



### **HENRY FRIENDLY: GREATEST JUDGE OF HIS ERA**

BY DAVID M. DORSEN

*The Belknap Press of Harvard University Press, Cambridge, MA, 2012. 498 pages, \$35.00.*

Reviewed by **Richard L. Sippel**

*He tempered academic brilliance with massive common sense.*

—from the forward by Judge Richard A. Posner

Henry Friendly, born in 1903, served on the U.S. Court of Appeals for the Second Circuit from 1959 until his death in 1986. From 1959 to 1961, his career on the Second Circuit coincided with that of another of the greatest court of appeals judges, Learned Hand. Many, if not most, judges, lawyers, and law professors agree that Learned Hand should have been appointed to the Supreme Court. David Dorsen, the author of this biography, says the same for Henry Friendly, and I agree.

Genealogies can be interesting, and Dorsen provides one for Friendly, who was of German-Jewish heritage. His ancestors were from the rural town of Wittelshofen, in Bavaria. In 1852, to avoid conscription, his grandfather, Heinrich Freundlich, joined the great migration to America, where he became Henry Friendly. He settled in upstate New York and started a family. His son Myer, who became our Henry's father, was a successful merchant, able to afford his gifted son's educational needs. In 1919, at age 16, Henry was accepted to Harvard College, where he was elected to Phi Beta Kappa and graduated *summa cum laude*.

At Harvard, studying history with Charles Howard McIlwain, Friendly became an impassioned historian, and history remained a life-long avocation. For a course with McIlwain, Henry wrote a paper on the church and state in England under William the Conqueror, who reigned from 1066 until his death in 1087. The paper, which won a \$250 prize, showed William to be a deft politician who avoided fealty to the pope and weakened the church by moving secular cases from the ecclesiastic courts. McIlwain insisted on the use of primary sources, and, because some of those that Friendly needed were in Latin, Friendly learned the language. McIlwain also urged his students to read the words of original documents in the way that they were understood by the people

of the time—a practice that Friendly retained as a judge.

In the spring of his senior year, Friendly told his parents that, after a year in Europe, he would return to Harvard to seek a Ph.D. in medieval English history with McIlwain. His parents had expected him to attend Harvard Law School and then pursue a career that was more prestigious and lucrative than teaching. A friend of the family introduced Friendly to Harvard Law School professor Felix Frankfurter, who suggested that it wouldn't hurt for a student of medieval English history to know a little law, and that Friendly attend Harvard Law School for a year. He might like it and stick with the law, but it would benefit him even if he didn't.

Henry entered Harvard Law School in 1925 and stuck with it, becoming president of the *Harvard Law Review*. During his second summer at law school, he and classmate Thomas Corcoran (later an advisor to President Franklin Roosevelt) worked with U.S. Attorney Emory Buckner on a fraud prosecution of former Attorney General Harry Dougherty. After graduation, upon Frankfurter's recommendation, Justice Louis Brandeis hired Friendly as a clerk. This was the era when justices heard arguments in the Capitol's basement and worked at home, which, for Brandeis, was a fourth-floor apartment with two small rooms serving as offices for him and his clerk. Friendly researched and wrote footnotes while Brandeis wrote everything else, in longhand, to be sent to the Supreme Court's printer. Dorsen writes that "Brandeis's thoroughness and discipline in doing his own work contributed to Friendly's education."

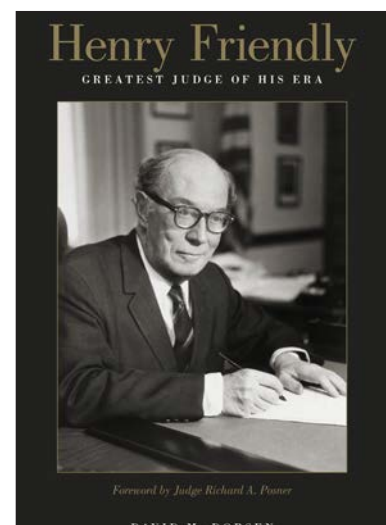
Dorsen discusses Brandeis' dissent in *Olmstead v. United States* (1928), in which the Court upheld a warrantless wiretap on the ground that it had not entailed an actual physical invasion of the home. "As originally drafted," Dorsen writes, "Brandeis's dissent relied on the ground that wiretapping violated state law," but Friendly persuaded him to add that wiretapping was a search and seizure under the Fourth Amendment. This was the dissent in which Brandeis said that the Constitution "conferred, as against the Government, the right to be let alone—the most comprehensive of rights, and the right most valued by civilized men." Brandeis' dissent became the law in *Katz v. United States* (1967). Unfortunately,

we will never know how Brandeis or Friendly would have addressed the government's surreptitious collection of megadata.

Brandeis could be a difficult person. Lewis Paper, a Brandeis biographer, asked Friendly to characterize Brandeis as either "aloof" or "warm." Friendly answered that neither term applied, as Brandeis "was kindly but always kept the appropriate distance." Friendly seems to have been similar to Brandeis in this respect, toward his law clerks and even his children.

