

## Law and the Modern Mind: Consciousness and Responsibility in American Legal Culture

By Susanna L. Blumenthal

Harvard University Press, Cambridge, MA, 2016.

385 pages, \$45.

Reviewed by Christopher C. Faille

This new book by Susanna Blumenthal, co-director of the Law and History Program at the University of Minnesota, takes a fresh look at the way that American judges understood their world, and especially the inner world of the litigants before them, throughout the 19th century.

Many destabilizing developments occurred throughout that century, events that upset the reflective equilibrium of judges, as they would have anyone else conscious at the time. In Blumenthal's brief list, the destabilizing developments included the booms and busts of the cyclical economy, the rise of Darwinism, the trauma of the Civil War and its aftermath, the disruptions of rapid industrialization, and the uncertainties engendered by waves of immigration. All of these chipped away at notions of mental competence and responsibility— notions

critical to deciding whether a defendant was to be held responsible for a crime, whether a decedent's declarations in his will were definitive in the disposition of his property, whether an insurer had to pay out to the family of a suicide, whether a party to a commercial transaction was competent to enter into the contracts involved, and of course much else.

Blumenthal's Big Picture is that the 19th century saw a slow move away from religious as well as metaphysical conceptions of the soul or self, toward naturalistic and medicalized takes on the mind. In her conclusion, Blumenthal quotes Douglas Baynton, a cultural historian at the University of Iowa, who has written of this shift that it began with "a God-centered ... culture that looked within to a core and backward to lost Edenic origins" and culminated in one "that looked outward and forward to a perfected future."

That Big Picture is not especially original and the value of this book won't be found there. Its value will be found, rather, in the details, in the botanical richness of the description of some of the trees in that already well-mapped forest.

### Life Insurance and Insanity

The matter of life insurance and insanity is especially striking. In 1898, the U.S. Supreme Court considered *Ritter v. Mutual Life Ins. Co.*, a case that arose because a fellow named William M. Runk, a Philadelphia businessman and an insured of the respondent, had shot and killed himself six years before.

Runk was a partner in a dry-goods firm. In this case, as was usual in the 1890s, the insured's insurance policy contained no express exclusion for cases of suicide. The law as interpreted by a trial judge held that a sane man's suicide does not warrant an insurance company payout, but an insane man's suicide does. The idea, presumably, was that the sane fellow might be tempted into suicide by a businesslike calculation of his family's coming gain from the proceeds versus their continued troubles in the event of this sane-but-hard-pressed fellow's continued living presence among them. The insane are neither tempted into suicide in this way

nor deterred from it by a contrary rule of law, so their suicide can occasion payouts without offense to a pro-life public policy.

Runk's suicide was of a not-uncommon sort. He owed a lot of money, had speculated using embezzled funds and lost those funds in the market, and so forth. He left a suicide note asking that the insurance funds be employed to pay those whom he had cheated. Of course, that suicide note has no consequences for his beneficiary, but the question was: Should the beneficiary get anything? That depended on whether Runk was sane or insane.

The jury found that he was sane and that the insurance company was not liable. The matter was appealed to the U.S. Supreme Court. This was in the era before *Erie v. Tompkins*, when the federal courts, including the Supreme Court, decided common law questions such as those of contract interpretation.

### Harlan's View

The Supreme Court took the case, and, in an opinion by the first Justice John Marshall Harlan, upheld the trial court's judgment. It explicitly affirmed the principle that, in the absence of explicit mention in the contract, a sane person's suicide is a defense against insurance company liability.

Harlan wrote that insurance premiums are typically determined by actuarial tables, and that those tables show at any time the probable duration of life. This arrangement suggests that the insured "will leave the event of his death to depend upon some other cause than willful, deliberate self-destruction." That phrase isn't as resonant as "the Constitution is color-blind." But it is clear and emphatic. Harlan knew how to be so.

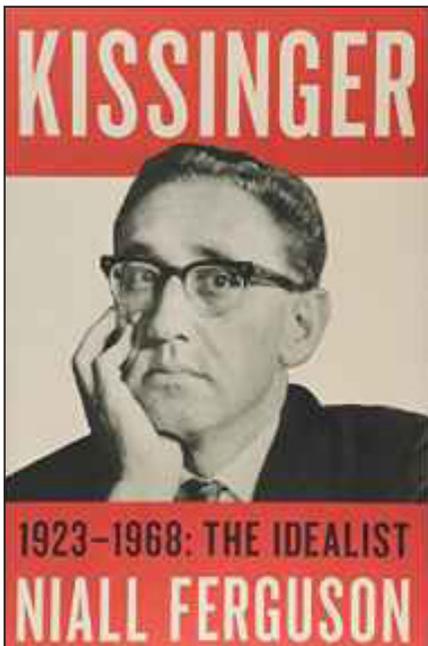
Blumenthal observes that the *Ritter* decision encountered resistance. Judges, in Blumenthal's words, remained "deeply conflicted about how to allocate the burden of loss between insurers and beneficiaries in cases of self-destruction." The very fact of a sane suicide embodies market failure and moral hazard, both threatening notions in the Gilded Age.

