Beyond the Formalist-Realist Divide: The Role of Politics in Judging

By Brian Z. Tamanaha

Princeton University Press, Princeton, NJ, 2009. 252 pages, $70.00 (cloth), $24.95 (paper).

REVIEWED BY HENRY COHEN

At her Supreme Court confirmation hearings before the Senate Judiciary Committee, Sonia Sotomayor testified that her judicial philosophy is "fidelity to the law. The task of a judge is not to make law, it is to apply the law." At his confirmation hearings, John Roberts said, "Judges are like umpires. Umpires don't make the rules; they apply them." These statements cannot be taken at face value, because, as every judge has known for centuries, judges sometimes do have to make law. This is not particularly to fault Sotomayor or Roberts, because the willingness of some senators to engage in demagoguery means that for a judicial nominee to educate the public about the true role of judges would be to risk his or her appointment.

But, if every judge has known for centuries that judges sometimes have to make law, then how does one account for the legal formalists whom Oliver Wendell Holmes refuted in 1881, when he wrote in *The Common Law*, "The life of the law has not been logic: it has been experience"? And, later, in the 1920s and 1930s, didn't the legal realists, building upon Holmes' insight, discredit legal formalism? No, shows Brian Tamanaha: legal formalism never existed; it is a straw man that the legal realists invented. All judges, even before the purported formalist era from the 1870s to the 1920s, were realistic about their roles. Tamanaha shows not merely that formalism never existed as a historical fact; he shows that the very concept of formalism is incoherent. Law *cannot* be applied mechanically; judges must always exercise judgment, and they have always known that.

The fact that judges must always exercise judgment, however, does not mean that judges are unconstrained, and Tamanaha shows that the legal realists never claimed that they were. Legal realists took a balanced approach to realism, understanding that, even though judges "sometimes are influenced by their political and moral views and their personal biases," "legal rules nonetheless work," because "there are practice-related, social, and institutional factors that constrain judges."

Despite this truth, Tamanaha writes, "the standard chronicle within legal circles as well as in political science, repeated numerous times by legal historians, political scientists who study courts, legal theorists, and others," is that, until the 1920s, "lawyers and judges saw law as autonomous, comprehensive, logically ordered, and determinate and believed that judges engaged in pure mechanical deduction." Then, in the 1920s, the standard chronicle continues, "the legal realists discredited legal formalism, demonstrating that the law is filled with gaps and contradictions, that the law is indeterminate," and "that judges decide according to their personal preferences and then construct the legal analysis to justify the desired outcome." Tamanaha claims that "[t]his ubiquitous formalist-realist narrative … structures contemporary debates and research on judging. The formalist judges are 'the great villains of contemporary jurisprudence.'" Tamanaha cites Richard Posner's *How Judges Think* (reviewed in the November/December 2009 issue of *The Federal Lawyer*) "as an effort to debunk the delusions of legal formalism that still beguile the legal fraternity." *Beyond the Formalist-Realist Divide*, by contrast, seeks to debunk the traditional narrative of formalism overthrown by realism. "The objective of this book," Tamanaha writes, "is to free us from the formalist-realist stranglehold" and to "recover a sound understanding of judging."

Tamanaha is not the first scholar to assert that formalism never existed, but he is the first to provide overwhelming evidence for the assertion. In *Law Without Values*, Albert Alschuler wrote that, for generations, readers of Holmes' *The Common Law* "have inferred that someone (perhaps even someone notable) had attempted to deduce the entire corpus of law from *a priori* postulates. Why else would Holmes have disparaged the idea? Possibly, some now-obscure German legal theorist fit Holmes' description of the deductive formalist bogeyman, but I know of no American who did." Tamanaha provides example after example of American judges and scholars in the supposedly formalist era—in 1870, for example—matter-of-factly observing that "the excision of politics from the judicial mind is impossible," or writing in 1881 that "[i]t is useless for judges to quote a score of cases … to sustain almost every sentence, when every one knows that another score might be collected to support the opposite ruling." Note the writer's claim that everyone knew this. So much for formalism.

Tamanaha next provides overwhelming evidence that the legal realists were not the extreme skeptics of judging that they have been perceived to be. Although legal realism is associated with the view that the law is only a matter of what the judge had for breakfast, and the legal realists emphasized the extent to which judges can manipulate legal rules and precedents, they nonetheless recognized, Tamanaha writes, "the stabilizing and constraining factors in law." The legal realists understood, as Richard Posner has written, that "the social interest in certainty of legal obligations requires the judge to stick pretty close to statutory text and judicial precedent in most cases." Supreme Court justices, of course, have a greater opportunity than do other judges to be guided by their personal predilections in creating new precedent, but the Supreme Court decides a minuscule number of cases as compared to other courts. Close to 93 million cases were filed in state courts in 2001.

"Balanced realism" is the name that Tamanaha bestows on the approach

that both so-called formalists and legal realists advocated, and balanced realism is Tamanaha's view of a sound understanding of judging. Balanced realism, he writes, "has two integrally conjoined aspects—a skeptical aspect and a rule-bound aspect. It refers to an awareness of the flaws, limitations, and openness of law, an awareness that judges sometimes make choices, ... [y]et it conditions this skeptical awareness with the understanding that legal rules nonetheless work; … and that judges render generally predictable decisions consistent with the law. …" Tamanaha does not suggest, however, that all judges think alike:

> [A]t the most general level, a broad contrast among contemporary jurists can be drawn between those identified as formalists and their opponents: formalists tend to emphasize the reasons why and ways in which legal rules, texts, and precedents can and should control; their opponents tend to emphasize the limitations of legal rules. There are differences of attitude and emphasis. But these differences are neither deep enough nor sharp enough to maintain the formalist-realist antithesis. Neither side adopts the complex of (exaggerated) beliefs typically associated, respectively, with formalism or realism. ... "[F]ormalism" and "realism," in the end, are casual terms empty of theoretical content.