During his clerkship, Friendly received an offer from Harvard Law School, which Brandeis urged him to accept. But, Dorsen writes, "[w]hile he had been willing to make financial sacrifices to become a professor of history, he was not willing to do the same to become a professor of law. He liked the law, but he loved history." Friendly seriously considered working for the Interstate Commerce Commission, having "met one or two of the better examiners [today administrative law judges], and they seem to be highly competent men who have the joy of making important decisions. Of course, the pay is small. ..." But Friendly instead took a job with the prestigious law firm of Root, Clark, Buckner, Howland & Ballantine, which, Dorsen writes, "was one of only two Wall Street firms with a Jewish partner, which was important to Friendly." The other firm with a Jewish partner—three, in fact—was Sullivan & Cromwell, and it too offered Friendly a position, but he felt that "they don't want me but have to make an offer because I was Editor-in-Chief of the *Harvard Law Review*."

At Root, Clark, the plan was for Friendly to



work exclusively for Grenville Clark, “who had suffered a nervous breakdown and was constitutionally unable to delegate work.” Clark’s partners thought that Friendly would be the top-notch assistant whom Clark would trust. But, after Friendly spent a few months mostly reading the *New York Times*, he was released from Clark’s supervision. Yet, Friendly would later work with Clark on cases involving insurance companies, savings banks, and bankrupt railroads. He ranked Clark with Brandeis and Frankfurter as the men who most influenced him.

In 1928, after Friendly stopped working with Grenville Clark, Elihu Root Jr. assigned him to work for a new client: Pan American Airways, which had been founded only the year before. Friendly worked on fending off a challenge to a mail route that Pan Am had been awarded in Chile. Pan Am’s president Juan Trippe preferred Friendly’s quick answers to an equivocating Root. “Within a few years,” Dorsen writes, “Friendly was handling Trippe’s important problems largely on his own.” He also represented the New York Telephone Company in a case involving a technical question of “original cost” accounting, and he won a complex case in the First Circuit under the Public Utility Holding Company Act. There were colorful cases too. For several years he worked on the estate of a wealthy eccentric recluse, Ella Virginia von Echtzel Wendel, whose father had been an associate and in-law of John Jacob Astor. And Albert Einstein retained Friendly on a small personal matter.

In 1930, Friendly married Sophie Stern, whose mother came from an established and wealthy Philadelphia family and whose father later became chief justice of the Supreme Court of Pennsylvania. Describing Henry and Sophie’s marriage, Dorsen writes, “His inhibitions and emotional constraints never impeded his wife’s free spirit. Whether or not she recognized that her husband’s emotions were far less developed than his intellect, she embarked on the marriage with her typical enthusiasm ... running the household, arranging their social life, and, after a few years, raising three children.” The children were not Henry’s passion; he was neither physically nor emotionally close to them. The family lived in a luxury apartment building in Manhattan, on Park Avenue and 89th Street, in the midst of the Great Depression.

Outspoken at times, Sophie voted for socialist Norman Thomas (grandfather of journalist and author Evan Thomas), and “it bothered no one—clearly not her husband.” “When

the Friendlys socialized,” Dorsen writes, “it was with other Jewish couples living on the Upper East Side.” Friendly served as president of the Harmonie Club, “a bastion of the German-Jewish elite” on Fifth Avenue. He also participated in a Saturday luncheon group with federal judges Jack Weinstein, Milton Pollack, and Marvin Frankel, among others. He and Sophie also were fond of overseas travel, he by plane and she by ship. Sophie used to say: “one if by land, and two if by sea, and if it’s by air, you don’t go with me.”

Friendly became a partner at Root, Clark in 1937, and left the firm in 1945 with a group of mid-level partners to form Cleary, Gottlieb, Friendly & Cox. Along with being a partner, he also became vice president and general counsel of Pan Am. A major client for the new firm was the Guggenheim family, with its extensive mining interests and philanthropic projects.

In 1959, President Dwight D. Eisenhower nominated Friendly to the Second Circuit. Connecticut senator Thomas Dodd, however, had to be persuaded to support Friendly. Dorsen writes, “Frankfurter told Friendly that only Senate Majority Leader Lyndon Johnson could handle Senator Dodd,” so Frankfurter met with Johnson. Frankfurter started to make his case for Friendly, when Johnson cut him off and said, “Felix, are you telling me that this Jewish boy should be on the Second Circuit? That’s enough for me.” Johnson called Dodd and “told him in no uncertain terms that he expected the notice for Friendly’s hearing to go out in fifteen minutes.” Friendly was quickly confirmed. A decade later, Abe Fortas’ resignation from the Supreme Court led Friendly to think that he might be tapped. But Nixon said that he wanted a Southerner who was a “strict constructionist.” Nixon also said that he did not want anyone to give him “a Jew’s name,” adding, “I don’t want a liberal Jew on the Supreme Court.”

Dorsen views Judge Friendly as “a conservative in the traditional mold, judicially restrained and reserved, but not always agreeing with either the judicial or political right.” He once told a law clerk that he voted Republican unless there was a very good reason not to. The clerk took this to mean that Friendly planned to vote for Kennedy over Nixon. Friendly later kept a bust of JFK in his chambers.