At points in this book, one senses the shadow of Albert Camus, a philosopher and

novelist of another place and time, declaring that suicide is the only serious philosophical question. Camus' "absurd hero" is an eminently sane figure who concludes that the indifferent universe gives him no good reason to say "no" to suicide. That's a view of the human condition with which the eminent jurists discussed in this volume surely never grappled.

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*Christopher Faille, a member of the Connecticut bar, is the author of *Gambling with Borrowed Chips, a heretical account of the Global Financial Crisis of 2007-08. He writes regularly for MJINews, a website for actual and potential investors in the legal marijuana industry.**



## Kissinger: 1923–1968: The Idealist

By Niall Ferguson

Penguin Press, New York, NY, 2015. 986 pages, \$39.95.

Reviewed by Christopher C. Faille

I begin my discussion of this complicated book with its subtitle. The phrase "the idealist" isn't being used in its colloquial sense to mean one who cherishes and pursues abstract and demanding moral principles. That sense of the word, for better or worse, has a whiff of Don Quixote about it, and it doesn't sound at all like the Henry Kissinger some of us remember.

Niall Ferguson uses "idealist" in a quite different sense: the classic metaphysical sense. An idealist is one who believes that

ideas, as opposed to the material world, sit at the heart of reality. This doesn't sound like the Kissinger we remember either, but not because we think of Kissinger as disdaining idealism in this sense. Rather, we might naïvely guess that the issues for which idealism in this sense stand might never have been a concern of his. And this naïve view, as Ferguson shows, would be wrong.

*Kissinger: 1923-1968: The Idealist* argues that Kissinger, while he was developing his own philosophy and worldview, took quite seriously the Kantian idealist notion that the reality of material objects—of that whole world that seems to exist outside of one's head—cannot be proved to exist.

### Collingwood's Method

Ferguson takes as his own method the views on history and its study propounded by philosopher R.G. Collingwood. In his preface, Ferguson quotes Collingwood:

1. All history is the history of thought.
2. Historical knowledge is the re-enactment in the historian's mind of the thought whose history he is studying.
3. Historical knowledge is the re-enactment of a past thought incapsulated in a context of present thoughts which, by contradicting it, confine it to a plane different from theirs.

In short, when we do history we try to figure out why someone did something. No external fact is ever an adequate answer. An adequate answer always entails the reasons, within the mind of that someone, insofar as they can be re-created in a necessarily different context. A scholar-turned-statesman might seem to be the ideal case for a Collingwood-esque approach to history.

Even without philosophically distinguished authority for such sentiments, Ferguson would surely be on firm ground in writing, "The first task of a biographer who undertakes to write the life of a scholar—even if that scholar goes on to attain high office—ought surely to be to read his writings." And that task Ferguson has evidently accomplished with care.

### The News Here

The news in this book, I submit, is the emphasis Ferguson places on an unexpected master-disciple relationship: Kissinger's connection to a now-nearly forgotten political scientist named William Yandell Elliott (1896-1979). Though I believe that

Ferguson sympathizes rather excessively with Kissinger, I will concede that Ferguson is right in trying to recover Elliott from obscurity, and framing him as a central figure among the national-security intellectuals of the mid-20th century.

The context of Elliott's first appearance in this book is a discussion of a decision Kissinger had to make in the late 1940s as an undergraduate concentrating in government (Harvard parlance for what in other universities would be called "majoring in political science"). Kissinger chose Elliott as his senior faculty adviser. Ferguson tells us this, but then oddly starts to discuss one negative implication: that Kissinger therefore did *not* select Carl Friedrich for that role in his life, though Friedrich would have been "the more obvious" choice. So Ferguson goes off immediately on a tangent about Friedrich and his reputation at the time.

Eventually, we come back to Elliott. He was known then as the author of *The Pragmatic Revolt in Politics* (1928), a harsh indictment of William James' pragmatism. Pragmatism is a philosophy to which (full disclosure) this reviewer adheres, but which Elliott saw as anti-intellectual at its core and as consequently complicit in movements then on the rise in Europe, including both fascism and syndicalism. Elliott put forward his own theory of what he called the "co-organic state," a theory that was intended to save democratically organized nation states from what Ferguson, paraphrasing Elliott, calls "the supposed subversions of the pragmatists."

Elliott approved of the League of Nations and in general of Woodrow Wilson's vision of extending the constitutional machinery of the more enlightened nations onto the world stage. He saw *this* vision as Kantian and he saw Kant as a sort of anti-James, the antidote to the badness of pragmatism.