Beyond the Formalist-Realist Divide is a clearly written and groundbreaking book. Although its focus is historical, its objective—in which it succeeds—is to change the way we think about law today. **TFL**

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Abraham Lincoln: A Life

By Michael Burlingame

Johns Hopkins University Press, Baltimore, MD, 2008. 2024 pages (2 vols.), $125.00.

A. Lincoln: A Biography

By Ronald C. White Jr.

Random House, New York, NY, 2009. 796 pages, $35.00.

Reviewed by Henry S. Cohn

These two bicentennial biographies of Abraham Lincoln have been ranked by Pulitzer Prize-winning Civil War historian James McPherson as among the finest of the many books about our 16th President; McPherson especially praises these works as capturing Lincoln's humanity and downplaying his iconic status.

Michael Burlingame states that his two-volume *Abraham Lincoln: A Life* is the first comprehensive biography of Lincoln since Carl Sandburg's six-volume classic, which appeared in 1926 (*Abraham Lincoln: The Prairie Years*) and 1939 (*Abraham Lincoln: The War Years*). Sandburg, a poet, admitted that he ignored sources and relied upon historical data of doubtful worth. At the time of its publication, Edmund Wilson, a bit cruelly, said that Sandburg's biography was the worst thing to have happened to Lincoln since the assassination.

Burlingame is a professional historian—a professor at Connecticut College for many years and now a professor of Lincoln studies at the University of Illinois' Springfield campus—and his *Abraham Lincoln: A Life* is meticulous. An even longer version of the book, with additional footnotes, is available at www.knox.edu/lincolnstudies.

Burlingame tracked down new sources on Lincoln, including newspaper articles and letters showing Lincoln's less-than-sterling behavior as a politician in rural Illinois. Burlingame shows that Lincoln was often unjustifiably cutting in his assessment of his opponents and employed an occasional "dirty trick." Burlingame has uncovered information on the famous "Bixby" letter bearing Lincoln's signature that was sent to a grieving mother who claimed (falsely, Burlingame shows) to have lost five sons in battle. Burlingame proves that the letter was actually composed by Lincoln's capable assistant, John Hay.

With the luxury of two volumes, Burlingame relates in great detail events that other Lincoln biographies treat more cursorily. In 1831, for example, when Lincoln first left his abusive father's home, he and his companions traveled to New Orleans on the Sangamon River through New Salem, Ill. Most biographies include a page or two on this incident (including how Lincoln's raft became stuck on a dam), because it explains why Lincoln subsequently settled in New Salem. Burlingame, by contrast, spends several pages on the trip, explaining who organized it, what preparations were made, and how Lincoln became acquainted with the New Salem citizenry.

Similarly, Lincoln biographers mention that he was called the "railsplitter" during the 1860 presidential campaign. Burlingame tracks down the origin of the nickname to the 1860 Illinois Republican state convention. Lincoln's cousin, John Hanks, obtained rails from Macon County that Lincoln had split, and Hanks brought them to the convention hall as part of a stunt to promote Lincoln as a simple laboring man. Lincoln apparently had not been consulted, and politely distanced himself from his relative's efforts.

Burlingame also provides an extended discussion of the oft-related story of Lincoln's trip to Washington, D.C., in February 1861 to assume the presidency. Because of a plot on his life, Lincoln was advised by detective Alan Pinkerton to change trains and to wear a disguise when traveling from Baltimore to Washington. Burlingame investigates the nature of the threat, the location of Mary Lincoln at the time of the trip from Baltimore to Washington, and Lincoln's unusual appearance upon arrival in Washington.

A major topic of Burlingame's book is Lincoln's legal career, beginning with his years as a student both in New Salem and Springfield, his junior partnerships with John Todd Stuart and Stephen Logan, Lincoln's practice before

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leaving for Congress in 1847, his return to practice in 1848 as his political opportunities crashed, and finally his successful years at the bar after 1854 when he was running for the Senate and the presidency. Burlingame discusses the first cases Lincoln took on, his choice of William Herndon as a partner, his messy office, his humorous arguments in court, and his trips throughout the old Illinois Eighth Judicial Circuit. He also sets forth Lincoln's efforts to collect his fees, including his largest fee, which was owed by the Illinois Central Railroad. The later years of Lincoln's legal career were hectic. He was in demand, trying important cases yet at the same time founding the Republican Party in Illinois and debating with Douglas.

A second major topic in the book concerns the various presidential campaigns in which Lincoln participated, including his own in 1860 and 1864. Among the first was the campaign in 1840, when Lincoln supported the Whig candidate, William Henry Harrison, over Lincoln's lifelong hero, Henry Clay. In 1848, just as his term in Congress ended, Lincoln campaigned in the Northeast for Zachary Taylor and impressed the voters of Massachusetts. In 1860, Lincoln's own nomination came about after he received a boost from his speech at Cooper Union in New York City.