Friendly kept a commonplace book, or copybook, of entries, mostly handwritten but also with photocopies from books and articles. “In it he had assembled hundreds of quotations under subject headings, starting with ‘Arguments’ and ending with [Ludwig

Wittgenstein.” The person most often noted was Oliver Wendell Holmes Jr., with Learned Hand, Felix Frankfurter, Paul Freund, Samuel Johnson, Frederic William Maitland, and Jerome Frank frequently reproduced. Some entries were quirky: “If you can think about something which is attached to something else without thinking about what it is attached to, then you have what is called a legal mind.” (Justice Ginsburg used the same quotation in footnote 2 of her dissent in *Fisher v. University of Texas at Austin* (2013), which struck down the university’s use of race as a factor in undergraduate admissions.) Some entries were deflationary: “A metaphysician who had written on the secret of Hegel was congratulated upon his success in keeping the secret.” His favorite may have been “Many questions are solved by walking; *Beati omnes qui ambulat* [Blessed are all who walk].”

At age 82, a widower with serious health problems and deteriorating sight, Friendly committed suicide with pills. His obituary in the *New York Times* quoted Wilfred Feinberg, the chief judge of the Second Circuit, as saying that Friendly was “one of the greatest Federal judges in the history of the Federal bench,” and Judge Richard Posner as calling Friendly “the most distinguished judge in this country during his years on the bench.”

Like Henry Friendly, David Dorsen was an editor of the *Harvard Law Review*, and he is recognized for his legal scholarship and excellent writing. Although this book review will not discuss Friendly’s judicial decisions, *Henry Friendly* contains instructive discussions of them. An appendix to the book lists Friendly’s 51 law clerks, the year they clerked, and their subsequent positions. They included Chief Justice Roberts, federal court of appeals judges Merrick Garland, Michael Boudin (Friendly’s favorite clerk), Pierre Leval, William Bryson, and professors David Currie, Bruce Ackerman, and Phillip Bobbitt. Friendly’s nonjudicial writings were voluminous, and another appendix lists them. The book’s endnotes are thorough, and some are substantive rather than merely referential. *Henry Friendly* warrants a place on one’s short shelf, next to Gerald Gunther’s biography of Learned Hand. ☉

*Richard L. Sippel is the chief administrative law judge at the Federal Communications Commission. For two years in the mid 1970s, he was in the same law firm as David M. Dorsen. The views expressed in this review are his alone and not the commission’s.*

## THINGS THAT MATTER: THREE DECADES OF PASSIONS, PASTIMES AND POLITICS

BY CHARLES KRAUTHAMMER

Crown Forum, New York, NY, 2013. 387 pages, \$28.00.

Reviewed by John C. Holmes

Pulitzer Prize winner Charles Krauthammer writes a column that is syndicated to 400 newspapers, and he is a nightly panelist on Fox News' "Special Report" with Bret Baier, and a weekly panelist on PBS' "Inside Washington." He was educated to become a psychiatrist. While a medical student he became permanently paralyzed in a diving accident in a swimming pool and studied largely in bed with his books suspended above him. In *Things That Matter*, Krauthammer barely mentions this life-changing event, and he lives a robust life with many passions and interests that he writes about in an intelligent and witty manner.

Nor does Krauthammer dwell on the seven years he studied to be become a physician and a psychiatrist, as he loves his career as a commentator, mostly on political matters. This book is a collection of newspaper columns and short magazine pieces, and also includes five longer essays. Krauthammer explains: "this book was originally going to be a collection of my writings about everything but politics. ... But in the end I couldn't. For a simple reason, the same reason I left psychiatry for journalism. While science, medicine, art, poetry, architecture, chess, space, sports, number theory and all things hard and beautiful promise purity, elegance and sometimes even transcendence, they are fundamentally subordinate. In the end they must bow to the sovereignty of politics."

But "much of the politically oriented writings in this volume," Krauthammer writes, are weighted "toward those dealing with constitutional issues and general principles. ... I've tried to give as little space as possible to campaigns and elections, to personalities and peccadilloes, to things that come and go." Yet *Things That Matter* is divided into four parts—"Personal," "Political," "Historical," and "Global"—and only 32 of the book's 88 chapters are in the political part. Other subjects Krauthammer covers range from Winston Churchill to a chess championship to the family's border collyie to Israel to global warming. The five longer essays are on the ethics of embryonic research, Zionism, and "America and the World."

Krauthammer was born in Canada, his wife in Australia. His writings demonstrate a profound love for his adopted country, the United States. But Krauthammer praises the fact that

in Washington, D.C., and Manhattan are statues of "foreign liberators ... who had nothing to do with us," including Gandhi, Masaryk, Bolivar, Garibaldi, Mazzini, and Kossuth. "They have but one thing in common: They share America's devotion to liberty. Liberty not just here but everywhere. ... Much of the world ... insists ... that America's costly sacrifices in Iraq and even Afghanistan are nothing more than classic imperialism in search of dominion, oil, pipelines or whatever such commodity devalues America's exertions. The overwhelming majority of Americans refuse to believe that. ... [These statues] are not for show. It is from the heart, the heart of a people conceived in liberty and still believing in liberty."

