises or leads a religious organization. It is not a book to be read in a single sitting. But it is one to be bought and frequently used. **TFL**

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*David M. Ackerman recently retired after serving as legislative attorney with the Congressional Research Service at the Library of Congress. Among his legal specialties is the law of church and state.*

### **Unequal Democracy: The Political Economy of the New Gilded Age**

By Larry M. Bartels

Princeton University Press, Princeton, NJ, 2008. 325 pages, \$29.95.

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#### REVIEWED BY MICHAEL COBLENZ

I distinctly remember the reaction of many of my conservative friends when Bill Clinton was elected President in 1992. “We’re going back to the days of double-digit interest rates and double-digit inflation,” one friend confidently predicted. His comment mirrored one of the major avenues of attack against Clinton during President George H.W. Bush’s 1992 re-election campaign. One of the iconic commercials of the campaign showed desolate scenes from Arkansas while describing the state’s woe-filled economy, implying that Clinton had ruined Arkansas’ economy and would do the same to the national economy.

The 1992 campaign was also the first time I saw a graph of the Dow Jones industrial average showing that the stock market historically did better under Democratic Presidents than under Republican ones. The numbers were skewed wildly by the disastrous crash of 1929 under the Republican Hoover administration, but, even with Hoover’s numbers factored out, the Democrats still had an edge. The chart’s implication was that the election of a Democrat would not destroy the economy but could actually help it.

The economic predictions of my conservative friends (and the conservative pundits and politicians they were parroted) turned out to be totally wrong. The chart was right: the Dow went

up and the economy grew substantially under Clinton. Curiously, none of my friends, conservative pundits, or Republican politicians ever admitted his or her error. Instead, they said that the good economy under Clinton stemmed from the policies enacted by Ronald Reagan some four years before. (This, of course, made hash out of their campaign claims about the President’s power to affect the economy, but never mind.) In a similar vein, many conservatives claim that the current economic woes are not the fault of the last eight years of the Bush administration, but are the fault either of the Clinton policies of the eight years before that or of the new Obama administration.

The implication, then and now, is that Democrats just don’t know how to handle the economy. (This accounts, to no small degree, for the fact that business groups like the U.S. Chamber of Commerce rarely endorse Democratic politicians.) According to this reasoning, the purportedly “pro-business” policies of Republican Presidents are better for the national economy than the supposedly anti-business or pro-labor policies of Democratic Presidents. But then how do we account for the performance of the Dow? Is it a fluke—a statistical anomaly that is unrepresentative of the economy as a whole?

According to Larry Bartels, since the end of World War II, the economy has consistently performed better during Democratic administrations than during Republican ones. Bartels, a professor of public policy and international affairs at Princeton University, presents a detailed economic analysis of these issues in his book, *Unequal Democracy*. He analyzes the overall gross national product (GNP) and the cumulative income growth by income percentile of the population instead of by the Dow, but the results are similar. Bartels finds that, since 1945, the real per capita GNP grew 2.78 percent under Democrats and 1.64 percent under Republicans. In the roughly 60 years that he studied, Democrats controlled the White House for 27 years and Republicans for 32. There have been major changes in the national economy—a switch from a manufacturing to a service economy,

computerization, and globalization—during both Republican and Democratic administrations. Even accounting for these changes, the economy has performed better with a Democrat in the White House than with a Republican.

Although Americans’ incomes grew during both Republican and Democratic administrations, the real growth under Democrats has been among families in the lower-income percentiles. “On average, the real incomes of middle-class families have grown twice as fast under Democrats as they have under Republicans, while the real incomes of working poor families have grown *six times* as fast under Democrats as they have under Republicans.” Bartels also finds that, from 1945 to 1974, every income group benefited almost equally from the growing economy, but, since 1974, most of the benefit has gone to those in the upper incomes. Cumulative income growth for the bottom 20th percentile (the poorest fifth of the population) was 10.3 percent during this period, while the income growth for the top 20th percentile was 42.9 percent. The numbers are even starker farther up the income ladder, with the richest 5 percent of the population gaining 62.9 percent in income from 1974 to 2005.

Bartels believes that this is more than mere happenstance. Rather, it results from distinct partisan policy choices. Since the end of World War II, the gap between the top 20 percent of income and the bottom 20 percent has “increased under each of the six Republican presidents in this period. ... In contrast, four of five Democratic presidents—all except Carter—presided over declines in income inequality.” The curious fact is that, although the wealthy do much better than the poor or middle class under Republicans, overall the wealthy still do better under Democrats. On average, since 1945, the wealthiest 10 percent of Americans have seen their incomes increase approximately 2.1 percent during Democratic administrations but only 1.8 percent under Republican administrations.