Elliott was also rare among the political scientists of his day in his concern with the politics of strategic commodities. He coauthored *International Control in the Non-Ferrous Metals* (1938), which, in Ferguson's reading, "argued for an Anglo-American condominium to control the world's supply of nonferrous metals and other war matériel." This may ring bells for students of Kissinger's career.

By 1942, Elliott had a named chair at Harvard, and by the end of that decade he had young Henry Kissinger as a protégé. While Kissinger was still an undergraduate,

Elliott was writing enthusiastically of him that he is “more like a mature colleague than a student” and that he had never known a student with such “depth and philosophical insight.”

### The Meaning of History

Kissinger's senior thesis at Harvard, which was an incredible 388 pages long (“the longest-ever thesis written by a Harvard senior and the origin of the current limit on length,” writes Ferguson), bore the ambitious title “The Meaning of History.” At its core, it consisted of a compare-and-contrast exercise among three philosophers: Oswald Spengler, Arnold Toynbee, and Immanuel Kant. Spengler appears here as the apostle of gloom—the man associated with the idea that western civilization is involved in an inevitable decay just as other civilizations before it have decayed, and that it will die as they have died. Toynbee adopted much of Spengler's cyclical theory, but gave it a potentially optimistic twist—civilizations can revive themselves as they respond to the challenges they face. It is only a civilization that fails to respond to a trenchant challenge that is doomed to decay.

Toynbee also postulated that history has a goal, a *telos*. Human history is at heart the development of a single civilization that will span the globe, incorporate all the achievements of the several civilizations of its past, and be at peace with itself. Mankind, he wrote, “must become one family or destroy itself.”

The undergraduate Kissinger, with a young intellectual's confidence, rejected Spengler for his failure to find a place for human freedom in the world, and dismissed Toynbee's combination of erudition and teleology as the “superimposition of an empirical method on a theological foundation.”

These adverse findings, and Elliott's influence, sent Kissinger back to Kantian idealism. Kant distinguished between the phenomenal world (the world as it appears to us), in which everything is deterministic, and a noumenal world (the unperceivable reality), which has room for freedom. In this Kantian notion, Kissinger finds the answer to his original double question—the meaning of history and the place of freedom—writing, “Purposiveness is not revealed by phenomenal reality but constitutes the resolve of a soul.”

This answer leads Kissinger, again as a good student of Elliott's, to an anti-pragmatic lesson. The international scene manifests

as a competition of systems, defined largely as economic systems. Under the influence of pragmatism, discussion of this scene, and of its history, can turn into an argument about the relative efficiency of those systems. But, in encouraging the argument about efficiency, pragmatism commits a grave error because that issue “is on the plane of objective necessity and therefore debatable.”

By this Kissinger means that a pragmatic argument about efficiency is an argument about what goes on in the external world, the world outside our minds, the world that (as idealists argue) can't even be proven to exist. On the other hand, by understanding the noumenally real nature of freedom, one comes to reject totalitarianism in a less “debatable” way, a way that would survive the discovery that it might be economically more efficient.

Think about that. Doesn't it mean that the meaning of history is that history has no meaning? Such meaning as we have in life on this view belongs to an inward world cut off from history, so, as to history (surely a phenomenal study—a study about the world of teacups and saddled horses outside the skulls of the historians), we have a Kantian license to be nihilists. In the outer world, for all this philosophizing can tell us, only power exists; there are only winners and losers. Those who dislike this can find their compensation inside themselves, in disregard of history.

That wasn't Kant's interpretation of Kant. Indeed, Kant wrote a book about *Perpetual Peace*, expounding on his own conception of political progress. Toynbee was a bit like the Kant of *Perpetual Peace*. But Ferguson says that Kissinger thought he had “caught Kant out,” that is, that he had caught Kant failing to be sufficiently Kantian in that book, failing to stay true to the message of his more famous *Critiques*.

### Pragmatism Looks Good After All

So it seems that Kissinger, with Elliott's warrant, took the Kantian license to be a nihilist about history and politics right off Kant's desk, and did so in defiance of Kant himself.

This Elliott/Kissinger sort of Kantian, which, as noted above, has its roots in a rebellion against pragmatism, is the sort of thing that makes pragmatism look good. But more of that thought in a bit.

After getting his bachelor's degree and after another brief sojourn in Germany, Kissinger returned to America and Harvard

and decided to pursue a doctorate in government with Elliott as his dissertation adviser. Having made that decision, he turned for the subject of his dissertation to the early 19th century. His dissertation described how Metternich and Lord Castlereagh restored equilibrium in Europe after the disaster of the Napoleonic wars.

This dissertation has been much discussed by earlier Kissinger biographers. Ferguson makes the case that they have generally failed to understand it. Many have thought that Kissinger identified with Metternich and sought to negotiate world equilibrium on behalf of the United States in the Nixon and Ford years in much the way that Metternich on behalf of Austria had worked to place his empire within a continent-wide equilibrium. But Ferguson thinks that that misses the point. Kissinger wasn't identifying with any of the individuals who figured in his account, and is sometimes quite damning about Metternich in particular, writing about his “smug self-satisfaction,” for example. Kissinger identifies, rather, with the Big Picture into which his characters fit.

