

The Yale Biographical Dictionary of American Law

Edited by Roger K. Newman

Yale University Press, New Haven, CT, 2009.
622 pages, \$65.00.

REVIEWED BY WILLIAM DOMNARSKI

Taxonomy has its limitations. This may not be the thought first on our lips each morning, but it is one that is all but inescapable after reading through *The Yale Biographical Dictionary of American Law*. This book does what a splintered approach—one that treats biography, legal doctrine, legal history, and institutional history single-mindedly—cannot do. It presents the full pageant of what we have achieved and what we have gone through to get here. In its own way, it is all rather stirring.

Those whom we expect to find here—most of our U.S. Supreme Court justices as well as many attorneys general, solicitors general, various Presidents, and well-known lawyers and academics—are here, to be sure. But it is from the whole, not from the individuals, that we most profit, as we learn about:

- the struggles over slavery in the 19th century, the implementation of Jim Crow laws, the fight for desegregation, and the implementation of *Brown v. Board of Education*;
- the rise of women in the legal profession;
- developments in law school education;
- the rise of treatise-writing in the 19th century;
- the development and growth of the publication of judicial opinions;
- the development (yes, it is true) of law librarianship and of research tools, such as Shepard's, the West digest system, and electronic databases;
- the development of Legal Realism and Legal Process schools of thought and their sometimes ferocious battles;
- the development of law and economics and its rise to influence;

- the decline of laissez-faire constitutionalism and the battles over textualism, originalism, strict constructionism, and pragmatism, as well as the related debate that we have had, since the onset of judicial review, over judicial restraint and activism.
- the developing disengagement from English common law;
- the developing specialties within the profession and the rise, growth, and specialization of law firms; and
- the rise of public interest and poverty law.

The Yale Biographical Dictionary of American Law describes, in an unorchestrated approach, the relationship between lawyers and social change and between judges and social change; the relationship between scholarship and the Supreme Court; the most cited and influential law review articles, books, and treatises; great professors and their teaching styles; successful lawyers and their courtroom and advocacy styles; the influence of professors serving in government; the leading authorities in fields such as torts, contracts, antitrust, administrative law, and property; and famous litigants who act as agents of change, such as Rosa Parks, Clarence Earl Gideon, Dred Scott, and Fred Korematsu. The infamous, such as O.J. Simpson, are also included.

Usually a top expert writes on the subject at hand, but there are rare treasures in finding heavyweights writing on their rivals, friends, and colleagues, with personal connections sometimes poking out and adding insight not found anywhere else. We have, for example, Ronald Coase writing on Aaron Director, Walter Murphy on William O. Douglas, Anthony Lewis on Clarence Earl Gideon, Abner Mikva on Arthur Goldberg, Guido Calabresi on Fleming James Jr., Warren Christopher on Henry O'Melveny, Allen Farnsworth on Samuel Williston, Robert Bork on Alexander Bickel, Andrew Kaufman on Benjamin Cardozo, Linda Greenhouse on Anthony Lewis, and Ellen Ash Peters on Grant Gilmore.

Writers of the entries in the book practice objectivity and describe what most matters about their subjects.

Sometimes, though, pitches are made to reconsider a languishing, misunderstood career. We have arguments for re-evaluating Henry Baldwin, Homer Cummings, Joseph Hutcheson, Wiley Rutledge, George Shiras Jr., Augustus Hand, Marvin Miller, and Francis Lieber. Often the points are well taken.