If this is true, why is there the perception that Republicans are better managers of the economy than Democrats are? Bartels notes that most of the

growth in the economy under Democrats occurs early in their administrations, while for Republicans it occurs later in their terms. He suggests that the greatest predictor of an election is the state of the economy in the year immediately preceding the election. As Bill Clinton's campaign manager, James Carville, aptly noted, "It's the economy, stupid." Bartels suggests that Republicans are somehow much better at stoking the economy in the year before the election, and they benefit from this in public perception and at the polls.

But how do Republicans do this? Bartels doesn't tell us. In fact, one of the major drawbacks of *Unequal Democracy* is that Bartels never provides any details about specific policies that produce the results he so painstakingly describes. Bartels claims, for example, that the rich benefit under Republican presidents, while the poor do better under Democrats, but he doesn't explain the economic policies that produce these results. Is it tax cuts, reduced regulation, Federal Reserve policy? We never learn. Bartels does provide a few broad generalizations: Democrats accept inflation if it means job growth, while Republicans fight inflation to protect the investor class. Democrats favor progressive tax policies with higher taxes on the wealthy, and they favor increases in the minimum wage and funding for domestic programs to help the poorest citizens. Republicans, by contrast, favor cutting taxes and limiting government regulation of business and the economy. All that is well and good, but it doesn't explain the connection between these policies and the effect that Bartels' data seem to show.

Bartels is clearly more interested in proving the effect of these policies than in addressing the cause, and he often goes overboard to prove his point. More often than not, he presents data through regression analysis rather than through straight statistical description. When, for example, he discusses the likelihood of people in various income groups voting for the incumbent party, we learn that election year income growth affects the "probit parameter estimate" of high-income voters by 0.082, while it affects middle-income voters by 0.110. I'm sure economists under-

stand what this means, and I suspect it is more statistically accurate than data understandable by lay people would be, but to me it is meaningless. The book would have been improved—it would be more understandable and would reach a broader audience—if the economic data were more meaningful to the average reader.

Bartels addresses a very important issue: the effect of partisan policy choices on the economy. But he misses something important by failing to discuss—even briefly—the specifics of those policies. He also fails to address an even more fundamental question: What is the purpose of government? Is it to ensure the success of businesses? Is it to ensure that investors make the highest return, or that their investments are secure? Although each is a noble goal in and of itself, it seems that government should be about more than that. Calvin Coolidge once famously said that the business of America is business. That sounds nice, but where does it say that in the Constitution?

In contrast, is the purpose of government to make sure that as many citizens as possible enjoy the fruits of the economy? Is it the purpose of government to structure the system so that prosperity is as broad-based as possible? That is clearly Bartels' view (and I happen to agree), but, again, where does it say that in the Constitution?

It is a partisan political choice to say that the government should regulate the economy to ensure the broadest possible income growth for the greatest number of citizens. That makes sense from a utilitarian perspective—the greatest good for the greatest number—but that doesn't make it inherently right or wrong. It is equally legitimate to say that the purpose of government is to ensure a level economic playing field and then let the strong prosper and the weak fall by the wayside. *Unequal Democracy* provides evidence for one side of the debate, but, because it fails to address why one policy choice might be better than another, it will simply be dismissed by those who have a different idea about how the economy should be structured. **TFL**

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## **Federal Prison Guidebook**

By Alan Ellis and J. Michael Henderson  
*The Law Offices of Alan Ellis, Mill Valley, CA,  
and Ardmore, PA, 2008. 400 pages, \$79.00.*

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REVIEWED BY ELIZABETH KELLEY

When the fourth edition of the *Federal Prison Guidebook* was published, I wrote a glowing review of it for the July 2006 issue of *The Federal Lawyer*. The new 2008 edition deserves a review that is no less glowing. The book can be divided into two sections: the first section is an introduction to the Bureau of Prisons and to federal sentencing, and the second section is a guide to each of the 105 federal prisons, organized by region of the country. Although much of the information in the second section is the same as it was in the previous edition (for example, the address and contact information of each institution, its security level, and program offerings), the first section—chapter 6, in particular—has been rewritten. Chapter 6 reflects the developments in federal sentencing law since the U.S. Supreme Court's landmark case of *United States v. Booker*, 543 U.S. 220 (2005), which held that the federal sentencing guidelines were not mandatory but advisory.