After giving his address at Cooper Union, Lincoln traveled through New England to make speeches and to visit his son Robert, who was studying at Philips Exeter Academy. In Connecticut, he told a now famous story to justify the position he held on slavery at the time, which was that, although he personally hated slavery, he recognized the right of the states where it existed to retain it, and he opposed only its extension into the territories. He postulated that, if a man found snakes in bed with his children, he would refrain from attacking the snakes and thereby exciting them. "But, if there was a bed newly made up, to which the children were to be taken," he would not agree "to take a batch of young snakes and put them there with them."

When Lincoln was re-nominated in June 1864, he left the choice of vice president to the convention. In order to put a Southerner on the Republican ticket, the convention made the disastrous choice of Andrew Johnson of Tennessee. A victory for Lincoln looked doubtful, and several politicians urged him to withdraw, but his fortunes changed when George McClellan, Democratic candidate, stumbled by endorsing a peace plank, and General Sherman took Atlanta.

Burlingame received his doctorate from Johns Hopkins University, where he was trained by the prominent Lincoln scholar, David Donald, who died in 2009. Donald won a Pulitzer Prize for his *Charles Sumner and the Coming of the Civil War*—a book that relied upon a psychologist's advice on Sumner's mental condition after Preston Brooks caned him on the Senate floor in 1856 for his anti-slavery views. Burlingame himself uses psychology when he addresses a third major topic of his biography: Lincoln and his family. This is the most dramatic and controversial portion of the biography.

Burlingame has few kind words for Lincoln's father. Thomas Lincoln was a lazy, slovenly man who showed no determination to succeed as a farmer or carpenter and had no use for his ambitious son's educational interests. Lincoln broke with him in 1831, never saw him again, and would not even attend his funeral. Burlingame portrays Lincoln's mother, who died when he was nine, as tall, reticent, and more quick-witted than her husband. There is not much of record about Nancy Hanks Lincoln, although there was neighborhood gossip about her character. Burlingame speculates that Lincoln might have been ashamed of her and that this experience may have caused him psychological damage.

And then we come to Lincoln's wife, Mary Todd Lincoln. Burlingame has been feuding for many years with another Johns Hopkins graduate, Jean Baker, who now teaches at Goucher College in Maryland, about whether Mary was a good or bad influence on Lincoln. Baker argues that Mary was intelligent, charming, and aggressive, and that she contributed to Lincoln's rise in politics and was a resource of ideas for him. Burlingame, relying on Mary's enemy, William Herndon, flatly rejects Baker's conclusions. Burlingame sees Mary as scheming, mentally ill, and abusive to her husband. He begins with the categorical assertion that Lincoln's loss of Ann Rutledge, his first and only love, resulted in bouts of depression throughout Lincoln's life. He relates Mary's frequent outbursts of anger, her breakdowns after the deaths of their sons Eddie and Willie, her cross demeanor when meeting government officials in Washington, and her jealousy when Lincoln kissed a general's wife or a female visitor. Mary's spending habits during wartime became fuel for Lincoln's opponents.

Burlingame concludes his book by noting the enormous hurdles that Lincoln overcame in his life, including a "miserable marriage." Although his portraits of the Lincoln family are entertaining and represent a major scholarly achievement, Burlingame's "insistent demonization" of Lincoln's wife has been criticized. Princeton history professor Sean Wilentz, writing in *The New Republic* (July 15, 2009), called Burlingame's vitriol an unnecessary "peculiarity."

Ronald White's *A. Lincoln: A Biography*

According to James McPherson, Ronald C. White's *A. Lincoln* is the best biography of Lincoln since David Donald's *Lincoln*, published in 1995, and "[i]n many respects it is better than Donald's." But White tracks Donald to some degree. For example, White's chapter on Lincoln in Congress, which describes Lincoln's politically unwise introduction of the "spot resolutions" on the Mexican War, is similar to Donald's chapter on the same topic. White, however, had the benefit of source materials that Donald lacked. In reviewing Lincoln's law practice, for example, White had the full *The Law Practice of Abraham Lincoln: Complete Documentary Edition,* published by the University of Illinois in 2000, whereas Donald had only a preliminary version of it. White also had the use of personal notes that have recently been brought to light in which President Lincoln mused over current events.

At a mere 800 pages, White's book, of course, does not have the encyclopedic breadth of Burlingame's volumes. White undertook no detective work, such as Burlingame did to uncover the nickname "railsplitter," and White provides only quick summaries of the travails of Thomas Lincoln and Nancy Hanks. Yet White's style is less choppy than Burlingame's, and *A. Lincoln: A Biography* is filled with photographs, broadsides, reproductions of letters, and political cartoons that are not found in *Abraham Lincoln: A Life*.

Reviewers have praised White's literary style and his positive conclusions about Lincoln's conduct of the Civil War and his decision to issue the Emancipation Proclamation. A review by Andrew Ferguson in *The Weekly Standard* (Mar. 16, 2009), however, faulted White for being too eager to please his readers in describing Lincoln's views on slavery and African-Americans. At times, White does not take a stand; for example, whereas Burlingame, even if perhaps unjustifiably, attacks Mary Lincoln, White merely relates that Mary had some charming qualities as well as weaknesses.