The volume draws us in with its sadness, poignancy, irony, and occasional humor. We see careers played out and wrong choices made, to be followed by regret and our sadness at the lives that result. This is true for Robert Hutchens, James Landis, Marvin Mitchelson, Michael Musmanno, and John Rutledge. Poignant descriptions create their own moments for us, such as when Marvin Frankel marks 50 years of appearing before the Supreme Court, the last time in a wheelchair, only to die 11 days later, saying at the end that his work was done. There are moments of humor, such as when reading that Felix Frankfurter—a colossus of vanity—described Joseph Proskauer as the vainest man he knew, or when learning that Elihu Root's father's nickname was Cube and his brother's was Square. Lawyers can also be amusing when describing what is dearest to them: fees. Hugo Black was known to cry in an effort to emotionally move certain Alabama juries, but "not for less than \$25,000," he said. Percy Foreman of Texas, we also learn, "promoted an image of expensive fees. 'It doesn't matter if my client is guilty,' Foreman said, 'By the time he's paid my fee I've punished him enough.'"

Irony plays no small role in several of the entries. The most interesting examples relate to personality, sometimes prompting our reflection, sometimes our laughter. Irving Kaufman's entry tells us, for example, that Kaufman was an accomplished trial judge and appellate judge and that he worked tirelessly at both his job and at promoting himself, which prompts the observation that "perhaps his unquenchable need for recognition was the necessary spur that made his many accomplishments possible." Lawyer and diplomat William Pinkney (1764–1822) was "a vain man and something of a fop who was always seeking admiration. He died unexpectedly, and many said it was because the

corset he wore to diminish his heavy-set build had been pulled too tight.”

Juxtaposition can sometimes act as its own form of commentary due to nothing less than sheer coincidence. Thus, we find that the entry on Henry O'Melveny written by Warren Christopher follows the entry on Ted Olson, Christopher's nemesis from a well-publicized case in 2000. And, as it turns out, the entry on Joseph Bradley, who spoke for the Supreme Court in 1872 when it refused bar admission to Myra Bradwell on the basis of her gender, is followed by the entry for Bradwell herself. We also find, for those interested in the world of large, trend-setting law firms, that the entry on William Cromwell, of Sullivan and Cromwell fame, follows the entry on Paul Cravath, another corporate law firm pioneer.

Some entries produce an exclamation of “wow.” It can be for an entire career, such as that of John Forrest Dillon (1831–1914), a state and federal judge and legal writer; but usually it is for bits of information that make us rethink what we know. We learn, for example, that federal district judge Jack Weinstein would sentence a defendant while sitting with him at a table, sans judicial robe. Lee Rankin, after he left the post of U.S. solicitor general, moved back to New York and opened a one-man office. And for those drawn to the chuckle, federal courts maven Charles Alan Wright sent inscribed copies of his federal practice treatise to all federal judges upon its publication in 1963.

One great virtue of *The Yale Biographical Dictionary of American Law*, with its approximately 700 entries in 607 double-columned pages, is the chance it gives us to see how change in American life and in the profession occurs, and how, for so many of these changes in American life, we have courageous lawyers and judges to thank. A second virtue is that we can recognize, because it is a recurring theme in the book, that effective writing matters. It matters in all fields and for all legal actors—judges, lawyers, academics, and treatise writers alike. If nothing else, in recognizing this fact and in reading the various bits of fine writing quoted throughout the volume, we become inspired to improve our writing skills.

Every lawyer should own this book.

Every lawyer should spend 30 minutes a day reading through it, from beginning to end, for as long as it takes. It will be the best investment that can be made of a lawyer's time. All of law comes alive in this volume. What more can we ask for? **TFL**

William Domnarski is a federal court practitioner in the Central District of California. His latest book, Federal Judges Revealed, published by Oxford University Press, was reviewed in the October issue of The Federal Lawyer. Domnarski wrote the entry in The Yale Biographical Dictionary of American Law on John D. Voelker, who, under the pen name of Robert Traver, wrote Anatomy of a Murder. Domnarski can be reached at domnarski@sbcglobal.net.

Speaking Up: The Unintended Costs of Free Speech in Public Schools

By Anne Proffitt Dupre

Harvard University Press, Cambridge, MA, 2009. 289 pages, \$29.95.

