

***Kafka Comes to America:  
Fighting for Justice in the War on  
Terror***

By Steven T. Wax

*Other Press, New York, NY, 2008. 380 pages,  
\$25.95.*

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REVIEWED BY JON M. SANDS

Brandon Mayfield was alleged to be a terrorist with ties to Al Qaeda and to have helped explode a bomb in Madrid that killed nearly 200 people. He was facing the death penalty. If you were his public defender, what would you say to him at your first meeting? In this case, Steven Wax said, “We need to deal with reality and be honest with each other. I will never pull any punches with you. You’re going to know exactly what I know about the case. There are some tough decisions that you will have to make, and my job is to help you make them, armed with the best and most complete advice I can give you. You may not always like what I say and, when you don’t, remember this conversation and that I can serve you best with complete honesty between us.” This is what Wax says to all his clients, and he is true to his word.

Brandon Mayfield, a lawyer, was suspected in the Madrid bombings because of a supposedly damning fingerprint found on a plastic bag associated with a terrorist cell. It was Wax’s mission to defend him as best as he could, and Wax did so, exemplifying the best traditions of the legal profession and the guarantees of the Sixth Amendment. *Kafka Comes to America* is Wax’s account of representing Mayfield, told in the way Wax said that he would deal with Mayfield: with honesty and with no pulled punches. And what a story it is! Wax and I are colleagues; he is the federal public defender for the District of Oregon, and I am the federal public defender for the District of Arizona. Knowing Wax, it is impossible not to be affected by his grace and commitment to indigent defense. Yet, although one can be committed to defending indigent clients charged with ordinary crimes, it is something else entirely to find one-

self embroiled in the war on terror and defending those vilified by the Bush administration and despised by the country. Everyone believes that these suspects are guilty. Does it matter that they get a trial? It should matter, because Brandon Mayfield and Adel Hamad, another alleged terrorist whom Wax represented, were innocent.

On March 11, 2004, a bomb exploded in the Madrid subway. The investigation soon centered on an Al Qaeda terrorist cell with North African connections. One piece of evidence was a plastic bag with a fingerprint. The FBI assisted the Spanish investigation and fed the fingerprint into a computer database. The investigators were surprised when this fingerprint led to a match with an American citizen, Brandon Mayfield. Mayfield was an honorably discharged soldier, a husband and father, and a Muslim, who had converted to Islam at the behest of his wife, whose father was Egyptian and was teaching at an American college. The Spanish authorities did not believe that the fingerprints matched, but the FBI’s so-called experts, in their zeal, viewed the evidence through their prism of bias and saw what they wanted to see.

The supposed match was a botched comparison, but this was not discovered until later. In the meantime, the FBI thought that it had its man and began to connect the dots of his life, rather than re-examine the points of comparison between the ridges, loops, and whorls of the two sets of fingerprints. To the FBI, Mayfield’s life conveyed circumstantial evidence of guilt, because Mayfield had represented Arabs on immigration charges, and, in this capacity, he had ties with a known terrorist. Therefore, he must have been involved in the bombing. In the military, Mayfield had worked on Patriot missiles; therefore, in the FBI’s eyes, he must know about explosives. His conversion to Islam surely indicated a radicalization of his views, and his Internet searches of the news of terrorist attacks must suggest that he himself planned a terrorist attack. Mayfield’s home was subject to “sneak and peek” searches. And then, on May 6, 2004, he was arrested, his office and files were seized, his home was ransacked,

his family was frightened, and his life became a nightmare of accusations. It would take Wax and his team several harrowing weeks of working feverishly to reveal the FBI’s error. (For a history of forensic fingerprints, see Simon A. Cole, *Suspect Identities: A History of Fingerprints and Criminal Identification*, which I reviewed in the August 2003 issue of *The Federal Lawyer*.)

One rewarding feature of *Kafka Comes to America* is Wax’s firsthand account of how a public defender goes about representing a client. Wax takes us through the steps—from the call from the court informing the public defenders’ office that an initial hearing has been set on a new defendant, to the meeting in lock-up, to the initial court appearances, to the dawning realization of the scope of the case. Wax makes clear the enormous responsibility of representing a person who is facing the death penalty for terrorism and who insists that he is completely and absolutely innocent. Defense counsel are usually inured to such protestations and become all the more skeptical of them when the prosecution claims to have fingerprints. But Wax makes clear to Mayfield that he will defend him zealously, no matter what; as Wax tells Mayfield, in pressing him about what really happened, “whether or not I believe you are innocent is *not* the issue. I’m going to fight just as hard for you whether you are involved or not. The truth matters in deciding what we do, not whether I fight.” Even with his legal training, Mayfield was skeptical of Wax’s assurances.