What was the Big Picture? It was this: When equilibrium fails, the world has to pass through much chaos before another order can come about. And when a revolution arises, when it becomes something more than so many idiosyncratic plots or sporadic unrest, the equilibrium has already failed. So an intelligent conservatism, the sort with which Kissinger at this point identified himself, cannot be about opposing revolution, but has to be about forestalling revolutions, about managing things so that revolutions don't arise and don't need to be opposed frontally. In short, when conservatism has to become counter-revolutionary, it has already lost.

Those abstractions apply to Metternich's situation thus: The wave of revolution in Europe that began in 1787 destroyed the old order, making proper conservatism impossible for decades. The continent had to pass through a vast amount of bloodshed and disorder, until the general revulsion against that condition finally made a new order possible. Metternich, Castlereagh, and others were the executive officers of that general revulsion, the realizers of that possibility. A new order, and so a renewal of conservatism that was not merely counter-revolution, that was *for* something rather than just counter to something, became possible.

That new equilibrium lasted, more or less, until 1914. Then Europe broke down

into another long period, a bit longer than 30 years, again with vast bloodshed and chaos. The Cold War that had developed in the late 1940s, when Kissinger was first studying under Elliott, constituted a new equilibrium. So others were playing the part of Metternich and Castlereagh. Far from being their imitator, Kissinger was their passive though admiring observer. People such as George F. Kennan and George C. Marshall (of the Marshall Plan) might be considered the analogs of Metternich and Castlereagh—their heirs in the late 1940s, the re-creators of equilibrium. Kennan, Marshall, and others re-created their world's equilibrium, which is what conservatives thereafter—including, if we may project a bit, Presidents Nixon and Ford from 1968-1976—were striving to conserve, as they sought to forestall another analogous revolution and period of turmoil.

### Connecting Some Dots

Thus, as Ferguson reads Kissinger, he was in this period through his study of post-Napoleonic government developing his own idiosyncratic sort of conservatism, influenced by Kant via Elliott, but distinct from “the more common forms of American conservatism,” with which his relationship would “never be an easy one.”

One thinks (flashing ahead, well beyond the scope of this first volume) of the presidential nomination contest in the Republican Party in 1976, when Kissinger was one and perhaps even the key bone of contention between President Gerald Ford and Governor Ronald Reagan. Ford, with Kissinger, was willing to cede sovereignty of the Canal Zone to Panama; Reagan was not. The eventual winner of the general election, President Jimmy Carter, would follow up on and successfully conclude the bargaining to that effect. But the example perhaps clarifies the difference between forestalling revolutions and combating them. Ford and Kissinger might reasonably have thought that they were forestalling revolution in Panama by ceding the land around the canal on terms that secured what was most important to a world-straddling empire: the right of passage.

But let us back up and connect some dots. What did Kissinger as a graduate student take from his undergraduate study of Kantianism in the context of the meaning of history? How did Kant's ideas apply to the study of Metternich and the meaning of some old-school European diplomacy?

The impression one takes away is that

Kant's work, studied through the prism of Elliott's interpretations, gave Kissinger the sense that moral action requires the choice of the least of the available evils. The phenomenal world is inherently sloppy, statesmen deal with crooked timber, and all actions involve risk, yet action in the face of our own ignorance is required. So much evil may be done in the world in the reasonable expectation of forestalling greater evils, and the greater evil was represented in the young Kissinger's developing thought by the breakdown of order inherent in revolutions and Bonapartisms.

Now, let us defy Elliott's anti-pragmatism and ask the forbidden question: Did it work? How well did the policies inspired by this particular variant of Kantianism serve the country for which Elliott's disciple labored? (Let's ignore just for convenience the question of how well that country's policies were serving the rest of the planet.) We have to wait for Ferguson's second volume for his accounting, but, in the meantime, perhaps we can make do with Greg Grandin's summary in *The Nation* (Feb. 5, 2016), commenting on an odd exchange in a presidential debate in which Sec. Hillary Clinton, to Sen. Bernie Sanders' dismay, seemed to be bragging about her closeness with Kissinger.

Grandin replied in part:

Pull but one string from the current tangle of today's multiple foreign policy crises, and odds are it will lead back to something Kissinger did between 1968 and 1977. Over-reliance on Saudi oil? That's Kissinger. Blowback from the instrumental use of radical Islam to destabilize Soviet allies? Again, Kissinger. An unstable arms race in the Middle East? Check, Kissinger. Sunni-Shia rivalry? Yup, Kissinger. The impasse in Israel-Palestine? Kissinger. Radicalization of Iran? “An act of folly” was how veteran diplomat George Ball described Kissinger's relationship to the Shah. Militarization of the Persian Gulf? Kissinger, Kissinger, Kissinger.