REVIEWED BY DAVID W. LEE

Anne Proffitt Dupre, a professor at the University of Georgia School of Law, has written a comprehensive study of the effect of the U.S. Supreme Court's application of First Amendment principles in the public school context. *Speaking Up: The Unintended Costs of Free Speech in Public Schools* concentrates on free speech in high schools, with the Supreme Court cases of *Tinker v. Des Moines Independent School District*, 393 U.S. 503 (1969), and *Morse v. Frederick*, 551 U.S. 393 (2007), providing the bookends of this drama. In *Tinker*, the Court held that a public school district violated the First Amendment rights of Iowa high school students when it prohibited them from wearing black armbands in class in order to protest the Vietnam War. In *Morse*, the Court distinguished *Tinker* in holding that an Alaska high school student had no First Amendment right to display a 14-foot banner that read “BONG HiTS FOR JESUS” at a school-supervised event.

There can be no question that *Tin-*

ker, despite its fame as a victory for free speech rights in public schools, has imposed—and is still imposing—significant costs on America's public schools. The Supreme Court in *Tinker* held that students have free speech rights unless school officials can demonstrate that their speech would cause “a substantial disruption or material interference” with school activities. As Dupre points out, because of *Tinker* and its progeny, “[m]any students and their parents developed a level of scorn—even contempt—for school discipline and those who attempt to enforce it, and an increased willingness to use the power of the courts to undermine those who would enforce school rules to maintain discipline.” Justice Black, in his dissent in *Tinker*, phrased it this way: “One does not need to be a prophet ... to know that after the Court's holding today some students ... will be ready, able, and willing to defy their teachers on practically all orders.”

The vehicle for enforcing this First Amendment right is usually an action filed in federal court under 42 U.S.C. § 1983 against school officials for damages against them personally, as well as against the school district. The cost and intimidation factors are tremendous. By filing this type of lawsuit, the student goes on the offensive, and the schoolteacher or administrator becomes a defendant in a court of law, facing potentially unlimited damages if a jury finds that the First Amendment had been violated by the enforcement of school rules. Punitive damages and attorneys' fees may also be awarded under § 1983.

In *Morse*, the Supreme Court reversed the decision of the Ninth Circuit in favor of the student Joseph Frederick. The Ninth Circuit had held that the principal, Deborah Morse, had violated Frederick's First Amendment rights by suspending him for displaying his banner. The Ninth Circuit, in what Dupre calls an “astounding” decision, also held that Morse had violated Frederick's “clearly established” constitutional rights and, therefore, had no defense of qualified immunity. This meant that, because there was no question that *Morse* had caused the student's suspension, her liability was established

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as a matter of law, and she would have had to pay money damages to Frederick. If the Ninth Circuit's ruling in *Morse* had not been reversed by the Supreme Court, *Morse* would not even have had the benefit of a jury trial, except for the purpose of determining the amount of damages she owed. The Supreme Court in *Morse* noted that Frederick had also sued *Morse* for punitive damages, which are particularly pernicious because liability insurance to cover them is often unavailable. The intimidation inherent in student free speech lawsuits is undeniable and contributes to the deterioration of school authority in which *Tinker* has played a role.

Dupre also points out that, under the Civil Rights Attorney's Fees Act of 1976, 42 U.S.C. § 1988, a prevailing plaintiff in a § 1983 action is entitled to recover reasonable attorneys' fees. The school district consequently has to pay not only its own attorneys to defend the lawsuit, but, if a plaintiff prevails on any issue—regardless of whether damages or injunctive relief are awarded, it must pay the student's attorneys' fees as well.

One of the most compelling aspects of *Speaking Up* is its detailed rendition of the facts in *Morse*. Dupre effectively describes Frederick's insubordinate actions and notes that the display of the "BONG HiTS FOR JESUS" banner was preceded by an unruly snowball fight and the throwing of bottles by a number of students at the scene. When Frederick and his friends displayed their banner, Frederick brushed off *Morse's* order that he put it away. *Morse* submitted an affidavit stating that, after she told Frederick to come to her office, he turned and walked in the opposite direction.