Wax takes us through his decisions and the hesitancy he felt, in light of the fingerprint match, at banking so much on his client’s protestations of innocence. He re-creates the atmosphere of fear, and the government’s whipping up of opinion against Mayfield by leaking information to the press as well as misinformation on “deep background.” Wax, in the meantime, began to examine the government’s case, but he encountered a problem: the government was not in the mood to share its evidence of Mayfield’s innocence and hid behind claims of “classified information” and national

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security. Wax also had to consider the risks he would run in asking the court to allow his own expert to examine the fingerprint; for example, if the request was granted, the government might try to come up with a new theory to show Mayfield's complicity in the attack. We know the ending of Mayfield's experience, but the story is still engrossing because of Wax's and his team's doubts, concerns, and calculations. Wax's depictions of in-chamber conversations with a skeptical judge and the dealings with the good cop/bad cop prosecutors all ring true. Some bruised feelings may come out in Wax's characterizations, but nothing that seems like an attempt at settling the score. Assistant U.S. attorneys who are assigned to prosecuting accused terrorists, especially those from the main office of the U.S. Department of Justice and not from the local districts, appeared to be true believers; those with doubts kept them to themselves.

Wax's efforts led to the unraveling of the case. New fingerprint experts ruled out Mayfield as a suspect. The subsequent investigation revealed a host of errors and a great deal of sloppy work on the part of the FBI and its so-called experts; it is startling just how inept the FBI was and the degree to which its investigators wore blinders. Heads justifiably rolled, and new protocols were put in place. Mayfield himself received a settlement in a civil suit, but not before other government abuses, including active misleading of the courts, were revealed. All in all, this is a sordid account of a prosecution, and it should bring shame to the government. Of course, the Department of Justice and the Bush administration remain steadfast in the rightness of their cause and their interpretation of executive power. One does not sleep any easier after finishing this book.

Adel Hamad, Wax's other client who was charged in the war on terror, was a Sudanese hospital administrator, who was picked up in Pakistan in 2002 by Pakistani security. Questioned about providing aid and comfort to terrorists, Hamad protested his innocence. He was assured that his papers were in order and that he would be released shortly. Instead, he was taken to Guantanamo

as an enemy combatant. Held for years, he was finally able to challenge his confinement when, in *Rasul v. Bush*, 542 U.S. 466 (2004), the Supreme Court held that it had jurisdiction to consider habeas petitions from Guantanamo inmates. Hamad penned the following:

I request your honorable court to look into my request with consideration and that is that I object to my detention at the Guantánamo Bay, Cuba detention camp as an enemy combatant. Therefore I wish to file a petition for a Writ of Habeas Corpus. With my appreciation and my respect to you and my trust you will do me justice.

This habeas corpus petition, the venerable Great Writ, landed on Wax's desk by virtue of his job as a federal defender. What follows is the Kafkaesque experience of trying to defend someone without knowing the evidence or even the charges filed against him. This maddening experience is still going on. In Kafka's *The Trial*, Josef K. is arrested for a crime that is never revealed, and he is tried, in secret, on evidence that is never revealed. Wax quotes from the novel:

K. must remember that the proceedings were not public; they could certainly, if the court considered it necessary become public, but the Law did not prescribe that they must be made public. Naturally, therefore, the legal records of the case, and above all the actual charge-sheets, were inaccessible to the accused and his counsel, consequently one did not know in general, or at least did not know with any precision, what charges to meet in the first plea.

"Translated to Guantanamo," Wax writes, "*The Trial* would go like this:

We say you are guilty of being an enemy combatant but won't tell you why or what the evidence we have. We won't give you a lawyer in our CSRT proceeding, won't let your habeas corpus lawyer help you there, and won't let him tell

you anything he learns from any classified source. Now defend yourself."

Wax's account of the jury-rigged proceedings at Guantanamo, which he effectively interweaves with his account of the Mayfield case, demonstrates the craft and persistence of counsel. Somehow establishing trust with a client who had no reason to trust him, Wax and his defense team get crucial information that corroborates Hamad's story of his whereabouts and charitable mission. Investigation in war-torn and dangerous countries ensues as well as more trips to Guantanamo, and finally, despite the tribunal's skepticism, Wax secured Hamad's release.

The efforts of lawyers like Wax demonstrate how important counsel is. Providing independent counsel is not a wink to due process, but gives innocent people the ability to defend themselves against the power of the state. Even if a defendant is guilty, the verdict is meaningful only if he or she has had an adequate defense.

Wax writes in an understated manner; he does not provide soaring rhetoric, but rather a straightforward account of a professional at his craft, which is nothing more and nothing less than effectuating the Sixth Amendment's right to counsel. In recounting his experiences, Wax had to re-create conversations, and they ring true. (Of course, he secured his clients' permission before revealing any confidential communications.) I'm a bit uneasy about re-creating dialogue; turns of phrases and that right riposte come out better the second time around. But Wax, to his credit, keeps the dialogue spare and believable. The epigrams that head each chapter come from a wide range of sources—judicial opinions, literature, Yiddish proverbs—and appear to be phrases that he has used, not drawn from books of quotations.