But there are two reasons why White's biography is essential reading, even if it is disappointing in its avoidance of controversy. The first is White's careful analysis of Lincoln's religious beliefs. The author sets forth Lincoln's contacts with Rev. Phineas Densmore Gurley of Washington's New York Avenue Presbyterian Church, who helped console the family after the death of Willie Lincoln. Lincoln's musings on the Civil War, derived from his personal notes, show his inner conflicts over the loss of life in battle and over the role of the divine in human affairs.

A second virtue of White's book is that it captures perfectly Lincoln's remarkable public oratory. White has written a prize-winning book on Lincoln's second inaugural address, which he considers Lincoln's greatest speech, and, in *A. Lincoln: A Biography*, White nicely brings together the biographical backgrounds of this and Lincoln's other important speeches. He describes, for example, Lincoln's preparing his first inaugural address as he strives to stave off Southern succession and makes brilliant alterations to Secretary of State William Seward's draft of the speech. White also discusses Lincoln's marvelous annual message to Congress ("As our case is new, so we must think anew and act anew"), given on Dec. 1, 1862, in the face of Union army losses just before Lincoln issued the Emancipation Proclamation.

White examines the immediate and lasting impact of the Gettysburg Address, making the point that it has a religious tone by showing that the word "dedicate" or "dedicated," which Lincoln used six times in the brief speech, has a Presbyterian connotation. At the last minute, Lincoln also added the phrase "under God" to the address.

In analyzing the second inaugural address, White again brings in Lincoln's musings on whether the war was inevitable and on God's role in history. White also relates a story about Frederick Douglass' visiting Lincoln on the night of the address, Mar. 4, 1865. Burlingame tells of this meeting as well, but White's description of it is much more moving and is a highlight of his book.

These biographies both show that, even if we "knock Lincoln from his post-assassination pedestal," as McPherson recommends, he remains an amazing figure—wise, dedicated, magnanimous, and caring. **TFL**

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The Will of the People: How Public Opinion Has Influenced the Supreme Court and Shaped the Meaning of the Constitution

By Barry Friedman

Farrar, Strauss and Giroux, New York, NY, 2009. 593 pages, $32.50.

Reviewed by Charles S. Doskow

Barry Friedman's *The Will of the People* is an ambitious book. Examining, as per its subtitle, *How Public Opinion Has Influenced the Supreme Court and Shaped the Meaning of the Constitution*, it covers our entire constitutional history, interweaving public reactions that have shaped it for better or worse. It is a tall order, well met.

How does public opinion influence the Court? And what expressions of opinion reach the justices in their marble palace? Elections? Polls? E-mails? Those of members of Congress? The answer, of course, is all of the above. But, not surprisingly, these influences are felt most with respect to the Court's unpopular decisions.

And just what can the public do about unpopular decisions? Precious little, Friedman concludes. The Court is immune from direct attack by anything other than impeachment, and that never occurs. So why is the Court responsive to outside opinion, as it surely is?

There are outside factors that can change the Court's direction: the appointment of justices is one. Pressure from Congress can simply be a chorus of criticism, or the threat of impeachment, or movement to limit jurisdiction. Mr. Dooley assured us a century ago that the Supreme Court follows the election returns. (To Friedman's credit, he shows remarkable restraint, not quoting that venerable barfly until page 252.)

But most important is public opinion itself. The Court cannot get too far ahead of the people. Or too far behind. The *Korematsu* ruling is cited as the paradigm of how public opinion pushed the Court to perhaps its greatest error since the *Dred Scott* decision. In the face of virtually no evidence of danger, overwhelming public opinion resulted in a mass violation of human rights. As Friedman points out, "In time, the country rightly tripped over itself apologizing."

Did public opinion force a change in the justices' positions in the "Red Scare" cases? During the 1956 term, the Court decided 12 cases in which statutes attacking Communist activities were challenged as unconstitutional, and the government won none of them. "On one day alone, June 17, 1957—quickly dubbed 'Red Monday'—the Court decided four such cases." Press and public opinion strongly opposed the decisions, and Congress was poised to act with jurisdiction-stripping legislation. But the opposition was appeased when Justices Frankfurter and Harlan changed their positions and

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began ruling in favor of the government. Friedman attributes the switch to the concern of the two justices, particularly Felix Frankfurter, for the Court's reputation. He quotes Chief Justice Warren as saying that "Felix changed on Communist cases because he couldn't take criticism."

There is a lot more to this story, as Friedman relates, including the role of the legal academy in joining the chorus claiming that the Court had gone too far. But only the 1937 switch in time, which blocked Roosevelt's Court-packing plan, matches it for a sudden about-face on such a critical issue.

For sheer shock value and violent reaction, nothing quite matches the demise and rebirth of the death penalty. A five-to-four majority in 1972 (the four dissenters being the four Nixon appointees) invalidated every state death penalty law on the basis that its arbitrary enforcement violated the "unusual" part of the Eighth Amendment's ban on cruel and unusual punishments. The public was shocked and outraged by the decision, despite the fact that imposition of capital punishment had been in serious decline nationwide. The states quickly enacted new laws, a majority passing laws within one year of the decision. Arguing in support of the state laws, Solicitor General Robert Bork said "once we have thirty-five [state legislatures] and Congress adopting a penalty, it is impossible to say that it is in conflict with current morality."

The Court fell into line. Justices White and Stewart switched sides; Justice Stevens, who had just joined the Court as President Gerald Ford's only appointee, joined them, and presto! A five-to-four vote against the death penalty became seven-to-two for it. But the death penalty law as it emerged was reshaped. Bifurcated guilt and penalty phases were mandated, as were specific aggravated circumstances, and rape could no longer be a capital crime. Nevertheless, the 60 percent of the American people who had polled in favor of the death penalty were apparently mollified.