Dupre also makes clear that the display of Frederick's banner violated school policy that forbade advocating illegal drug use. She observes that "[t]he word 'bong' is a term that is generally understood to refer to a water-cooled pipe or pipe-like device for smoking marijuana." And it is common knowledge that the word "hit," which Frederick used in his banner, means inhaling marijuana. Dupre notes that "[t]he band Cypress Hill has recorded a song

called 'Hits from the Bong' that celebrates getting stoned."

Dupre also discusses other complicated litigation that has occurred since *Tinker*. *Bethel School District v. Fraser*, 478 U.S. 675 (1986), for example, involved a high school in the state of Washington at which a student named Fraser had given a nominating speech for a friend at an assembly prior to a student election. Dupre states that Fraser's speech "compared his friend to a penis during erection, intercourse and orgasm." Some of the students in the audience, which included many 14-year-olds, "hooted" during the speech, and "others simulated masturbation and sexual intercourse with their hips." Fraser received a two-day suspension from school, over which he and his parents filed suit under § 1983.

The Ninth Circuit ruled in favor of Fraser, finding the case indistinguishable from *Tinker* and finding no evidence that the speech had materially interfered with high school activities. The Supreme Court reversed the Ninth Circuit's decision, limiting *Tinker's* reach and quoting Justice Black's dissent in *Tinker*, in which Black had objected to idea that "the Federal Constitution compels the teachers, parents, and elected school officials to surrender control of the American public school system to public school students."

Dupre writes that later, in *Harper v. Poway Unified School District*, 445 F.3d 1166 (9th Cir. 2006), the Ninth Circuit upheld the punishment of a student who, after a California high school had sponsored a "Day of Silence" in support of gay students, had worn a T-shirt that said "BE ASHAMED, OUR SCHOOL EMBRACED WHAT GOD HAS CONDEMNED" on the front and "HOMOSEXUALITY IS SHAMEFUL 'Romans 1:27'" on the back. But, in an earlier case, *Chandler v. McMinnville School District*, 978 F.2d 524 (9th Cir. 1992), the Ninth Circuit had upheld the right of students to wear buttons containing the word "scab" (e.g., "Do scabs bleed?") to express opposition to replacement teachers who crossed picket lines during a strike.

The lines defining permissible and impermissible student speech are diffi-

cult to determine, except on a case-by-case basis after a school system has spent perhaps hundreds of thousands of dollars and experienced much distraction and trauma. Dupre notes the vagueness of the *Tinker* standard, quoting Justice Thomas' statement in *Morse* that "students have a right to speak in school except when they don't." Dupre also notes that *Tinker* places the burden on school districts to show that the student speech caused substantial disruption or material interference, and that this burden is responsible for the high cost of defending student free speech cases.

The cases dealing with this issue are continuing. For example, *Defoe, ex rel. Defoe v. Spiva*, 3:06-CV-450, was a free speech case filed in 2006 in the Eastern District of Tennessee by a student who had been disciplined for wearing a Confederate flag insignia on his shirt and belt buckle. On Aug. 11, 2009, after a five-day trial resulted in a hung jury, the federal district court granted summary judgment to the school district. The fact that this issue (which would not seem an unusual one to occur in a Southern school district) was litigated 30 years after *Tinker* shows that schools will continue to endure this sort of litigation unless *Tinker* is overruled or modified. One wonders how much money that could have been spent on educating children was used to fight this lawsuit, as well as how much embarrassment and intimidation the lawsuit inflicted on school officials.

There appears to be no principled way to determine, except through expensive and protracted litigation, whether a student's right to wear a Confederate emblem, a Che Guevara T-shirt, a swastika, a black armband, or a hammer and sickle is protected by the First Amendment in a public school context. The display of any of these symbols is protected outside of school, and litigation over them in the high school context is not worth the cost.