Why does Wax do this work? *Kafka Comes to America* also tells his story. Upon graduating from Harvard Law School and having experienced the civil rights movement and student unrest, Wax devoted himself to public service in order, in a sense, to repay a country that had offered refuge to his grandpar-

ents when they fled anti-Semitism, pogroms, and state terror in Europe. First as a prosecutor and now for the past 30-plus years as a public defender, Wax has been a dedicated public servant. In this way, he rebuts Justice Antonin Scalia, who, in a recent C-SPAN interview, expressed surprise about the job, saying that “a public defender from Podunk is so good, is so smart, is so competent. And I ask myself, ‘What is she doing being a public defender in Podunk? Why isn’t she inventing the automobile or, you know, doing something useful.’” Wax is doing something useful.

I know a judge who is on the Foreign Intelligence Surveillance Court. Occasionally we share the same plane to Washington, D.C. Would it be an inappropriate ex-parte proceeding if I pressed this book upon him to read on the plane? The book makes a great case for the defense. **TFL**

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## **Theodore Roosevelt: Preacher of Righteousness**

By Joshua David Hawley

Yale University Press, New Haven, CT, 2008.  
318 pages, \$35.00.

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REVIEWED BY HENRY S. COHN

Mark Twain once called Theodore Roosevelt (1858–1919) a “showy charlatan.” Joshua Hawley disagrees; in *Theodore Roosevelt: Preacher of Righteousness*, he demonstrates that Roosevelt had substance—that he had intellectual and philosophical bases for his actions. Although biography is an avocation for Hawley—he is now a law clerk for Chief Justice Roberts—his effort here is quite professional, and he adds a broader dimension to the historical record of one of our greatest Presidents.

Hawley takes the reader through the 60 years of Roosevelt’s life, setting forth what influenced him as a boy and a youth and describing the ideas he held as a young man and as an adult. As a child, Teddy developed severe asthma and was physically weak. Recovering bodily strength became his passion, and he read books and magazines that en-

couraged “manliness.” His favorite magazine was *Our Young Folks*, which admonished readers that “a strong building cannot be composed of weak timber.”

While an undergraduate at Harvard, Roosevelt’s love of the outdoors influenced his initial choice of a career as a naturalist. His favorite professor was Nathaniel Shaker, a paleontologist who taught Darwin’s theories and proposed that the Teutonic race was the final and perfect stage of human development. Roosevelt adopted this philosophy as his own. Racial superiority became a moral mandate requiring duty, character, and action. Roosevelt also came to admire the settlers of the American West, who he thought defined the country’s daring personality.

In 1878, when Roosevelt was 19, his father died. Roosevelt felt crushed and changed his plan to become a scientist, deciding instead to enter politics, in which his father, a wealthy businessman, had played a role. In 1881, Roosevelt dropped out of law school to run for the New York State Assembly in what he conceived of as a high-minded crusade for a better world. He was elected.

Roosevelt’s thinking was also shaped during the time that he recovered from the sudden death of his wife in childbirth in 1884. He resigned from the state legislature and traveled to the Badlands of the Dakota Territory, where, living with cowboys, he commenced writing his five volumes of American history. His themes were that the English language was synonymous with the progress of civilization and that Western civilization was characterized by a constant struggle. A man who struggles proves himself truly human.

Leaving the prairie, in 1886 Roosevelt remarried and ran unsuccessfully for mayor of New York City. In the 1888 presidential election, he campaigned for Benjamin Harrison, who, when he became President, appointed Roosevelt to the Civil Service Commission. Roosevelt served as Civil Service commissioner until 1895, when he became New York City’s police commissioner. In 1897, President McKinley appointed Roosevelt assistant secretary of the Navy. Roosevelt resigned from that position in 1898 to become a colonel in the First U.S. Volunteer Cavalry Regiment (the “Rough Riders”), whom he led up Kettle Hill and

San Juan Hill during the Spanish-American War. Following his military service, in 1898, Roosevelt was elected governor of New York. He had campaigned hard for William McKinley in the 1896 presidential election, replaced Garret Hobart as the Republican vice presidential candidate in 1900, and after McKinley was assassinated in 1901, found himself, at the age of 42, the youngest person ever to become President of the United States. (John F. Kennedy was the youngest person ever *elected* President.)

In the 1896 presidential campaign, Roosevelt had showed his conservative side in his attacks on William Jennings Bryan and the free silver platform. Roosevelt was also clearly anti-union, exploiting the public’s anxiety over union negotiating tactics. At the same time, Roosevelt realized that members of the working class had been neglected, and he declared that capitalists were members of the “wealthy criminal class.” By the time Roosevelt became President, he had become more progressive. He was influenced by a popular minister of the day, Washington Gladden, who strengthened Roosevelt’s view that salvation required the state to intervene on behalf of those in need. As Steve Courtney points out in his new book, *Joseph Twichell: The Life and Times of Mark Twain’s Closest Friend*, Roosevelt was a hero to liberal Protestants. To Twichell, who was the minister of the Asylum Hill Congregational Church in Hartford, Conn., Roosevelt was part of the “steady progress from age to age” of righteousness.