Friedman begins and ends with the same question: If the Court responds to the will of the people, does this not "threaten the whole idea of constitutionalism?" One of his conclusions is that, although the public and the Court may be at odds over particular decisions, "they come into line with each other *over time*." He quotes Woodrow Wilson as distinguishing between the "opinion of the moment" and the "opinion of the age."

But that is what the Constitution is supposed to do: protect against short-term rashness by imposing a daunting burden on amendment. "The making and enforcing of constitutional meaning," Friedman writes, "are the result of an extended dialogue between and among the courts and the American people."

The Will of the People considers public reaction, as it affects the Court, as part of an ongoing dialogue. The constitutional protections of the Court, and its imperviousness to short-term actions, stand as the means of assuring that the dialogue continues. **TFL**

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Too Big To Fail: The Inside Story of How Wall Street and Washington Fought to Save the Financial System from Crisis—and Themselves

By Andrew Ross Sorkin

Viking, New York, NY, 2009. 600 pages, $32.95.

Reviewed by Christopher Faille

Andrew Ross Sorkin tells us that, in November 2007, Citigroup considered Timothy Geithner for the then open post of CEO, after Charles Prince had resigned that office in the face of record losses. Geithner was passed over in favor of Vikram Pandit. Or perhaps Geithner rejected the post and Pandit received an offer thereafter. It is not particularly clear from Sorkin's accounts what exactly happened to the idea of taking Geithner onboard, although it seems that Sanford Weill, Citigroup's largest individual investor, and Robert Rubin, its lead director, disagreed about the merits of that idea.

Each man named in the above paragraph—Geithner, Prince, Pandit, Rubin, Weill—is important to the story Sorkin wants to tell us—the story of the intertwined financial and political panicking in fall 2008. Of course it is perfectly appropriate for a teller of that tale to inform us that, when Weill asked Geithner whether he was interested in running Citi, Geithner was tempted. He was then the president of the Federal Reserve Bank of New York, and he is now secretary of the treasury—he has spent a career in posts with rates of pay far below those of the bankers he regulates.

What is less important, what is indeed annoyingly irrelevant, is the following sort of detail: "[Geithner's] tastes weren't that expensive, save for his monthly $80 haircut at Gjoko Spa & Salon, but with college coming up for his daughter, Elise, a junior in high school, and his son, Benjamin, an eighth-grader behind her, he could certainly use the money." Such sentences remind me of a piece of advice that Sherlock Holmes reportedly gave Dr. Watson: "I consider that a man's brain originally is like a little empty attic, and you have to stock it with such furniture as you choose. A fool takes in all the lumber of every sort that he comes across, so that the knowledge which might be useful to him gets crowded out, or at best is jumbled up with a lot of other things, so that he has a difficulty in laying his hands upon it." Personally, I am certain I can do without this knowledge—the name of the salon, the price of the cut, the length of time between cuts, the names of Geithner's children. … I will endeavor to clear my attic of all of it.

A Working-Class Childhood

Yet Sorkin is relentless. I turn a couple of pages from the hair salon detail, and I reach a passage giving me an elaborate back story for Robert Steel, who was undersecretary for domestic finance of the U.S. Treasury in 2006–2008. I don't think my understanding of the financial crisis in fall 2008 is enhanced in the least by learning of Steel's working-class childhood: "His father serviced jukeboxes and later sold

life insurance; his mother worked part-time at a Duke Psychiatry lab." Nothing else in this book is illuminated by the mental image of the elder Steel fixing up a Wurlitzer.

These are not "novelistic" details, by the way. In a novel, Steel's working-class origins would be important to his character development through the crisis, and perhaps some memory of his mother's days at the Duke Psychiatry lab would give Steel behavioral insight into the way investors can panic en masse. But history—especially in its first drafts—never works out that neatly, and the childhood tidbits here just sit on the page, inert.

The Magic 799 Protected Companies

Nonetheless, there is valuable material in this book. I especially appreciated Sorkin's take—or his sources' take—on the government's brief experiment with a blanket prohibition of "short selling" in the stocks of 799 companies. It appears from his account that the ban was instituted not in the belief that it would do any good for the issuers involved, but just in the belief that it would be conspicuous.

A "short sale" is the sale of an asset that the seller does not yet own. In effect, it is a bet that the price of the asset will decrease in the interim between the day the contract was signed and the day the seller has committed to make delivery. As applied to the stock market, this means that a short seller will enter into a contract today to sell a share of XYZ stock to the buyer 30 days from the date of the contract at the price it is worth today—let us say $10. If, 29 days from now, the price of XYZ stock has fallen to just $5, then the short seller (or "short" for short) will buy it for that, sell it in accord with the contract for $10, and pocket the other $5 as profit.

But in practice it is a bit more complicated than that—even in the case of a winning bet—because a short generally will want to *borrow* a stock certificate of XYZ in the interim to make sure that there is one at hand when it becomes necessary to deliver. The short may borrow that share for a month for $1, then buy it from the lender for the $5 price when the time comes. This means that the profit in the hypothetical case is $4 instead of $5. The entity through which the speculator borrows the stock for the duration of its short position is sometimes known as its "prime broker." All the major investment banks—including those that were under heavy pressure to sell in September 2008—have prime brokerage divisions that make their money finding stocks for these short sellers to borrow. Thus, when those banks began complaining that their troubles were the result of the machinations of the shorts, then … well, some people perceived an irony in the situation. The banks were blaming their troubles on the (lucrative) clients of their prime brokerage divisions.