Speaking Up has many virtues. It is a comprehensive and balanced analysis of the First Amendment in the public school context. It focuses primarily on student speech, but also reviews other First Amendment school issues, including those concerning the student press,

book banning, the recitation of prayers and the Pledge of Allegiance in public schools, and teachers' and academic free speech. Even those who disagree with Dupre will find her analysis of students' First Amendment cases an invaluable resource. Although fair in its discussion of both sides of the issue, *Speaking Up* makes clear that *Tinker* has been a disaster for public schools. **TFL**

David W. Lee, an attorney in Oklahoma City, is a frequent lecturer on the subject of federal civil rights actions and is the author of Handbook of Section 1983 Litigation (Aspen Publishers, 2009 ed.).

Jailhouse Lawyers: Prisoners Defending Prisoners v. the U.S.A.

By Mumia Abu-Jamal

City Lights Books, San Francisco, CA, 2009. 251 pages, \$16.95.

REVIEWED BY HEIDI BOGHOSIAN

In prison, a hierarchy of dangerousness dictates which inmates receive discipline and retaliation from correction officials. If judged by how the rest of society treats them, the most dangerous would seem to include gang members, political prisoners, blacks, gays, and AIDS patients. In fact, however, the quiet bookworms who pore over legal cases and books are most frequently subjected to punitive retaliation. They are the jailhouse lawyers—little known by the American public, but respected and relied on by thousands of other inmates—and now the subject of a long-overdue book by perhaps the world's best-known death-row prisoner.

In the vernacular, the term “jailhouse lawyer” has a derogatory connotation. In *Jailhouse Lawyers: Defending Prisoners v. the U.S.A.*, Mumia Abu-Jamal demystifies the term, debunks the stereotypes, and elevates these individuals to their rightful status as staunch defenders of the Constitution. From his unique vantage point (he has been incarcerated for more than a quarter of a century, most of that on death row), Abu-Jamal aptly humanizes the individuals toiling behind bars to bring cases against enormous institutional, societal,

and legal obstacles. In this, his sixth book, Abu-Jamal—a member of the literary group PEN—illuminates the often contrasting values motivating so-called street lawyers (such as private criminal defense attorneys and public defenders) and jailhouse lawyers, while he reveals the vagaries of a judicial system that too frequently decides cases not on their legal merits but on the basis of which judge or jury is picked.

Why do prison officials consider jailhouse lawyers dangerous? Abu-Jamal explains:

Few people are better situated than jailhouse lawyers to observe the contradictions in society and, on occasion, to bring them forth into public view. For their services, for protecting the Constitution from violation, their institutional reward is often a bitter consignment to the depths of the hole. The reason is actually quite simple: unlike other groups in prisons, jailhouse lawyers ... force prisons to change their formal rules and regulations, especially when they are illogical or downright silly, and for this administrators unleash their disciplinary arsenal with special vehemence.

Jailhouse lawyers advise and assist other inmates on a range of cases and levels—from seeking redress as to prison conditions to counseling others on routine matters—that often reach the U.S. Supreme Court. Many are self-taught or mentored by other jailhouse lawyers. The cases in *Jailhouse Lawyers* reveal the profound impact that these men and women have had on the legal system and on the lives of others.

Abu-Jamal dedicates a chapter to street lawyers to put criticism of jailhouse lawyers into perspective. He writes, “Most lawyers today resemble the early [Clarence] Darrow, when he was a well-paid advocate of corporations, not the later Darrow, who took up the cases of social and political underdogs.” According to Abu-Jamal, street lawyers, unlike jailhouse lawyers, are officers of the court, and “even those among the most conscientious (like the ACLU), follow their training to acquiesce to, rather than to challenge,

the imposition of repressive rules.”