Krauthammer discusses how Hitler's and Stalin's totalitarianism dominated the 20th century. He takes issue with *Time* magazine's choice of Albert Einstein as "person of the century." He writes, "If Einstein hadn't lived, the ideas he produced might have been delayed. But they certainly would have risen without him." But "only Churchill carries that absolutely required criterion: indispensability. ... Who slew the dragon? Yes, it was the ordinary man, the taxpayer, the grunt who fought and won the wars. Yes, it was America and its allies. Yes, it was the great leaders: FDR, de Gaulle, Adenauer, Truman, John Paul II, Thatcher, Reagan. But above all, victory required one man without whom the fight would have been lost at the beginning. It required Winston Churchill."

Krauthammer is not only unafraid to take on sacred cows and perceived wisdom, he relishes doing so. In a chapter titled "The Double Tragedy of a Stolen Death," he relates how the former congressman Father Robert Drinan's death was upstaged by the death of the racehorse Barbaro, to which the *Washington Post* gave top billing. Mother Theresa unfortunately died on the eve of the funeral for Princess Diana. Krauthammer comments: "In the popular mind, celebrity trumps virtue every time." He quotes the comedian Art Buchwald: "Dying is easy. Parking is hard." As to Buchwald's own death, Krauthammer writes: "[D]ying well is also a matter of luck. By unexpectedly living almost a full year after refusing dialysis for kidney failure, Buchwald won himself time to taunt the scythe."

Krauthammer devotes several chapters to Israel and to Jews, whom he notes constitute one-fifth of one percent of the world's population, but 20 percent of its Nobel Prize winners. He writes that, although, in America, Jews have in one sense found the Promised Land, "in the

last half century, Jews have shrunk from 3% to 2% of the population." The cause is low fertility, which is a product of Jews' rising education and socioeconomic status, and endemic intermarriage, with only about one in four children born from an intermarriage being raised Jewish. Moreover, Jews' success in assimilating has diminished their need and desire for Jewish culture and religious practices. The opposite is true in Israel, where the Jewish culture, history, and religion are the reason for its very existence. Krauthammer argues that, given Israel's precarious situation, it should not be judged by the standards applied to secure and peaceful countries. The very existence of Israel is threatened.

Krauthammer also discusses baseball (he is a devotee of the Washington Nationals), mathematics, economics, international relations, the French, and much else. His writing is engaging, always insightful, and often humorous. But you needn't take my word for it; shortly following its publication, *Things That Matter* soared to the top of the hardcover nonfiction bestseller list, where it has remained. ☉

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## HISTORY AND THE HUMAN CONDITION: A HISTORIAN'S PURSUIT OF KNOWLEDGE

BY JOHN LUKACS

Intercollegiate Studies Institute, Wilmington, DE, 2013. 233 pages, \$27.95.

## A SHORT HISTORY OF THE TWENTIETH CENTURY

BY JOHN LUKACS

The Belknap Press of Harvard University Press, Cambridge, MA, 2013. 230 pages, \$24.95.

Reviewed by Jeffrey Glenn Buchella

The 19th-century French philosopher and historian Alexis-Charles-Henri Clérel de Tocqueville left to future generations a rich intellectual inheritance. Americans have had a vital, even singular, relationship with the author of *Democracy in America*, which first appeared in two volumes, in 1835 and 1840, the product of its author's journey through the then-fledgling republic. Tocqueville's two-year



sojourn had begun in 1831, when he was only 26. Not much more than a generation had passed since the English colonies had united in a war for independence, yet a schism was developing that would lead to civil war.

Tocqueville served in high-level posts in post-revolutionary France and recorded many of the major historical events of his lifetime in works that have had a lasting authority and influence. By force of reputation, he would attract future generations of scholars to both his personality and his ideas. Posthumous admirers would use the foundation he established to survey their own times, fashion observations about the nature of the American experiment, and contemplate what the future would hold for the heirs of 1776.

When the historian John Lukacs fled the Soviet occupation of his native Hungary, arriving in the United States in 1946, at Philadelphia's now defunct Broad Street Station, he was just 22 years old. Already, during the first decade after his emigration, he would be engaged in the work that would form the foundation of the remainder of his career. Little more than 10 years after he arrived, he published *The European Revolution & Correspondence with Gobineau*, in which he collected, translated, edited, and provided commentary on Tocqueville's correspondence with the French aristocrat, novelist, and man of letters, Joseph Arthur Comte de Gobineau. This book provided readers with an early awareness of Lukacs' lifelong interest in Tocqueville—one that would provide inspiration for many of the themes that would define his work over the next 60-plus years.

Tocqueville celebrated the unique possibilities of the young "Anglo-American" nation, but, importantly, he did so informed by his own beliefs. He was a non-materialist in that he believed that ideas are more important in explaining human behavior and history than are economic factors. He rejected racial inequality, and he was deeply preoccupied with both the promise and the dangers inherent in the democratic experiment. Finally, he was committed to the idea that religion was an essential part of life, though his commitment was different from the rural fundamentalist strains he observed in the New World.

*History and the Human Condition* is a collection of eight essays published between 2002 and 2012, together with a complete bibliography of Lukacs' writings, spanning the period from 1947, when he was beginning his career, to the present. The bibliography is helpfully organized into sections listing books,

articles, reviews, and miscellaneous matters, which in turn include transcribed interviews, speeches, readings, and even letters to the editor—all of which offer a rich introduction to the 90-year-old author's oeuvre.