Theodore Roosevelt’s economic views at this time were shaped by Henry Carter Adams, an economist who urged that the government intervene in private market decisions. Especially after his massive victory in the 1904 election, Roosevelt took on the trusts and lobbied Congress to establish the Interstate Commerce Commission and the Food and Drug Administration. He claimed to be following the dictates of Edmund Burke and to cling to conservative principles as he tried to prevent class warfare.

As Roosevelt’s second term ended, he gave his blessing to his hand-picked successor, William Howard Taft, and went on an extensive hunting trip in Af-

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rica. But Taft proved to be a traditional Republican, favoring the tariff and having little interest in land conservation, and by 1910 Roosevelt was back on the campaign trail, seeking the Republican presidential nomination for 1912. Now he was in favor of the “New Nationalism,” a doctrine that was shocking for its time, as it enshrined what came to be called the welfare state. In his support for this doctrine, Roosevelt adopted the teachings of Herbert Croly, author of *The Promise of American Life* and soon to be editor of *The New Republic*. After studying Croly’s works, Roosevelt declared that he favored a policy of “more active governmental interference with social and economic conditions in this country than we have yet had.”

Hawley is at his finest in describing the pivotal 1912 election and the intellectual differences between Woodrow Wilson and Roosevelt, who was rejected by the Republicans and signed on with the Progressive Party. Roosevelt called Wilson a reactionary on the ground that Wilson would leave the destitute without governmental aid. Wilson, forming his views with the help of Louis Brandeis, called for individual freedom and open markets. He favored competition, not regulation, and believed that Roosevelt’s cure for social ills relied too much on government intervention. After Wilson defeated Roosevelt, however, he adopted many of Roosevelt’s views as his own.

Roosevelt died at the age of 60, drained by the death of his son Quentin in World War I. Roosevelt’s final sad years were spent as a political outcast, railing against the popular Woodrow Wilson and dabbling in matters such as eugenics. Joshua Hawley’s achievement is that he does not let us forget that, with all his idiosyncrasies, Theodore Roosevelt remains one of America’s great figures. Roosevelt’s preachy message is relevant to today’s politicians, who should recognize that politics is more than, in Hawley’s words, a “banal project of economic management”; good government also has its moral challenges. Politicians should add to their calls for the liberty of the individual a recognition that government must play a role in solving society’s problems,

thereby, in Hawley’s words, “protecting the activities that make us human and make us free.” **TFL**

*Henry S. Cohn is a judge of the Connecticut Superior Court.*

### ***The Annotated Cat: Under the Hats of Seuss and His Cats***

Introduction and Annotations by Philip Nel

Random House, New York, NY, 2007. 190 pages, \$30.00.

REVIEWED BY JON M. SANDS

Except for nascent members of the Federalist Society, very few of us grew up reading Supreme Court opinions or perusing the U.S. Code Annotated. Rather, we cut our literary teeth on *The Cat in the Hat* books and their supposed moral relativism. Now, more than 50 years since its publication in 1957, when, in Ellen Goodman’s words, *The Cat in the Hat* “worked like a karate chop on the weary little world of Dick, Jane and Spot,” a definitive annotated version of both *The Cat in the Hat* and *The Cat in the Hat Comes Back* has been published. *The Annotated Cat* will delight the obsessive lawyer in all of us.

*The Cat in the Hat* tells of a brother and a sister who, left alone at home, allow in a human-sized cat who is wearing a hat; the story that follows describes the mischief that ensues. In *The Cat in the Hat Comes Back*, the Cat returns with Little Cat A nested inside his hat. Little Cat A doffs his hat to reveal Little Cat B, who, in turn, reveals C, and so on down to the microscopic Little Cat Z, who turns out to be the key to the plot. *The Annotated Cat* contains the entirety of both books (including their covers), explicating the 236 words used in *The Cat in the Hat* and the 290 words in *The Cat in the Hat Comes Back*. Philip Nel’s annotations provide a biography of Theodor Seuss Geisel (Dr. Seuss) as well as a sociological snapshot of the time, including an examination of the cultural impact of the *The Cat in the Hat* books.

Children cannot read, the schools are

failing, and America is losing the education race. Is this today’s assessment? No, those were the fears in the 1950s, when *Life* and other mass-circulation magazines bemoaned the state of education in articles titled, “Why Johnny Can’t Read” and “Why Do Students Bog Down on the First R?” Part of the blame was placed on the teaching material used in primary grades, particularly on the dullness of the texts. Geisel, already a popular author of children’s books, convinced Random House to launch a new type of children’s book—one that would be irreverent and exciting. Given the go-ahead, Geisel initially found himself stuck.