Abu-Jamal's jailhouse lawyers are clearly of the later Darrow ilk. Clarence Earl Gideon was a homeless 51-year-old with an eighth-grade education who was denied a lawyer when he was tried on charges of breaking and entering a pool hall. In 1962, he filed a writ of certiorari in the U.S. Supreme Court—handwritten with a pencil. A year later, in *Gideon v. Wainwright*, the Court ruled that the Sixth Amendment right to counsel applied to all criminal cases. Despite the victory, Abu-Jamal notes that “over forty years since *Gideon* became the ‘law of the land,’ hundreds, if not thousands, of people are still being held in jails and prisons without meaningful access to counsel. ... In such a context, we can see why many men and women turn to those imprisoned with themselves to try to find some hope in a den of hopelessness.”

Many jailhouse lawyers have reputations as superior litigators; Richard Mayberry is one of them. He prevailed in *Mayberry v. Pennsylvania*, 400 U.S. 455 (1971), in which the Supreme Court held that, except when the judge acts instantly, when he or she charges a defendant with contempt of court, due process requires that the defendant be afforded a public trial before a different judge from the one who imposed the contempt charge. (Mayberry argued the case in the lower court but did not argue before the Supreme Court.) Abu-Jamal recalls Mayberry's first case in federal court, *U.S. ex. Rel Mayberry v. Myers and Prasse*, 225 F. Supp. 752 (E.D. Pa. 1963), in which he won the right to purchase law books, which were considered contraband in 1963, by mail. Abu-Jamal describes Mayberry as a “brilliant and imaginative litigator,” writing that “He is a member of no bar association, he claims no cachet from any school, and yet his work stands as a testament to one man's power to resist, with intelligence.”

Abu-Jamal cites several other jailhouse lawyers of distinction, including former inmate Paul Wright, founder of *Prison Legal News*, a monthly award-winning publication providing educational materials for jailhouse lawyers

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around the country. Another jailhouse lawyer, Rahsaan Brooks-Bey, considers his best victory *Brooks v. Andolina*, 826 F.2d 1266 (3d Cir. 1987), which enjoined prison officials from punishing and retaliating against inmates for exercising their First Amendment rights. Martin Sostre filed and won several landmark cases, writes Abu-Jamal, including *Sostre v. McGinnis*, 442 F.2d 178, 189 (2d Cir. 1971), in which the Second Circuit ruled that Sostre, who now lives in Manhattan with his family, had “freedom from discriminatory punishment inflicted solely because of his beliefs, whether religious or secular.”

Abu-Jamal notes the stark contrast between the treatment of jailhouse lawyers and the deference to lawyers who engage in flagrantly unethical conduct but are not sanctioned; the latter have included a lawyer who cited no legal authorities in his brief, lawyers who came to court with cocaine on their noses, and those “in the throes of a raging mental illness.”

Jailhouse lawyers were dealt a profound setback with passage of the Prison Litigation Reform Act of 1996 (PLRA). Proponents of the legislation argued that litigation by inmates should be curtailed because of their tendency to bring frivolous lawsuits. Abu-Jamal points out the untruth of highly publicized reports of inmates suing over the kind of peanut butter they were given or the color of their towels. The lack of truth in these stories was reported in *Prison Legal News* in an article by Chief Judge Jon O. Newman of the Second Circuit, outlining his reply to a letter printed in the *New York Times* from the attorneys general of four states. Judge Newman contrasted the allegations about the prisoners’ suits with the facts of the cases and showed how the attorneys general used lies and misrepresentations to support their arguments. In a telling indictment against the PLRA, Abu-Jamal writes that, if the events of Abu Ghraib prison had occurred in an American penal institution, victims would not be eligible for damages under the PLRA, because the PLRA prohibits recovery for psychological or mental harm or injury.

In spite of the PLRA, jailhouse law-

yers continue to work against the odds to help others and to challenge unconstitutional laws. Abu-Jamal tells of Running Bear, who assisted in overturning three death sentences (one of them his own):

He describes “hearing a kid yell up to me that the PA Supreme Court just overturned his capital case based on a brief I wrote” as one of his most treasured memories of his jailhouse lawyering career. “Saving someone’s life via pen and paper is a rewarding and unforgettable experience.”