Indeed. The record will likely make any candid observer hanker for the most simpleminded of pragmatisms, and value it over the odd and disastrous consequences of the legacy, at once idealistic and nihilist, that Elliott passed along with Kant's imprimatur to his favored student.

### The Master and Student Fell Out

The Elliott-Kissinger relationship, as portrayed in this volume, has a fitting conclusion, a falling-out suitable for classic fiction. In 1959 and 1960, with Vice President Nixon seeking the Republican nomination for President, Elliott sought to become a member of Nixon's inner circle. He may have fancied himself one of the next administration's foreign policy insiders.

Elliott now saw his protégé Kissinger as a rival in the game of courtship. At this time, Kissinger was an adviser to Nelson Rockefeller, governor of New York. Rockefeller was always seeking to burnish his own foreign-policy credentials to bolster a contemplated presidential campaign of his own. So it is unsurprising that, when Elliott wrote to Nixon in January 1960 to advise him to have a meeting-of-the-minds with Rockefeller, Elliott mentioned Kissinger in this connection. What may be surprising is that this mention was a backstab.

“For some time I have thought that the best role for me in this matter [the Nixon-Rockefeller talks] was not to operate through Henry Kissinger. I find that intermediary a doubtful channel, and now one disappointed in [his] ambitions by Nelson's very wise choice” not to contest the primaries. That is what Elliott wrote; seeking to keep his old student off the gravy train that he thought he had clambered onto. As Ferguson puts it, Elliott had decided that Kissinger “had become too big for his boots.”

Elliott's attempt to muscle Kissinger out of a position in the executive branch and to create one for himself turned out to be fruitless. This was, of course, because Nixon lost the 1960 election to John F. Kennedy. After Nixon won the election in 1968, however, Kissinger gained precisely the kind of role that Elliott had apparently envisaged for himself.

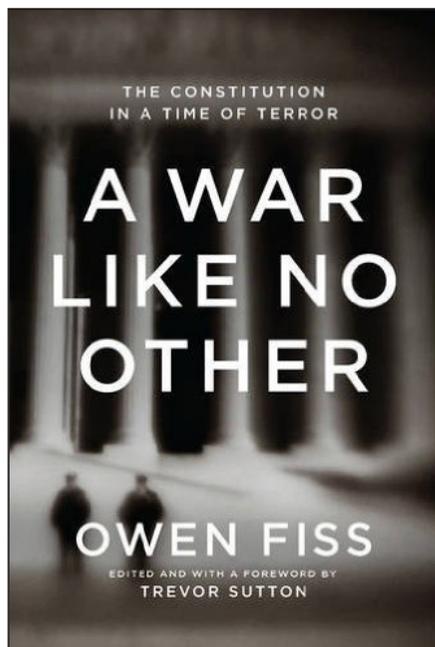
According to historian Andrew Scott Cooper, who cites James Schlesinger, Nixon's CIA director for five months in 1973 and later his Secretary of Defense, the Nixon/Kissinger policy toward the Shah of Iran began with “we've got to give him what he needs” in order to make him our surrogate guardian of the Gulf, and then evolved into “we've got to give him what he wants.” It is clear in hindsight that this inflation of the Shah, motivated by the concern for resources that Kissinger may have learned at Elliott's knee, contributed mightily to the destabilization of the entire

region. Our ongoing 21st century wars in the Middle East have much less to do with the abstraction of “terrorism” than we imagine, and more to do with access to resources. They are at their core an effort to pick up the pieces that remained after Kissinger’s reliance on a Persian surrogate blew up spectacularly.

As we continue to send our young men and women to fight in the Middle East, we will continue to pay the price. ☉

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*Christopher Faille, a member of the Connecticut bar, is the author of Gambling with Borrowed Chips, a heretical account of the Global Financial Crisis of 2007-08. He writes regularly for MJINews, a website for actual and potential investors in the legal marijuana industry.*



## A War Like No Other: The Constitution in a Time of Terror

By Owen Fiss

The New Press, New York, NY, 2015. 332 pages, \$27.95.

Reviewed by Elizabeth Kelley

It has been more than 14 years since the War on Terror began. As lawyers, our lives and our practices have been forever altered, from having to show a photo ID and opening our briefcases while going through courthouse security to representing the growing number of clients who have post-traumatic stress disorder or traumatic brain injury because of the wars in Afghanistan and Iraq. But,

unless we practice national security or civil rights law, we are unlikely to keep up with the cascade of court decisions, legislative actions, and executive branch statements and policies concerning matters such as drones, extraordinary rendition, Guantánamo Bay, and wiretapping. Helping to fill this need is *A War Like No Other: The Constitution in a Time of Terror*, by Owen Fiss, edited and with a forward by Trevor Sutton.