Geisel gave many accounts of how *The Cat in the Hat* came to be. His favorite account begins with the description of his frustration at the list of 300 words to which he was restricted. He wanted to write an adventure story in which the heroes would climb mountains and save people. Unable to come up with anything, he took the first two words from the list that rhymed—“cat” and “hat”—and started from there. Another account has Geisel riding an elevator up to the publisher’s office to pitch the book, and when the doors opened at a lower floor, a spry elderly woman entered with a wry smile and white gloves. Other accounts focus on Geisel’s constant doodling, which included early sketches of a mischievous cat.

An academic, Philip Nel traces Dr. Seuss’ cat to its literary antecedents. Among the precursors were comics, especially George Herriman’s “Krazy Kat,” in which the rambunctious Ignatz Mouse experiences a cross-species transformation into a cat. Other influences were troublemaking varmints, ranging from Howard R. Garis’ Uncle Wiggly, who was a top-hatted rabbit popular before World War I, to Ub Iwerks’ animated cartoon, “Dick Whittington’s Cat,” in 1936, featuring a cat, who, like Dr. Seuss’ wore a hat and gloves. One of the precursors was even an animated movie in which a cat named Felix is home alone with a young child, and the cat, naturally, proves to be a disastrous babysitter. Traveling back to before the 20th century, Nels points to Charles Perrault’s “Master Cat, or Puss in Boots,” dating from 1697, and the variations that flowed



from that story. Then there was Edward Lear's illustrated poem, "The Owl and the Pussycat" (1871), and John Tenniel's illustrations for Lewis Carroll's *Alice's Adventures in Wonderland* (1865) and *Through the Looking-Glass* (1871). In illustrating his books, Dr. Seuss worked and reworked the drawings, and Nels provides ample examples of each drawing, showing how the rough sketches developed.

*The Cat in the Hat* begins with the following verse:

The sun did not shine.  
It was too wet to play.  
So we sat in the house.  
All that cold, cold, wet day.

Sounds simple, but it isn't. As Nel explains, "*The Cat in the Hat* is written mostly in anapestic dimeter, while sometimes preceding an anapestic foot with an iamb. An iamb is an unstressed syllable followed by a stressed syllable; an anapest is two unstressed syllables followed by a stressed syllable; and 'dimeter' means that such a pattern occurs twice in a line." (Yes, this will be on the test.) Nels points out the interplay of words, stresses, and repetitions.

What does the fish in *The Cat in the Hat* represent? Commentators—and they are legion—have had a field day in trying to explain the characters, or at least stick labels on them. Dr. Seuss called the fish "my version of Cotton Mather." The psychoanalytical explanation has the fish representing the superego and the authority of the absent mother (more on that later). Nels writes that Thing One and Thing Two (who are unleashed from the box that the Cat brings in) "seem to spring from the id—pleasure-seeking, impulsive, chaotic. The children serve as the ego, trying to mediate between the fish (superego) on the one hand, and the Cat and his Things (id) on the other." Aren't you buying this gloss? Perhaps you'd prefer to consider the Cat's film and literary archetypes, including the wizard in "The Wizard of Oz," Professor Harold Hill in "The Music Man," and even Flem Snopes from Faulkner's novels. *The Cat in the Hat* also had historical forerunners, including the Russian Revolution. According to one authority, "*The Cat in the Hat* is a revolt against authority, but

it's ameliorated by the fact that the Cat cleans everything up at the end. It's revolutionary in that it goes as far as Krensky and then stops. It doesn't go quite as far as Lenin." Who came up with this explanation? Dr. Seuss himself did.

Nels provides a wealth of information about the Cat and its author. The Cat sometimes has five fingers, sometimes four, and sometimes three. And, although *The Cat in the Hat* made Dr. Seuss famous and wealthy (Nels provides all the sales figures), Dr. Seuss was, in fact, a dog person and did not own a cat at the time he wrote the books.

We also learn that, in 1956, 67 percent of American households had at least one dog, 41 percent had at least one cat, 22 percent had at least one bird, but only 7 percent had a fish as a pet. Moving from pets to humans, one in seven households had a mother working full-time outside the home. In *The Cat in the Hat*, Dr. Seuss has the mother leave for the entire day—for who knows what? The critic Louis Menand scolds, "What private demons or desires compelled this mother to leave two young children at home all day, with the front door unlocked, under the supervision of a fish? Terrible as the cat is, the woman is lucky that her children do not fall prey to some more insidious intruder." Yet, as Nel notes, no critic expressed concern at the time or threatened to call Child Protective Services on the author. Nel explains that communities were tightly knit in the 1950s, and we notice the presence of neighbors in *The Cat in the Hat*.