XYZ Corporation in our example can be referred to generically as the "issuer." And issuers are generally unhappy when their stock price falls, because—other things being equal—that makes it more difficult for them to raise money as needed. Money, of course, can be raised by the further issuance of stocks, which is easier to do when the price of those already on the market is going up than when it's going down. Even in the absence of any issuances within a given period, it is easier for a company to borrow money if its stock price is high than if it is low. So a falling stock price can worsen a credit crunch and become part of a set of pressures leading a company to take refuge in Chapter 11 bankruptcy.

But it is important to remember that, when the banks let out a clamor for bans on short selling, they did not call for the ban to cover shorting on, say, automobile manufacturers or building contractors. Banks would have had to close down their prime brokerage operations altogether. Instead, the banks called for a ban on short sales of the stocks of companies *in the financial sector*—a ban that would allow short sellers to continue the practice vis-à-vis auto companies or building contractors, and that would allow the banks to continue lending stock certificates to those shorts.

How did the U.S. government come to adopt that ban, even temporarily? (It was announced on Sept. 19, 2008, and allowed to lapse close to three weeks later.)

A Conspicuous Assertion of Authority

As Sorkin tells it, on Wednesday, Sept. 17, 2008, Treasury Secretary Paulson returned a phone call from Steve Schwarzman, the chairman of the Blackstone Group. Schwarzman told him: "You have to approach what you're doing from the perspective of being a sheriff in a western town where things are out of control … and you have to do the equivalent of just walking onto Main Street and shooting your gun up in the air a few times to establish that you're in charge because right now no one is in charge!"

Schwarzman continued, saying that it wasn't important whether a ban on short sales would have any real effect in terms of removing the pressure on the financial sector. According to Schwarzman, the ban was just a loud gun that Paulson could fire off immediately in order to establish his sheriff-hood. This is an intriguing story, and it confirms what skeptical observers thought at the time. But it is important to remember that, if Sorkin is right, then Schwarzman was urging Paulson to fire a gun that was not even in *his* holster—it was in the holster of the chairman of the Securities and Exchange Commission, Christopher Cox.

This leads us into another theme: throughout the book, Sorkin presents the SEC's Cox as something of a lightweight. Indeed, at one point, Sorkin describes a meeting around a "burled wood table just off [Speaker of the House Nancy Pelosi's] office," to discuss the administration's plan to buy toxic assets off the books of the banks, and he tells us gratuitously that Cox was there "more as a courtesy than anything else."

From such hints I take it we are meant to infer, though this is nowhere made explicit (unless I missed it in the crush of detail about burled wood and such) that, if Paulson, who was a heavyweight in this area, wanted a ban on short sales, he could get Cox, who was a lightweight, to issue one, and that the Schwarzmans of the world understood that all along.

Cox's SEC fell into line, announcing a ban on the short selling of stocks issued by any of 799 companies in the

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financial sector, as noted above. Was this a good idea on the whole? What are the pros and cons of the role short sales perform in the marketplace, during either ordinary times or periods of crisis? Don't look to Sorkin for the answers to such questions. Instead, one gets a lot on the way characters were dressed at crucial meetings and what makeshift non-chairs they sat on when the meetings became crowded.

I concede that the next generation's historians might consider this book a valuable resource in their efforts to make sense out of our time, but I hope they are properly caffeinated when they make the effort. **TFL**

Christopher Faille, a member of the Connecticut bar since 1982, writes on a variety of financial issues, and is the co-author, with David O'Connor, of a user-friendly guide to Basic Economic Principles *(2000).*

Law and Literature, Third Edition

By Richard A. Posner

Harvard University Press, Cambridge, MA, 2009. 570 pages, $24.95.

Reviewed by Thomas Holbrook

The avoidance of the concrete is ubiquitous in legal prose.
— Richard A. Posner

The 550 close-set pages of this third edition of Judge Richard Posner's valuable survey and examination of law and literature conclude with a list of works "suitable for courses in law and literature." The list includes *Eumenides*, *The Gospel According to St. John* (the trial of Jesus), several of Shakespeare's plays, Faulkner's "An Odor of Verbena," Camus' *The Stranger*, and—of course—Kafka's *The Trial*. To which I would add Faulkner's *Intruder in the Dust*, which Posner summarizes and discusses early in the book.

All in all, the third edition is a "good news/bad news" book. Good in that it's bulging with summaries, synopses, and acute critical analyses. Bad in that it's bulging. As a wit observed about a similar book, the covers of this work are too far apart.

Way too far apart. Posner has attempted to compile an epi-tome of every conceivable overlap, influence, interdependence, confluence, or nexus between his two immense subjects. And, more remarkably, he has succeeded about as well as could be imagined. The synopses of themes and plots provided throughout the book will supply an endless reservoir for cribbed term papers by lesser students—at least in outline and often in content. (The student cribber is here forewarned, however, that Posner writes cleanly and efficiently, so that the neophyte perpetrating plagiarism will spend as much effort dumbing down and befogging the cribbed material to disguise its source as he or she would spend just investing the time necessary to write an original paper.)