Fiss is professor emeritus of law at Yale University. He clerked for Thurgood Marshall at the U.S. Court of Appeals and for William J. Brennan Jr. at the U.S. Supreme Court. He is one of this country’s most-cited professors on constitutional law. Sutton served as a law clerk on the U.S. Court of Appeals and is a recent graduate of Yale Law School.

*A War Like No Other* is concise and straightforward. It has 10 chapters by Fiss with a prologue to each by Sutton. In his forward to the book, Sutton states its theme:

Linking all the essays is Fiss’s sustained concern for the offense done to the Constitution by the political branches in the name of public safety, and the refusal of the judiciary to hold those branches accountable. As Fiss observes, practices that at first seemed like temporary excesses of the Bush administration have become entrenched legal doctrines perpetuated by President Obama and enshrined in judicial opinions. How these constitutional aberrations outlasted the political climate that created them constitutes the central narrative of this volume.

Indeed, *A War Like No Other* is a no-holds-barred critique of everyone and every institution involved in what Fiss calls the “debasement” of the Constitution, deriving from “judicial cowardice” to President Obama’s “lofty rhetoric about the future” that substituted for action aimed at abuses of the Constitution:

At his first press conference, President Obama was asked to comment on Senator Patrick Leahy’s proposal for the establishment of a truth commission. He then said that he was more concerned with the future than with the past. ... The willingness of Obama to speak only to the future was ill-conceived. He also had a duty to

seek an accounting for the wrongs of the past. He should have prosecuted those who engaged in practices clearly understood to be torture and, on top of that, allowed those who were in fact tortured to pursue civil remedies.

What, then, is the answer? Can a balance be achieved between national security and civil liberties? Chapter 5, “Law is Everywhere,” provides an example. This chapter profiles Aharon Barak, a retired justice of the Israeli Supreme Court and a close friend of Fiss’. Israel has lived with violence ever since its founding and is exposed to it on a daily basis. However, Barak, in his judicial decisions, forged a path that our Supreme Court justices could emulate:

In all this—his refusal to defer to the military in the trade-off of values, his insistence on the least restrictive alternative, and, finally, his application of the requirement that the harm to fundamental values not be disproportionate to the gain in security—Justice Barak held firm in his attachment to the law and the belief that the law is the embodiment of reason in the service of humanity. His method was to demand, systematically and relentlessly, that any sacrifices of rights required by a proper regard for human dignity be fully and rationally justified.

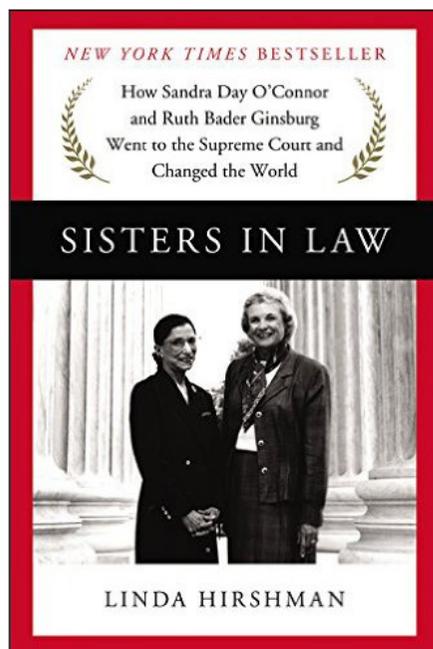
If *A War Like No Other* could be made stronger, it would be by including a chapter on the impact of post-Sept. 11 measures that seem far removed from the lives of the ordinary legal practitioner and ordinary citizen. For instance, what is the impact, if any, of the continued existence of the prison at Guantánamo on the rights of pre-trial detainees? Does the largely unfettered use of drones abroad influence acceptance and regulation of their domestic use? Have decisions on warrantless wiretapping paved the way for federal agencies to require private industry to design encryption technology with a backdoor accessible to law enforcement?

Both Fiss and Sutton are passionate advocates for “one constitution in war and peace,” and *A War Like No Other* is a passionate piece of scholarship. ☉

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*Elizabeth Kelley is a criminal defense lawyer based in Spokane, Wash., who has a nation-*

wide practice representing persons with mental disabilities. She is serving her third term on the board of the National Association of Criminal Defense Lawyers. She has been appointed to the National Advisory Committee of The ARC's National Center on Criminal Justice and Disability. She hosts two Internet radio shows, *CelebrityCourt* and *AuthorChats*. She can be reached at [ZealousAdvocacy@aol.com](mailto:ZealousAdvocacy@aol.com).



## Sisters in Law: How Sandra Day O'Connor and Ruth Bader Ginsburg Went to the Supreme Court and Changed the World

By Linda Hirshman

HarperCollins Publishers, New York, NY, 2015.

390 pages, \$28.99.