Nels sees *The Cat in the Hat* and *The Cat in the Hat Comes Back* as a unified work. For example, whereas, in the first book, weather is a cause for boredom, in the second book, a snowstorm forces the children to work. The Cat is greeted with open arms in the first book but is regarded with suspicion in the second. Nels also includes several of Dr. Seuss' short stories that preceded *The Cat in the Hat* books as well as essays and reviews that followed them. Many reviewers expressed disappointment in the first Cat, tsk-tsk'ing the mess he makes. It should come as no surprise that sales of the books to schools were disappointing, but commercial sales boomed. *The Annotated Cat* also takes in the books' worldwide appeal, noting that the many

translations of the books are works of art in themselves, catching the originals' rhythm with short common words. Even the sounds have to be translated: "plop" becomes "plopp" in the German translation, "plope" in Hebrew, "paf" in Spanish, and "sss" in Latin.

*The Cat in the Hat* has influenced our culture widely. Parodies of the book are numerous, as are the lawsuits alleging that these parodies infringe a copyright. (The most noted of these lawsuits involved a parody of O.J. Simpson's murder trial. *Dr. Seuss Enterprises L.P. v. Penguin Books USA Inc.*, 109 F.3d 1394 (9th Cir. 1997).) *The Cat in the Hat* has been made into a television program (with a different ending) and, in 2003, into a movie starring Mike Myers in the title role. The rock band R.E.M. mentions *The Cat in the Hat Comes Back* its 1992 song, "The Sidewinder Sleeps Tonight."

Returning to the end of the first book is an appropriate way to end this review. You will remember that the mother comes home and asks her children:

"Did you have any fun?  
Tell me. What did you do?"  
And Sally and I did not know  
What to say.  
Should we tell her  
The things that went on there that day?  
Should we tell her about it?  
Now, what SHOULD we do?  
Well ...  
What would YOU do  
If your mother asked YOU?

The question poses a moral dilemma. Think about how ambiguous the question is. Of course the child knows what she should answer. But would she? If the book is being read to her, the answer probably differs from what it would be if she read the book herself. In any event, two commentators argue the following:

That question poses once again the dilemma of virtue's relation to authority. The question is profoundly disturbing to children, and for good reason. To choose conventional morality in alliance

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with authority is to surrender all possibility of existential realization. To be for no other reason than that they tell you to be is not to be at all. On the other hand, children rightly understand the reality of power in the world: Individualized, direct confrontation with authority will surely fail. The child who would defiantly celebrate the Cat's visit is doomed to awesome punishment, yet the child who contritely tells the truth forestalls punishment at the price of self-respect. The other choice is to abandon the search for virtue altogether, making a pact with powerful satanic forces in an orgy of joyful self-gratification that will ultimately lead to empty despair.

Could this be where the Critical Legal Studies movement had its origins? Alison Lurie is more commonsensical: the implied answer is "Don't tell Mother." Whatever our answer is, at whatever age, the answer tells us more about ourselves than the story does. **TFL**

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### ***The Telephone Gambit: Chasing Alexander Graham Bell's Secret***

By Seth Shulman

*W.W. Norton & Co., New York, NY. 256 pages, \$24.95.*

#### REVIEWED BY HAROLD BURSTYN

In this exceptionally readable book, Harold Shulman, a journalist who specializes in science and technology, tells how he found evidence that casts doubt on the story of the invention of the telephone that we all learned in childhood. That this story was canonized in the 19th century in a series of legal cases makes it of special interest to lawyers, particularly patent practitioners.

As the first journalist invited for a year's fellowship at the Massachusetts Institute of Technology's now defunct Dibner Institute for the History of Science and Technology (1990–2006), Shulman intended to compare inventors

Thomas Alva Edison (1847–1931) and Alexander Graham Bell (1847–1922), who were "born just twenty days apart in 1847." Shulman's project was all the more feasible because of two recent contributions to scholarship. The Edison Papers at Rutgers University ([edison.rutgers.edu](http://edison.rutgers.edu)) is publishing its holdings in print, on microfilm, and digitally; as of 2008, six volumes have been published chronicling Edison's life from birth through 1883. The Library of Congress, home to The Alexander Graham Bell Family Papers, 1862–1939 ([memory.loc.gov/ammem/bellhtml](http://memory.loc.gov/ammem/bellhtml)), has placed almost 5,000 digitized items online, including Bell's laboratory notebooks from 1876, the year he applied for and received the basic patent for the telephone.

Shulman never got very far with Edison. Instead, he puzzled over why Bell had changed the direction of his research after the trip to Washington, D.C., from which he returned with his first patent. In *The Telephone Gambit*, Shulman follows his insight that the drawing in Bell's laboratory notebook of his first telephone transmitter appears to copy a drawing in Elisha Gray's caveat, filed the same day as Bell's patent application. (Under U.S. patent practice at the time—until 1910—an inventor who filed a caveat had a year to perfect an invention. A caveat was thus similar to today's Provisional Patent Application.)