Law and Literature contains many useful (and entertaining) observations and dicta for students of literature, and rather fewer—especially from Posner as a sitting judge—for lawyers or students of law. Here is his summary comparison of the two:

> A good literary critic is a careful, thorough, scrupulous, informed, logical, and practical reader of literary texts, and a good lawyer is a careful, thorough, scrupulous, informed, logical, and practical reader of legal texts. They are both close readers, but of different materials.

The book is, in fact, a fuller cornucopia of observation and information about literature than most books solely so devoted. It is several rungs less useful for a lawyer, judge, or legal scholar. For lawyers, Posner sees value received from his lucubrations as primarily stylistic; he wishes to see legal—and particularly juridical—writing clearer and more apt. For example, "Judges might be able to learn from immersion in literature how best to persuade." He continues:

> I say "from immersion in literature" rather than "from occasionally reading a good book" because the only paths to writing well are innate writing talent, varied experience in writing, a literary education beginning at an early age, and heavy reading of fine writing.

One of the most savory portions in this book demonstrates the transformative power of heavy reading of fine writing, though Posner surely realizes that no judge or lawyer extant will reach the transformative level of his exemplar. Before he quotes that exemplar, he gives us Thomas North's 1599 "untransformed" translation of Plutarch's presentation of Cleopatra on the water:

> She disdained to set forward otherwise, but to take her barge in the river ... ; the poop whereof was of gold, the sails of purple, and the oars of silver, which kept stroke in rowing after the sound of the music of flutes, howboys, citherns, viols, and such other instruments as they played upon the barge. And now for the person of herself: she was laid under a pavilion of cloth of gold tissue, apparelled and attired like the goddess Venus. ...

Then (of course) the transformative writing power of North's contemporary, Shakespeare:

> The barge she sat in, like a burnished throne,
> Burnt on the water. The poop was beaten gold;
> Purple the sails, and so perfumèd that
> The winds were lovesick with them. The oars were silver,
> Which to the tune of flutes kept stroke, and made
> The water which they beat to follow faster,
> As amorous as their strokes. For her own person,
> It beggared all description. ...[1]

This book is a hodgepodge, a grab bag—what a dear departed aunt of

mine would describe as a dog's breakfast—of almost innumerable quotations and cuttings. But because most such instances here are dusted with gold, they are well worth our time, and if we have any respect whatever for language, will make us better readers, writers, ... and lawyers.

Alas, they will not make this too long and sometimes repetitive book any shorter. Harvard University Press should have applied the skills of a savvy and effective editor to this generally excellent book to do that. **TFL**

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Endnote

[1]A more complete, and in some ways better, stylistic comparison of these materials appears in Posner's The Little Book of Plagiarism at 51–56 (2007).

Demystifying Legal Reasoning

By Larry Alexander and Emily Sherwin

Cambridge University Press, New York, NY, 2008. 253 pages, $26.99.

Reviewed by Daniel W. Skubik

Larry Alexander and Emily Sherwin have written an engaging and provocative text. They set out to demystify—one might more plainly say debunk—the claims typically surrounding descriptions of legal reasoning. For example, it is not uncommon to hear those inside, as well as outside, the legal profession describe the varied tools or methods of reasoning employed in legal cases as being quite different from ordinary reasoning. Legal reasoning is said to run the gamut from analogical reasoning to canons of statutory construction, from discovery and application of legal principles to constitutional rubrics or intentions of the framers—with all these devices unique or at least uniquely deployed within the legal system by legal professionals to respond to legal quandaries. As the authors summarize the traditional claims near the end of their book: "Legal decision making is sometimes described as a craft. ... [Judges] reason by analogy, construct legal principles, and find meanings in canonical texts that differ from the intentions of the authors of those texts. The methods of legal decision making are not accessible to those outside the profession."

However common such descriptions may be—even or perhaps especially by insiders—Alexander and Sherwin assure us that such descriptions are wholly mistaken. In fact, "legal reasoning is ordinary reasoning applied to legal problems. Legal decision makers engage in open-ended moral reasoning, empirical reasoning, and deduction from authoritative rules. These are the same modes of reasoning that all actors use in deciding what to do. Popular descriptions of additional forms of reasoning special to law are, in our view, simply false."

Both authors have been writing on the subject of legal reasoning for quite a few years. Of course, one can expect that their positions will have evolved over time; such is the prospective bane and potential glory of all scholarship. Indeed, Sherwin authored a law review article in 1999, "A Defense of Analogical Reasoning in Law," (66 *University of Chicago Law Review* 1179) that develops an interpretation of analogical reasoning that is virtually scuttled in this new book. But that's as may be. Of more immediate interest are the claims made throughout the book that all legal reasoning tools can be explicated in terms of what the authors call ordinary reasoning: it is moral, it is empirical, it is deductive. It is the same reasoning that every man and woman of ordinary cognitive capacity uses in making ordinary decisions in life. With regard to special approaches to reasoning or tools for decision-making that are unique to law, the authors write, "we intend to demonstrate that judges cannot be doing what they claim. One cannot [for example] 'reason' by analogy, and legal principles are chimerical." Rather, "legal principles, and analogies based on legal principles, do not determine the outcomes of cases. Judges who purport to reason on this basis are either reasoning naturally under the guise of legal principles or reasoning deductively from informally posited rules." Law is nothing special, even when it insists that it is.