Alan Ellis and J. Michael Henderson see *Booker* as a tremendous opportunity for criminal defense lawyers to be advocates again. Now that we are no longer confined in the straightjacket of the guidelines, we can be as creative as we like. With this in mind, chapter 6 of the guidebook outlines ways that attorneys can request departures and variances, as well as creative sentencing options, such as split sentences and home confinement. Chapter 6 also explains concepts such as relevant conduct and grouping. *Federal Prison Guidebook* is painstakingly footnoted and cites Bureau of Prison policy statements, of which the average federal practitioner might not be aware.

I took two lessons from the *Federal Prison Guidebook*. The first is that the Pre-Sentence Report (PSR) is supreme. When the probation department finish-

**REVIEWS** continued on page 58



es the PSR, the attorney should scrutinize every word and, needless to say, review it with his or her client. Then, the attorney should work with the PSR writer to correct any inaccuracy, however minor it may seem. If corrections are not made, the attorney should file formal objections with the court. This is vital, because not only does the PSR form the basis for sentencing, but it also follows the client to the institution and determines such things as placement and classification. In addition, if the client has health problems, make sure that they are documented in the PSR.

The second lesson I learned from the *Federal Prison Guidebook* is that attorneys can have an impact with respect to where their client is placed. If the client would benefit from a particular program—such as drug rehabilitation—that an institution offers, and if the client meets that prison’s security level, then request his or her placement there. The authors note that, in most cases, the Bureau of Prisons follows the court’s recommendation, even though it is not required to do so.

If the *Federal Prison Guidebook* has a drawback, it is its price of \$79. Indeed, much of its information, albeit in a different format, can be accessed at Ellis’ Web site, [www.alanellis.com](http://www.alanellis.com), and in several articles Ellis has written for *The Champion*, the magazine of the National Association of Criminal Defense Lawyers. But the fact remains: Ellis and Henderson’s work is cutting edge and everyone—attorneys, judges, probation officers, U.S. attorneys, and defendants and their families—can learn from it.

**TFL**

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## ***Making Poor Nations Rich: Entrepreneurship and the Process of Economic Development***

Edited by Benjamin Powell

Stanford University Press, Stanford, CA, 2008.  
452 pages, \$75.00 (cloth), \$29.95 (paper).

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REVIEWED BY JANE G. GRAVELLE

*Making Poor Nations Rich* addresses an issue that has confronted economists at least since Adam Smith: What makes countries poor or rich? Standard growth theory, applied to a world where technology can be transferred, suggests that nations will converge in their standard of living. Yet not only do dramatic disparities exist across countries, but in some cases the relative position of poor countries has worsened rather than improved. The essays in *Making Poor Nations Rich* suggest that the success of nations in achieving growth depends on political institutions and, in particular, on whether those institutions encourage entrepreneurship.

The book begins with four general essays. In the first, Mancur Olson Jr. claims to show that differences in wealth cannot be explained by differential access to knowledge or capital, or by differences in human capital, and this leaves as the only plausible explanation the quality of each nation’s institutions and policies. The theme of the second essay, by Randall G. Holcombe, is that entrepreneurial opportunities are created by the actions of other entrepreneurs. The third essay, by William J. Baumol, argues that the differences in countries do not arise from the total supply of entrepreneurial activity, but from the allocation between productive and nonproductive activity (rent-seeking such as lobbying and military activity). Baumol turns to historical examples from ancient Rome, medieval China, and the Middle Ages to illustrate his points. The final general essay, by Robert A. Lawson, presents evidence that variables reflecting economic success, such as per capita income and growth, are associated with the degree of economic freedom in a nation. Economic freedom, in turn, includes measures such as the size of government, property rights and security, sound money,

exchange with foreigners, and regulation. Following these general essays are four essays on failures (in Africa, Latin America, Romania, and Sweden) and five essays on reform and success or partial success (in China, India, Ireland, New Zealand, and Botswana).

These essays are easily accessible to noneconomists and make interesting reading, but to what degree should the reader accept the overall message of the book? The introduction seems to set up a straw man, in the form of mainstream growth theory, which provides a basic mathematical model for growth but does not answer important questions, such as why nations are poor or rich. Yet, the analysis of growth and of economic development in the economics profession is longstanding and widespread, and there is significant disagreement with the broad-brush conclusions to be found in this book. Although few economists would deny that lack of property rights, political instability, and the undermining of incentives (as in centrally planned economies) are likely to contribute in a major way to poor economic performance, it is another matter entirely to prescribe changing these conditions as a solution to the problems of poverty and lack of growth. Not only is fundamental institutional reform difficult, but there are other potential causes that should be addressed, such as limited human capital, poor infrastructure, overwhelming challenges to health, and geographic barriers. Some authors, such as Dani Rodrik, writing in the December 2006 issue of the *Journal of Economic Literature*, stress that problems need to first be diagnosed on a case-by-case basis and that solutions will differ from country to country. Indeed, one need only contemplate the differences in income between the states of Mississippi and Minnesota as an illustration that something other than the basic institutional rules must be at play in affecting the well-being of nations.