### Tocqueville Unbound

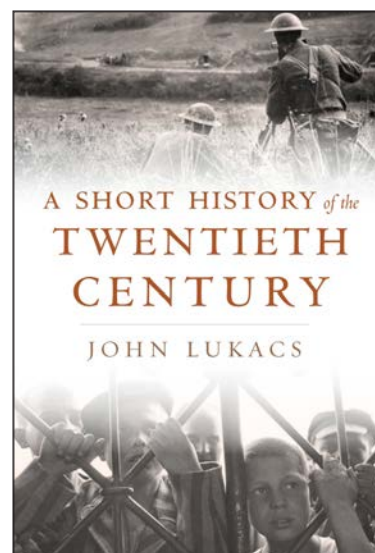
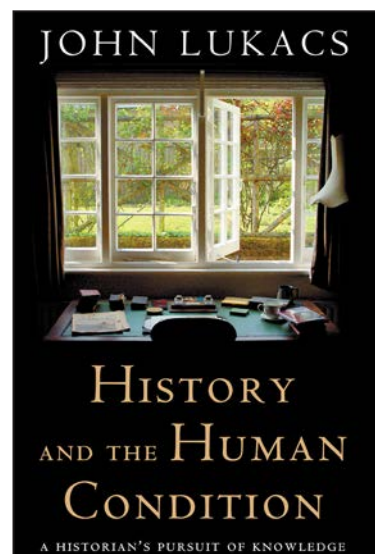
In *History and the Human Condition*, Lukacs writes, "More than two hundred years after Tocqueville's birth (1805), his international reputation is greater than ever," especially in the United States. Improbably, no serious biography of Tocqueville appeared until 1984, and, despite the publication of at least two additional biographies since then, Lukacs believes that Tocqueville remains misunderstood in important ways by the public and historians alike.

A popular impression in the United States is that Tocqueville's *Democracy in America* was principally about America, and an altogether admiring portrait at that. For Lukacs, however, Tocqueville's survey is principally about democracy, and is an analysis of the newly emerging political phenomenon as it was expressing itself not just in the United States, but elsewhere in the world. This misapprehension of Tocqueville's classic work, as Lukacs sees it, is related to the fact that most American readers, including many scholars, have fixed their attention—and praise—on volume I, even though volume II is more valuable with its many observations of, and warnings about, what was then a nascent and radical development in the political life of the world.

*Historical Consciousness: The Remembered Past* is a wide-ranging 1968 book—perhaps Lukacs' most important—that explores history itself from many angles. Lukacs emphasized that he did not base his ideas on Tocqueville, but merely cited him frequently in order to illustrate his own points. Lukacs explained that Tocqueville, as the premier historian of the then-emerging democratic age, had taught that the causes of historical action are infinitely concealed and complex, especially in a democracy. Tocqueville is often understood as a conservative who sought to explore the changing landscape following the slow collapse of the traditional European order defined by the authority of monarchs and powerful church establishments. The publication of volume II of *Democracy in America* in 1840 revealed the subtle and varied strands of his thinking. His central theme was self-government and its relationship to liberty, which he regarded as mankind's most precious possession.

Lukacs' journey had at least some similarities to Tocqueville's. Like Tocqueville, Lukacs had traveled from the Old World—the Hungary of his birth, where an attempt to restore the monarchy had taken place as late as 1944—to the postwar United States. He arrived more than 100 years after Tocqueville's travels in the United States had concluded. Like Tocqueville, Lukacs balanced an attraction and respect for both worlds.

In *Historical Consciousness*, completed when he was 44, Lukacs sought (although this is far from a central preoccupation of the book) to throw light on his own ideas in relation to Tocqueville's. He wrote that "it was Tocqueville who reconciled me to democracy. ... [H]e moved me toward the 'Left.' Many modern scholars have failed to see that Tocqueville was a demophile as much as he was a demophile. ..." He lacked the ingrained distrust of the people expressed by other conservatives of his time.



Yet, Tocqueville's time in the young republic left him with an awareness of the relatively "novel danger of democratic despotism," and he believed it important that this danger be appreciated for its subtlety: "If despotism were to be established among the democratic nations of our days, it would be more extensive and more mild; it would degrade men without tormenting them." Tocqueville observed American democracy closely and saw in it the potential for a new species of oppression.

Tocqueville was keenly aware of the significance of popular tendencies, and knew that "in men's souls ... we may find the symptoms of forthcoming events." In turn, "mens souls" might easily amount to a mob rule, whether by the majority, with its unchecked power to impose its will, or by a passionate minority that thwarts all opposition. Man's tyranny over his fellows is always a danger. Lukacs writes in *History and the Human Condition* that the historian Arthur Schlesinger Jr. quoted Pascal out of context when he wrote in *The Age of Jackson* that "man is neither angel nor brute." Pascal's greater truth was that "man is both angel and brute."

In *History and the Human Condition*, Lukacs suggests a corrective to Tocqueville's feared new species of oppression. Tocqueville believed, Lukacs writes, "that *some* kind of aristocracy remains necessary to counterbalance a degeneration of democracy into demagogic populism." Did this mean, Lukacs asks, that "Tocqueville, who was of course a nobleman by birth, had a nostalgia for an aristocratic order that compromised his vision of democracy"? No, Lukacs doesn't think so, but Tocqueville's fear of the excesses of popular rule were well founded, in part the result of his having observed firsthand the 1848 revolutions in Europe, where, he wrote, "The insane fear of socialism throws the bourgeois headlong into the arms of despotism."