The authors' arguments are sometimes terse, at times employ classical logic argument forms (for example, distinguishing strict syllogistic from enthymematic reasoning), and frequently deploy apt and occasionally inapt hypotheticals that nonetheless help to demonstrate their myth-destroying claims. Although those claims are not without real interest, advanced by argumentation that is quite often entertaining (one recurring hypothetical concerns interpretation and application of a legal rule that bears are dangerous nuisances and so cannot be kept by homeowners in a residential neighborhood), this review will not focus on such claims. I will leave to readers the assessment of the overall legitimacy and charms of the authors' debunking project. For myself, the claims may be a tad overdrawn, but bottom line—they remain sound. In short, the authors are quite correct: legal reasoning is ordinary reasoning; dressed up to appear otherwise, perhaps, but underneath the fancy labeled garb, it is altogether ordinary.

What caught my attention was a different set of claims that accompanied those other claims about legal reasoning. I am not certain that they are essential to the project of demystifying what lawyers and judges say they are doing when they are reasoning about the law. The claims might perhaps be reworked or simply jettisoned forthwith, and the remaining arguments about legal reasoning would still go through. I think that's so, though it is not clear to me that Alexander and Sherwin would agree or would even want to agree.

Let me present a few quotations that exemplify these other claims that so caught my attention:

- "The need for legal reasoning comes about when members of a community confer authority on certain individuals to settle moral controversies."
- "We assume that moral reasoning follows the Rawlsian method of wide reflective equilibrium."
- "The rule model is preferable if there is reason to think that a greater sum of moral errors will occur if judges always decide what is best, all

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things considered, than if they treat previously announced judicial rules as serious rules of decision."

- "We select legislators, administrators, and judges in large part based on our assessment of their moral expertise, that is, their ability to craft rules that represent moral improvements over the status quo ante."

Now, these claims are plainly wrong. We do not confer authority and so need legal reasoning in order to settle moral controversies; Alexander and Sherwin can assume whatever they wish, but they leave the reader out in the cold if their assumption is of questionable legitimacy, such as that Rawlsian reflective equilibrium is the proper method for moral reasoning; a strict utilitarian or even broader consequentialist moral sum is not a proper reference point for choosing a legal rule model; and, finally, we do not select legislators and the like for their moral expertise. In short, these dubious moral claims that seem to lie at the center of their case concerning legal reasoning should be rejected. From my perspective the effect that would have on their other arguments—such as how to construe what judges are really doing when they are deciding cases—is a wash. As noted above, I judge the logical arguments to work quite well, and one does not need these moral claims to motivate, justify, or support them.

At one point the authors' argument does wobble a bit, as what is apparently an attempt to invoke utilitarian moral reasoning fails on methodological grounds. Their "greatest happiness" exposition of how to interpret and apply a nuisance rule (to determine whether Max should be permitted to build and operate a gas station in the neighborhood), which ends in perversity and self-contradiction, results from their inapt construction of the calculations involved, not from the functional failure of the calculus. Without going into detail, the authors present only one side of the necessary calculus before arriving at a conclusion that they declare absurd. Were a full set of utilitarian calculations performed, one might wish to resist the result on some other grounds, but it would be neither perverse nor self-contradictory.

But if those moral claims aren't necessary, what are they doing there? Why go out of one's way to make contentious claims of dubious nature and inconsequential value? I think there is an explanation, though it may well be mistaken. First, because such claims do not appear to be essential, they can be overlooked, and the remainder of the argument can be embraced by someone like an Oliver Wendell Holmes, who would reject the moral language but accept the ordinary reasoning conclusions. The claims do no real harm, and although perhaps idiosyncratic, need not detract from the larger purpose served of demystifying legal reasoning. Like *obiter dicta*, the writer receives the pleasure of making the points though they contribute nothing critical, so readers can simply ignore them. That, of course, does not really explain their presence; it explains only why they weren't removed in the editing process.

Second, and more to the query of what service those moral claims might perform, is that Alexander and Sherwin appear to be operating under an unexpressed presumption that natural law theory provides the grounds for law and legal systems. The moral claims can truly make sense only if one also accepts the authors' unarticulated particular conceptualization of natural law—a law that is both moral and legal in content and grounds both moral and legal claims about how the world ought to run. Whether Alexander and Sherwin would take the additional step of locating that conception of natural law in a particular religion or religious conception (for example, a Thomist conception of natural law, such that human law is or ought to be an expression of natural law via use of proper reason, which latter law is properly an expression of eternal law and rests coherently beside divine law), I cannot say.

Is this fair? That is, is it appropriate for authors to present what amounts to a bootstrapping operation: buy one theory (legal reasoning is ordinary reasoning), get one free (natural law)? I find it disturbing, and doubly so because I claim a natural law pedigree in my own previous jurisprudential work. Though I am sympathetic to the moral argumentative moves made, I find the particulars worrying. I do not share all the authors' moral insights, though I am a Thomist. I cannot accept their moral moves, though I do likewise claim that law and legal systems make sense only in light of a conception of natural law that finds proper place for human conscience as well as human fallibility. At least, I think this is what I think, based on what must be reconstructed on limited evidence.

In that vein, I would invite prospective readers to read the work and evaluate the authors' claims for themselves. In like manner, I would invite the authors to make explicit what is left unexpressed in their text, so that we readers might more clearly see what motivates and justifies the moves made, lest we readers find ourselves buying far more than what we bargained for in the end. **TFL**

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