There is also a theme in the book that reaches beyond the objective of making poor nations rich, and it is best exemplified by the inclusion of Sweden with the list of countries that have failed. Sweden is a developed, high-income country that has recently experienced slower growth for reasons that are in dispute. The inclu-

sion of this country in *Making Poor Nations Rich* signals that the book targets not only political institutions—such as property rights, privatization, and stable environments—but also big government as a cause of poverty. The inclusion of Sweden diffuses the message of the book, because it suggests an agenda that goes beyond explaining and addressing the issues of developing countries.

In addition, the reader struggles for some time to determine what exactly the book means by “entrepreneurship” (a term technically meaning one who organizes, manages, and takes on the risk of a business enterprise), especially

in some developing countries where being a shopkeeper or farmer is common. In some relatively poor countries, many citizens are self-employed, although not always by choice (and one chapter in the book distinguishes between “necessity entrepreneurs” and “opportunity entrepreneurs”). When the problem of vagueness in the meaning of the term is compounded with a heavy reliance on anecdotal evidence, the book’s message becomes a little less persuasive. For a reader not versed in development economics and seeking an understanding of the causes of and cures for economic development, further reading is advis-

able before accepting wholeheartedly the message in this book. **TFL**

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## **CYBERIA** *continued from page 11*

wasn’t engaging in very defensive behavior and unfortunately that affected the court’s outcome. ... What the court was reacting to was what was more sympathetic, which was the plaintiff.

(Both of the above quotes appeared on SF Gate, the Web site of my hometown newspaper, the *San Francisco Chronicle*, in its “Tech Chronicles” column. (See [www.sfgate.com/cgi-bin/blogs/techchron/detail?&entry\\_id=45920](http://www.sfgate.com/cgi-bin/blogs/techchron/detail?&entry_id=45920).) The Electronic Frontier Foundation has published a timely online legal guide for bloggers. (See [www.eff.org/issues/bloggers/legal](http://www.eff.org/issues/bloggers/legal).)

### **Conclusion**

The final teachable moment provided by this case

is that if you (or your client) don’t have something nice to say about someone else, be aware that a court may out you for saying something offensive about that someone else on the Internet. Anonymity is not guaranteed. Proceed at your peril in Cyberia. When is a door not a door? When it’s ajar. **TFL**

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## **LABOR** *continued from page 13*

implicate the ADA. Employers may also require employees to wear personal protective equipment, such as gloves or masks. However, if an employee has a disability and needs an accommodation under the ADA when using the equipment—nonlatex gloves, for example—the employer must provide the accommodation unless it would cause undue hardship. Finally, EEOC guidelines provide that employers may require employees to work remotely as an infection-control strategy as long as employers do not single out employees because of a disability or any other reason that is protected under the law.

It is important for attorneys to advise employers on actions they need to take to prepare for a response to the upcoming flu season. Employers should formulate a flu response plan that ensures not only their employees’ safety and but also the continuity of business operations.<sup>4</sup> **TFL**

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### **Endnotes**

<sup>1</sup>Centers for Disease Control and Prevention, *Guidance for Businesses and Employers to Plan and Respond to the 2009–2010 Influenza Season*, available at [www.cdc.gov/h1n1flu/business/guidance/](http://www.cdc.gov/h1n1flu/business/guidance/), (last visited Sept. 4, 2009).

<sup>2</sup>Note that pandemic issues bring many federal laws into play, such as the Occupational Safety and Health Act, Family Medical Leave Act, HIPAA, and Fair Labor Standards Act, along with Title VII and state laws including antidiscrimination provisions.

<sup>3</sup>U.S. Equal Employment Opportunity Commission, *ADA-Compliant Employer Preparedness for the H1N1 Flu Virus*, available at [www.eeoc.gov/facts/h1n1\\_flu.html](http://www.eeoc.gov/facts/h1n1_flu.html) (last visited Sept. 4, 2009).

<sup>4</sup>For more information on this topic, see [www.flu.gov](http://www.flu.gov), [www.cdc.gov](http://www.cdc.gov), and [www.eeoc.gov](http://www.eeoc.gov).