## The Human Condition

*History and the Human Condition*, however, is not all of a piece. It contains essays that diverge broadly in subject, though each may be said to deal with Lukacs' unceasing exploration of the human condition. Yet the ghost of Tocqueville is often close at hand. In an essay that explores the idea that history is a form of literature, Lukacs emphasizes that many important lessons about democracy can be gleaned from Tocqueville's posthumously published *Recollections*, a "brilliant memoir of the 1848 revolutions." In his 1856 *Ancien Regime*, Tocqueville, in "going beneath the colorful sur-

face of events[,] was doing something profound and new." He sought to discover the forces that propelled the modern democratic system: what people think and believe as well as how and why they think and believe what they do.

In Lukacs' chapter on American exceptionalism—a topic that may have a special resonance today—one hears an echo of Tocqueville's influence. Volume I of *Democracy in America* contained high praise for the "Anglo-Americans" and their new nation. But, as we have seen, Tocqueville had reservations about the new American experiment. Lukacs' topic in the chapter is the January 1946 "wise and profound dismissal of ... American exceptionalism" by American historian Carlton J.H. Hayes. In the aftermath of America's unprecedented victory in World War II, Hayes' message was freighted with irony and prescience. He saw the thesis of American exceptionalism as:

a result and a stimulant of growing intellectual isolationism ... a lurking suspicion of inferiority, which long lingered with us, [and] has had the usual psychological compensation in strident assertions of superiority. ... [This] trend, if unchecked, can only confirm the popular myths that the "American way of life" is something entirely indigenous, something wholly new, and something vastly superior to any other nation's. It is also likely to strengthen our people's missionary and messianic impulse, which will have far greater scope and far greater opportunity for expressing itself in the current aftermath of the Second World War. ...

## The Dualities in Man's Nature

In the one chapter of *History and the Human Condition* that is set outside the United States, Lukacs explores the relationship between World War II Europe's leading atomic scientists, the German, Werner Heisenberg, and the Dane, Niels Bohr, both Nobel Prize winners. Their relationship and the events surrounding it formed the basis for Michael Frayn's 1998 Tony Award-winning play, *Copenhagen*. In 1937, the Nazi press had attacked Heisenberg, calling him a "white Jew." On Sept. 16, 1941, Heisenberg traveled from Berlin to Nazi-occupied Copenhagen by night train, walked to Bohr's house and commenced the first of three visits with Bohr, prior to leaving Copenhagen five days later. Scholars have long speculated as to what the men discussed,

especially during a private after-dinner walk, probably on Wednesday night, September 17. Did Heisenberg assure Bohr that the Nazi attempts to create a bomb would stall? Did he say or imply that he would work to undermine such efforts, or that he would otherwise provide Bohr with information related to the German efforts to create a bomb? Lukacs offers no final opinion on these questions, but he emphasizes that there was a "duality in Heisenberg's mind, a duality that existed and still exists to this day in the minds of many of his countrymen. He did not want Germany to lose the war. At the same time he regretted the war—the war against the West. ... [H]e did not wish the Nationalist Socialist Third Reich to be victorious." His ambivalence was "part and parcel of his anti-Communism." As Lukacs explains, Heisenberg was apt to muse, "Had only Germans and British not fought each other (in 1940 or 1941 or thereafter): this was the wish (and often the daydream) of many 'conservatives,' not only in Germany but throughout Europe, for many of them till this day. ... At the bottom of this wish (but not very deep down) was and is the belief that Communism and Russia were more dangerous (and more evil) than were National Socialism and Germany. That is a half-truth. But half-truths are more dangerous—and enduring—than are lies."

Elsewhere in *History and the Human Condition*, Lukacs argues, consistent with his friend George Kennan, that the Cold War was a consequence not of world communism, but of a classic geopolitical struggle between the Soviet Union on the one hand and the United States and England on the other—a conflict that Hitler had been convinced was inevitable.

*History and the Human Condition* closes with an essay in which Lukacs asserts that the study of American history presents unique problems that are related to the "structure of its democratic society," and that these problems include the "persistence of American popular nationalism" and "the militarization of popular imagination." Like Tocqueville, Lukacs does not take the republic for granted, and he sees as possible a tragic devolution of American democracy. He quotes the Dutch historian Johan Huizinga: "A too systematic idealism gives a certain rigidity of the conception of the world. ... Men disregarded the individual qualities and the fine distinctions of things, deliberately and of set purpose, in order always to bring them under some general principle. ..." Agreeing, Lukacs sees a medieval strain in American thinking—"a tendency to subscribe a sort of substantiality to abstract concepts."

## Tocqueville in the Modern Era

Lukacs' most recent book, *A Short History of the Twentieth Century*, is a general history with a very broad topic. But, as Tocqueville once wrote, "General history is useful ... in respect of the light which it throws on human nature." Lukacs writes, "From its very beginning, the United States represented the progress of democracy. The great Alexis de Tocqueville recognized this. His genius saw a change that ... was coming to France (and to most of the world) after perhaps thousands of years. This was the evolution from aristocratic ages to a democratic one ... a change in the very structure of history."