The traditional story that we learn in school has Gray filing his caveat later the same day that Bell's filed his application, causing Gray to lose the race. As Shulman shows, the facts do not support this story. It is likely that Gray filed his caveat earlier in the day than Bell did. In any event, the practice of the U.S. Patent Office was to disregard the exact time of the filing if both documents arrived on the same day. So why didn't the Patent Office follow its standard practice and declare an interference between Bell and Gray to determine who was the first inventor? Under U.S. law, then as well as now, the first to invent, not the first to file, gets the patent.

The answer appears to be that Bell's patent attorneys, Anthony Pollok and Marcellus Bailey, had special clout at the Patent Office. Had it followed its

standard practice, the Patent Office would have treated Bell's application and Gray's caveat as simultaneously received. Pollok and Bailey, however, convinced the office to deny the interference on the grounds—probably false as well as irrelevant—that Bell had filed first. Bell got his first patent with what, in comparison with other filings that year, was blinding speed. On March 7, 1876, Bell was issued U.S. Letters Patent 174,465 for "Telegraphy" for an application that had been filed on Feb. 17.

That wasn't all. The examiner in charge of electrical technology, the self-described alcoholic Zenas Wilber, had served with Marcellus Bailey in the Civil War. Wilber depended on his former comrade for occasional loans, which was contrary to Patent Office policy that examiners were prohibited from having any financial dealings with the attorneys who appeared before them. In an affidavit written a decade after the event, Wilber acknowledged having violated the rules by disclosing to Bell the details of Gray's caveat. Thus, Bell returned to Boston with his newly issued patent and began the series of experiments that quickly led him to come up with a working telephone, something that had eluded him before his trip to Washington.

By current standards of patentability, Bell did not have the invention in his possession when his patent was issued. In addition, both the crucial claim to telephony and the section of Bell's specification supporting that claim were apparently an afterthought, as neither Bell nor Gray had been looking to invent the electrical transmission of speech. For both inventors, the telephone was a by-product of what they had sought: the simultaneous transmission of multiple telegraphic messages over a single line. So instead of working toward a full patent application, Gray filed a simple caveat and continued to work on his multiplex telegraph. And Bell added a claim to telephony as an afterthought to his application for multiplexing telegraph signals. Yet Bell's claim to telephony, in an application directed primarily to multiplexing, survived, despite rigorous legal attack in the courts and a congressional investigation, ensuring a monopoly long enough to

establish dominance in the telephone industry for the Bell interests.

All the details that Shulman fleshes out were known to Bell's and Gray's contemporaries, though not with the clarity that Shulman brings to the story. From a plethora of sources, published and unpublished, including recent scholarly investigations yet to enter the mainstream, Shulman replaces the traditional account with one that is plausibly truer to the facts.

Bell, Gray, and their contemporaries completely misunderstood what the future would bring. Western Union had consolidated telegraphy in the United States, making the company the dominant player in communications, if not in business generally. Unable to grasp the idea that telephony rather than telegraphy would link homes and businesses, in 1876 the company's president, William Orton, turned down an opportunity to purchase Bell's invention for \$100,000—a decision that was, as Shulman notes, “one of the worst corporate decisions of all time.”

Nevertheless, the Bell telephone business, which began under Alexander Graham Bell's father-in-law and Orton's nemesis, Massachusetts lawyer and entrepreneur Gardiner Greene Hubbard, had no easy time establishing the dominant position that its successor AT&T has enjoyed to our own day. (See George David Smith, *The Anatomy of a Business Strategy: Bell, Western Electric, and the Origins of the American Telephone Industry* (1985)). Only after favorably settling a lawsuit against Western Union in 1879 and acquiring its manufacturing arm, Western Electric, did the Bell telephone companies become dominant.

Other lawsuits and a congressional investigation followed, and the Bell interests prevailed in all of them. By 1910, when the canonical story of Bell's first call—in which he said to his assistant, Thomas Watson, “Come here; I want you”—first appeared in print, Elisha Gray was dead and AT&T was the dominant, indeed the only, player in the telephone business.

Shulman's quest for the facts began with his comparison of Bell's notebook entry of March 9, 1876, and Gray's caveat filed Feb. 17 of that year. A modern lawyer has to wonder how this crucial

detail eluded the lawyers who fought so hard in the late 19th century against the Bell patent monopoly. Shulman suggests the answer, but he does not follow through with a full discussion. Until the merger of law and equity effected by the Federal Rules of Civil Procedure, first issued in 1938, litigation did not include discovery of documents. Bell's antagonists were limited to depositions and cross-examination based entirely on the public record. Bell's notebooks, containing what Shulman suggests was key evidence, remained in private possession until after Bell's death, when they were deposited at the National Geographic Society, which he headed and over which his descendants still preside. Only Bell's biographer, the late Robert Bruce, appears to have examined the notebooks, but Bruce was too partisan to see in them what Shulman sees.