Reviewed by Elizabeth Kelley

When a book's dust jacket boasts glowing endorsements from both Jeffrey Toobin, author of *The Nine* and *The Oath*, and former Justice John Paul Stevens, one expects that the book is a must-read. *Sisters in Law: How Sandra Day O'Connor and Ruth Bader Ginsburg Went to the Supreme Court and Changed the World* confirms this expectation.

We live in an age in which Supreme Court justices are celebrities. Sonia Sotomayor was greeted like a rock star when she visited Puerto Rico. Ruth Bader Ginsburg is fondly known as Notorious RBG—a play on the name of the rap star Notorious BIG.

A wealth of YouTube videos features the always colorful late Antonin Scalia. A recent flood of books has fed the frenzy. In addition to Jeffrey Toobin's books noted above, Joan Biskupic released *Sandra Day O'Connor: How the First Woman on the Supreme Court Became Its Most Influential Justice* and *Breaking In: The Rise of Sonia Sotomayor and the Politics of Justice*. In addition, Marcia Coyle has released *The Roberts Court: The Struggle for the Constitution*. Several justices and former justices have themselves published books in the last couple of years: Stevens, O'Connor, Sotomayor, and Scalia, as well as Stephen Breyer.

Add *Sisters in Law* to the mix. Indeed, the omission of dashes between the words in the title is significant. As the book shows, O'Connor and Ginsburg are as unrelated as can be: the former a Junior League president from Phoenix, the latter an ACLU lawyer from Brooklyn. But what binds them is the law—the law as a profession and as a tool for achieving equality for women.

As Hirshman describes in detail, both O'Connor and Ginsburg are products of their time. Both married young and had decades-long marriages to loyal, devoted spouses, both now deceased. Both women had children. Both enjoyed American upper-middle-class comforts. But both were also blessed with keen intellects and a desire to participate in the wider world. However, the wider world of the 1960s, 1970s, and 1980s was one where women were not always allowed to be equal participants. The legal profession was particularly unwelcoming.

Although O'Connor graduated third in her class from Stanford Law School (behind William Rehnquist), at least 40 law firms refused to interview her, and she eventually found employment as a deputy county attorney in San Mateo, Calif., after she offered to work for no salary and without an office, sharing space with a secretary. And the path was no easier for Ginsburg. At Harvard,

[Dean] Erwin Griswold gave a dinner party to find out how the women justified taking a place a man would otherwise have had. Following a well-established tradition, each of the women students was escorted by a male faculty member. ... In due course, Griswold called on Ginsburg to justify her presence in the law school. To her lifelong unending astonishment, the future feminist icon

answered the dean, "it's important for wives to understand their husband's work."

O'Connor and Ginsburg were not immune from dismissive and patronizing attitudes once they joined the high court. For example, shortly after Ginsburg arrived at the Court, the case of *J.E.B. v. Alabama ex rel. T.B.*, which concerned sex discrimination in jury service, came before it. Hirshman gives us the following behind-the-scenes view:

Since the chief was in the dissent, after conference, the decision about who should write the opinion fell to the senior in the liberal majority, Harry Blackmun. Giving the nod to Ginsburg, the author of the law of women's equality on juries, would have seemed the obvious move. But instead he kept it for himself.

Blackmun's tone deafness vis-a-vis his female colleagues was well known. Although he denied it at the time, the opening of his papers revealed that he resented Justice O'Connor from the get-go. After O'Connor was selected, he grouched about her overnight fame and her energetic embrace of the Washington social scene. His clerks report that he did a wicked imitation of his female colleague's distinctive loud, nasal diction. Blackmun had actually never thought that much of Ginsburg either; when the legendary Supreme Court litigator first appeared, he gave her a C+ on her oral argument.

Hirshman also tells the story of a visit to the Court by the couple who introduced Chief Justice Warren Burger to O'Connor, then an Arizona state court judge:

When the Driggses arrived, Chief Justice Burger was waiting to crow over the great outcome of their houseboat trip all those years before. What an addition Justice O'Connor made to the court, he said. Why, he made it his business to use his powers as the chief to single her out to write the opinions in really important cases because he thought so highly of her. It was an extraordinary admission from Burger, who had long been accused of

manipulating the assignment power, in violation of the unspoken norms of the institution he headed. Only thing is: it wasn't true. Even after five years on the tribunal, and numerous instances where the chief unexpectedly changed his position when he saw he would be on the losing side, Burger never assigned O'Connor to write the Court's opinion in any big cases.

How, then, did O'Connor and Ginsburg use the law to change the world, as *Sisters in Law's* subtitle claims they did? Very similarly and very differently. Although Hirshman admires both women, she does not paint them as being above the rough and tumble required to succeed in the legal profession and, ultimately, to be named to the Supreme Court. She often describes O'Connor in political terms, as calculating what battles to fight while she served in the Arizona legislature and how to vote on the high court. And one is left to ponder what Justice William Brennan meant when he called his "over-the-top" (Hirshman's term) dissent, which insulted O'Connor during her first year on the Court, "the worst mistake I ever made." As for Ginsburg, during her time at the ACLU, she revealed a "steel-trap mind behind the velvet modesty" when jousting over which lawyers should handle oral arguments before the Supreme Court.