"[T]he equality of human beings ... is advancing," Lukacs writes. "[T]he idea of democracy or, more precisely, of popular sovereignty," has become "more and more acceptable—and unquestionable." But Lukacs, like Tocqueville, is not offering unqualified praise. "To most people," he writes, popular sovereignty "meant the attractions of populism and nationalism. Few people understood that populism was not liberalism and that nationalism was different from patriotism." In fact, "[p]opulism and nationalism are the very worst (and, alas, powerful) components of democracy." Lukacs adds: "After the end of the American Century, a major problem is not so much the existence of American omnipotence as it is the way millions of Americans and many of their politicians unthinkingly believe in it."

Many years ago, Lukacs wrote that Tocqueville foresaw threats to individual liberty in "the tendency which many social and political thinkers a century later were still unwilling to recognize: the possibility that the age of aristocratic society and government would be succeeded by bureaucratic society and government rather than by a true democracy." In *A Short History of the Twentieth Century*, after surveying the main events and developments of the last 100 years, Lukacs concludes by quoting Tocqueville: "we are perhaps too apt to think that civilization cannot perish in any other manner [than by military invasion]. If the light by which we are guided is ever extinguished, it will dwindle by degrees and expire of itself."

## Envoi

In each of the books discussed above, Lukacs asks the reader to contemplate serious themes, but his view is neither naïve nor morose, and his focus is not entirely on history in the conventional sense. All his work has a tempered, more philosophical, even spiritual

quality. In a concluding chapter in *History and the Human Condition*, entitled simply, "The World Around Me: My Adopted Country," we find this quality expressed on a deeply personal level:

Ten years later Stephanie is dead and the asparagus and the raspberries do poorly, if at all. ... Still there is that forest of greenery on the other side of the water; and on this side, our grass descends to it, emerald and gilt under the sun, spinach-green after the shadows advance across it. One now unforgettable evening, about a dozen years ago, I suddenly decided to row down to my friends, the Reeves, two miles away. So I went, with the plashing of my oars the only sound, except for one far cry of a loon. ... [Later] I was alone, in the middle of the reservoir. Soon I saw not a single light. Alone, on that dark indigo water, as if one hundred miles away from any town, out in some wilderness, under a sickle moon. I was full of gratitude for what God and this country had allowed me, for this silent world where I belonged, where I had chosen to live. A mile ahead, after the bend, I saw the lights of our house. In twenty minutes I was home. ☺

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## TAKING THE STAND: MY LIFE IN THE LAW

BY ALAN DERSHOWITZ

Crown Publishers, New York, NY, 2013. 518 pages, \$28.00.

### Reviewed by Henry S. Cohn

Alan Dershowitz, a Harvard Law School professor for 50 years, an attorney with an international reputation, and the author of 28 prior books, has now, in a flourish, written a summary of his life in the law. The book combines his autobiography with his thoughts on current events and courtroom personalities; it includes chapters on free speech, Israel and the Palestinians, and on politicians, artists, and accused criminals that he represented or advised.

Dershowitz grew up in Brooklyn in an Orthodox Jewish family. His secondary education was at a local yeshiva. His teachers, on the whole, had no use for their overactive and quick-minded pupil; none thought that

he was college material. One told him that he would "always be a 75 [percent] student," and another urged Yeshiva University to reject him, which it did.

At a summer camp before his final year of high school, Dershowitz was lucky to meet an inspiring rabbi whose faith in him led him to consider college, and he applied to Brooklyn College. There, Dershowitz surprised the doubters and shot to the top of his class. He moved on to Yale Law School, another triumph, finishing first in his class. Alexander Bickel, the famous Yale law professor, arranged a clerkship for Dershowitz with Judge David Bazelon, a brilliant and driven judge on the D.C. Circuit. This, in turn, led to Dershowitz's spending a year at the Supreme Court as a clerk for Justice Arthur Goldberg.

These chapters on Dershowitz's clerkships are fascinating, as he describes Bazelon's severe work ethic ("It's only a one-year job and that means 365 days") and constant criticism of the drafts that he submitted. Dershowitz relates how Goldberg, in his memoranda to the other justices and with procedural maneuvers, fought to save every death-row appellant from the imposition of the death penalty. Goldberg was appalled that, nearly a decade after *Brown v. Board of Education*, bathrooms at the Court were racially segregated, and that the only black Court employees were messengers and the barber (who refused to cut black people's hair). Goldberg got Chief Justice Earl Warren to put an end to these practices, and Goldberg also hired the Court's first black secretary.

In 1965, with Goldberg's aid, Dershowitz became the youngest professor whom Harvard Law School had ever employed. At Harvard, he defied the prevailing stuffy atmosphere. He describes how hurt he was when a more experienced teacher refused to let him sit in on a class, claiming that his lectures were designed exclusively for his students. He faced down several alumni who wrote to the dean complaining about his teaching style. But the students appreciated his approach, which included techniques to relax nervous students. For example, he would deliberately misstate the facts of a case to amuse his students and provoke their reaction.

His departures from the Socratic method resulted in his becoming Harvard Law School's most popular instructor. One significant article from his early years at Harvard was "Psychiatry and the Legal Process: A Knife That Cuts Both Ways," published in *Judicature* in 1968. It is still regarded as a significant essay caution-



ing judges to avoid overreliance on psychiatric experts in rendering decisions on mental health questions.