Only in 1976, when the family donated the notebooks to the Library of Congress, did Bell's papers become open to public scrutiny. And only when the Library of Congress digitized them in 1999 (with a grant from AT&T) did scholars the world over get continuing access. Still, it was left to a journalist, albeit one working in a scholarly setting, to bring the full story to light.

This is an important book for lawyers to read. Shulman's message is not who did and who didn't invent the telephone on which we rely day and night. Rather, his story shows litigators how fundamental to the quest for truth in the courtroom was the merger of law and equity that brought forth modern discovery. And, to patent practitioners, Shulman offers a cautionary tale about how zealous prosecution can lead to overreaching, which will be discovered, if not in a courtroom today, then in the work of a probing historian tomorrow. **TFL**

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## ***Great Quotations That Shaped the Western World***

By Carl H. Middleton

Paragon House, St. Paul, MN, 2008. 784 pages, \$29.95.

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REVIEWED BY JOHN C. HOLMES

*Great Quotations That Shaped the Western World* contains more than its title promises; its more than 5,000 quotations are both accompanied by information about the people quoted and interspersed with historical overviews and commentaries on their times. The book's longer first part is arranged chronologically and includes quotations from ancient Greek civilization, the Middle Ages, the Renaissance, the Enlightenment, and on forward through modernism, postmodernism, and the information age. The book's shorter second part is thematic, with quotations on investment wisdom and quotations from the Bible, as well as foreign phrases.

Many of the book's quotations are famous ones, such as several excerpts from Churchill's speeches, some of which can still cause goose bumps and teary eyes. The excerpts contain phrases such as, “I have nothing to offer but blood, toil, tears, and sweat,” “This was their finest hour,” and “an iron curtain has descended across the continent.” The book also includes Churchill's wry saying, “History will bear me out, especially since I intend to write it,” as well as his purported exchange with Minister of Parliament Bessie Braddock, in which she said, “Winston, you are drunk,” to which he responded, “Bessie, you're ugly. And tomorrow morning I will be sober.” Other quotations in the book are from less famous people, such as the English clergyman Sydney Smith (1771–1845), who admonished, “It is the greatest of all mistakes to do nothing because you can do only a little. Do what you can.” (Editor's note: Smith also said, “I never read a book before reviewing it; it prejudices a man so.”)

Getting back to famous people, in 1884, future Supreme Court Justice Oliver Wendell Holmes Jr. said, “We pause ... to recall what our country has done for

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## REVIEWS *continued from page 55*

each of us, and to ask ourselves what we can do for our country in return." And Cary Grant is quoted as saying, "I pretended to be somebody I wanted to be until finally I became that person. Or he became me. Everybody wants to be Cary Grant. Even I want to be Cary Grant."

The book's biography of Dean Rusk states the following, in full: "American, secretary of state. In 1966 when de Gaulle took France out of NATO and ordered U.S. troops off French soil, Secretary Rusk asked if that included the U.S. soldiers buried in Normandy. In 2003, Colin Powell replied to the charge of empire building in Iraq, 'The only land we have ever asked for in return is enough to bury those that did not return.'" Middleton's pithy but effective biographical style is also evident in his introduction to Abraham Lincoln, listing Lincoln's eight defeats for public office, his two business failures, and his nervous breakdown before being elected President with only 39.9 percent of the popular vote.

*Great Quotations That Shaped the Western World* chronicles human achievements in literature, history, religion, science, philosophy, economics, politics, social science, military science, art, and business management. Middleton is unabashedly outspoken in lauding the values of Western civilization that have provided a level of economic prosperity previously unknown, and his book includes more quotations from business people on economic theory and management than are typically found in collections of quotations. He also has a keen sense of humor, as shown by two political quotations that he includes: "An honest politician is one who when he's bought stays bought," and "Never believe anything until it's officially denied."

Middleton posits that the success of Western civilization is not guaranteed and is currently under attack from within by multiculturalists and from without by Muslim extremists. Middleton honors liberty and the rule of law, and

he opposes statism. He acknowledges a conservative bias, which he claims contrasts with the liberal biases of most other compilations of quotations, such as *Bartlett's Familiar Quotations*, which includes 37 quotations from Franklin D. Roosevelt, 28 from John F. Kennedy, but only three from Ronald Reagan.

The book has two indexes, one chronological and one arranged by authors and events. More than merely a book of quotations, it is a history of Western civilization told through the words of its greatest thinkers, writers, politicians, business people, sports figures, and others. The collection could become a classic. Can it also be a page-turner? You bet! **TFL**

*John C. Holmes served as a U.S. administrative law judge for 30 years, retiring in 2004 as chief administrative law judge at the U.S. Department of the Interior. He currently works part time as an arbitrator and mediator and can be reached at trlnterry@aol.com. He is a longtime friend of Carl H. Middleton.*

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