*Sisters in Law's* dust jacket describes the book's author, Linda Hirshman, as a lawyer and a cultural historian. She is most known for her highly controversial book *Get to Work: A Manifesto for Women of*

*the World*. In *Sisters in Law*, Hirshman sees the lives and careers of O'Connor and Ginsburg through a feminist lens, and, accordingly, wrote *Sisters in Law* with a feminist pen.

Hirshman describes the personal element behind the word "sisters" in the title of the book:

And from the beginning she [O'Connor] did what she could to make sure Ginsburg succeeded. Ginsburg's first assignment was not the traditional "dog" case, where the Court is unanimous and the opinion uncomplicated. Instead, Chief Justice Rehnquist handed her a contentious 6-3 decision on one of the most complex federal statutes. "Sandra," Ginsburg asked her predecessor plaintively, "how can he do this to me?" O'Connor (who was on the other side in the decision) made her typical flat-tire response. "Just do it." Oh, and do it before he makes the next set of assignments, she advised. O'Connor knew—and it was one of the many unwritten rules of the institution that newbies must learn somewhere—that Chief Justice Rehnquist would not give Ginsburg another assignment until she had turned in the one she had. "Typical," Ginsburg remembered years later, of her predecessor's no-nonsense guidance. She called O'Connor "the most helpful big sister anyone could have." O'Connor welcomed her sister's delivery of her first opinion with a note: "This is your first opinion for the

Court, it is a fine one, I look forward to many more."

After she was appointed to the Court, O'Connor was treated for breast cancer. Later, when Ginsburg was treated for colon cancer, O'Connor gave her colleague advice about when to schedule treatments in order not to miss any conferences among the justices or oral arguments.

In *Sisters in Law*, Hirshman describes both O'Connor and Ginsburg as courageous and focused. They never believed that their genders should be a barrier. Instead, they persevered. They maximized their educations, talents, and prospects. But their unique experiences as women gave them special sensitivity to gender matters before the Court. One was described as the only woman whom Ronald Reagan would have found palatable to nominate, and the other was called the Thurgood Marshall for women, and both have indeed managed to change the world. ☺

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*Elizabeth Kelley is a criminal defense lawyer based in Spokane, Wash., who has a nationwide practice representing persons with mental disabilities. She is serving her third term on the board of the National Association of Criminal Defense Lawyers. She has been appointed to the National Advisory Committee of The ARC's National Center on Criminal Justice and Disability. She hosts two Internet radio shows, CelebrityCourt and AuthorChats. She can be reached at ZealousAdvocacy@aol.com.*

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self-incriminating statement was 'compelled' despite the fact that the law enforcement authorities adhered to the dictates of *Miranda* are rare."). *Accord Dickerson v. United States*, 530 U.S. 428, 444 (2000).

<sup>58</sup>For example, a suspect's invocation of his or her rights is "scrupulously honored" if the police wait half an hour and recite the *Miranda* warning again before resuming questioning. *See United States v. Hsu*, 852 F.2d 407, 409-410 (9th Cir. 1988) (citing *Michigan v. Mosley*, 423 U.S. 96 (1975)).

<sup>59</sup>*Missouri v. Seibert*, 542 U.S. 600, 608-609 (2004) (Souter, J.) (citing *Berkemer*, 468 U.S. at 433, n. 20).

<sup>60</sup>*Florida v. Powell*, 559 U.S. 50, 60 (2010)

(Ginsburg, J.) ("This Court has never indicated that the rigidity of *Miranda* extends to the precise formulation of the warnings given a criminal defendant.") (quoting *California v. Prysock*, 453 U.S. 355, 359 (1981)).

<sup>61</sup>*Powell*, 559 U.S. at 62. *See also Johnson v. Laxalt*, 624 Fed. Appx. 492 (9th Cir. 2015) (officer's "rambling ... ambiguous" response to the suspect's question concerning the scope of his possible waiver of *Miranda* construed against the suspect).

<sup>62</sup>*J.D.B.*, 564 U.S. at 269 (Sotomayor, J.) (citations omitted).

<sup>63</sup>*Id.* at 288 (Alito, J., dissenting).

<sup>64</sup>*Berghuis v. Thompkins*, 560 U.S. 370, 382

(2010) (Kennedy, J.).

<sup>65</sup>*Id.* at 404 (Sotomayor, J., dissenting).

<sup>66</sup>*Salinas*, 133 S. Ct. at 2186 (Breyer, J., dissenting).

<sup>67</sup>*Dickerson*, 530 U.S. at 443.

<sup>68</sup>*Berghuis*, 560 U.S. at 388.