In his early 30s and an accomplished law professor, Dershowitz faced personal challenges. He had married barely out of college and had two sons while attending law school. The marriage did not last, but, in his late 30s, Dershowitz remarried and had a daughter with his second wife, Carolyn. Carolyn became responsible for his taking more time to relax on weekends—a secular “Sabbath”—and for buying a vacation home on Martha’s Vineyard where they spent their summers. Dershowitz also describes dealing with one son’s brain tumor, fortunately cured by surgery and radiation. That son is now a successful filmmaker.

From his earliest times at Harvard, Dershowitz has participated in trial and appellate advocacy. He describes in the book many of the persons that he dealt with, and he states his views on their legal claims. In *Byrne v. Karalexis* (1971), he argued before the U.S. Supreme Court on behalf of a theater that had shown the film “I Am Curious (Yellow).” A Massachusetts court had found the film obscene, but the theater persuaded a three-judge federal district court to issue an injunction stopping Massachusetts from barring the film’s screening. The federal court found, in Dershowitz’s summary, “that the government had no power to ban or prosecute an ‘obscene’ film that was shown to the public in a theater on the ground that it might vicariously offend people who had a choice not to enter that theater.” Massachusetts appealed to the U.S. Supreme Court, and Dershowitz argued the case for the theater. The Supreme Court vacated the judgment not on the merits, but because a federal injunction of state crimi-

nal proceedings was inappropriate where the district court had not found that the threat to the appellees’ federally protected rights could not “be eliminated by [their] defense against a single criminal prosecution.”

*Taking the Stand* covers Dershowitz’s role in some of the most high-profile criminal trials of the 20th century. These include his defense of Claus von Bülow, accused of killing his wife with an overdose of insulin. The trial became the basis for the movie, *Reversal of Fortune*, in which Dershowitz was played by actor Ron Silver. Dershowitz assisted in the defense of O.J. Simpson, including helping to plan the demonstration for the jury that the glove didn’t fit. Dershowitz also discusses the less well-known part that he played in the defense of Sen. Ted Kennedy (D-Mass.) when he was accused in the 1969 death of Mary Jo Kopechne at Chappaquiddick. The defense was successful in resolving the charges against Kennedy with the misdemeanor of leaving the scene of an accident. Dershowitz remained close to the senator and his family throughout Kennedy’s life.

Two other topics that Dershowitz takes up are the Clinton impeachment and Mia Farrow’s accusations against Woody Allen. Dershowitz was never officially one of Clinton’s attorneys, but he was friendly with the President and advised his lawyers. He writes that the lawyers ignored his advice that Clinton default on liability in the Paula Jones trial. This would have allowed Clinton to properly refuse to have his deposition taken, and it was at the deposition that he first lied about having had sex with Monica Lewinsky. Others, such as the legal journalist, Jeffrey Toobin, have differed with Dershowitz on this strategy.

Dershowitz was an admirer and acquaintance of Woody Allen’s and a friend of Mia Farrow’s when the two actors had their acrimonious breakup in 1992. Dershowitz tried to mediate the dispute between Allen and Farrow and to resolve Farrow’s allegations against Allen regarding her children, and to avoid publicity. He accuses Allen of ignoring his advice, which led to ugly scenes in courtrooms and the media.

Dershowitz is a good teller of stories and jokes, which he interjects periodically in the book. He also reprints from his earlier works several lists that make telling comments about law and lawyers in the United States. For example, his “Rules of the Justice Game” reads in part:

Rule I: Most criminal defendants are, in fact, guilty.

Rule II: All criminal defense lawyers, prosecutors, and judges understand and believe Rule I.

Rule IV: In order to convict guilty defendants, many police witnesses lie about whether they violated the Constitution.

Rule V: All prosecutors, judges, and defense attorneys are aware of Rule IV. ...

Another example is his list of rules for attorneys defending high-profile cases. A portion of these rules reads as follows:

1. Never take a case just because the client is a celebrity. ... Make sure the issues in the case are within your area of expertise.
2. If you do take a case, don’t socialize with the celebrity. Never assume the celebrity is your friend. ...
3. Settle the case quietly if at all possible. ...
4. Never say anything about the client or the case to anyone, unless you are prepared to see it printed. ...
5. Every time you meet the client, be prepared to be fired for telling him what he doesn’t want to hear. ...

Dershowitz has become a vital part our legal landscape, and it is quite rewarding to spend time with him in this excellent book. ☺

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## ADDITIONAL BOOK REVIEWS

In addition to the book reviews in the paper copy of this issue of *The Federal Lawyer*, bonus reviews are included in the online version of the magazine. The following reviews are available at [www.fedbar.org/magazine](http://www.fedbar.org/magazine). ☺

### LAW, PSYCHOANALYSIS, SOCIETY: TAKING THE UNCONSCIOUS SERIOUSLY

BY MARIA ARISTODEMOU

Reviewed by Christopher Faille

### OWNING THE EARTH: THE TRANSFORMING HISTORY OF LAND OWNERSHIP

BY ANDRO LINKLATER

Reviewed by Jon M. Sands and Noah L. Bucon