Running Bear’s words, “rewarding and unforgettable,” may also be used to describe *Jailhouse Lawyers*. It testifies to the character of many jailhouse lawyers, who, when treated with disdain or worse, quietly persist in reading, analyzing, writing, and fighting to do what is right—doing justice. **TFL**

Heidi Boghosian is executive director of the National Lawyers Guild. (Mumia Abu-Jamal is the national jailhouse lawyer vice president of the guild.)

Understanding the Railway Labor Act

By Frank N. Wilner

Simmons-Boardman Books, Omaha, NE, 2009. 286 pages, \$39.95.

REVIEWED BY FRANCIS J. DUGGAN

In 1974, as a brand new Congressional Fellow on the staff of the Senate Labor Committee, I was directed to draft legislation to stop an imminent railroad strike and to prepare a committee report explaining the legislation. I stayed up all night learning what I could about the Railway Labor Act and produced the two documents, only to learn, gratefully, that the strike had been settled during those night hours. If it had not been averted, then Congress would have stopped the strike, no doubt by enacting the recommendations of a Presidential Emergency Board.

Since its enactment in 1926, the Railway Labor Act has set up numerous

hoops through which the parties have to jump before employees may strike or an employer may lock out employees, and my 1974 experience, as well as several since then, went down to the wire without a crippling nationwide rail strike. In my opinion, the Railway Labor Act works, despite some flaws, and neither labor nor management wants to change it materially. In fact, the law was drafted by both labor and management, and they both consider it their own.

Frank Wilner is an expert in all aspects of railroad law, not just labor relations. *Understanding the Railway Labor Act* is his fifth book, in addition to numerous pamphlets, newsletters, and assorted policy papers on behalf of management (he worked for the Association of American Railroads for 18 years), rail labor (he is currently the director of public relations for the largest rail union, the United Transportation Union), and as a federal regulator (he was chief of staff for the vice chair of the Surface Transportation Board, the successor to the Interstate Commerce Commission).

Without further ado, I must say that I have known Wilner for 30 years and have read all his books and most of his other published works. He can write like a scholar or a pamphleteer, and every time I read his work, I learn something that I no doubt should have known before.

Various categories of people will enjoy reading this latest book. Lots of people still love railroads, and will be interested in the history of this industry and the various crafts that have operated trains since its inception. Labor lawyers will appreciate the fine points of the Railway Labor Act, which predates the National Labor Relations Act, and will note current controversies that Wilner does not discuss, such as the disparate treatment of FedEx Express and the United Parcel Service, the former covered by the Railway Labor Act and the latter by the National Labor Relations Act. (Wilner does discuss this controversy, however, in his article in this issue of *The Federal Lawyer*.)

When I went to work for the Association of American Railroads in 1977, there were approximately 100 Class 1

railroads, 26 rail unions, and five men (no women) and a caboose on each train—and the railroads were all losing money or going bankrupt. If you want to know how this has all changed, with behind-the-scenes reports on each, then *Understanding the Railway Labor Act* is the book for you. A hint: there are now only six rail systems, all doing well, and the unions are still too many but merging.

Individual railroads have always had their own cultures, but not so much as the unions, whose different cultures hindered their merging into something more manageable for bargaining purposes. No other industry has such a panoply of unions: Locomotive Engineers; Locomotive Firemen and Enginemen; Railway Conductors; Railroad Trainmen; Switchmen; Railroad Telegraphers; Train Dispatchers; Machinists; Boiler-makers; Blacksmiths; Drop Forgers and Helpers; Sheet Metal Workers; Electrical Workers; Railway Carmen; Firemen and Oilers; Maintenance of Way Employees; Railway and Steamship Clerks; Freight Handlers, Express and Station Employees; Railroad Signalmen; and Order of Sleeping Car Conductors.

Understanding the Railway Labor Act is easy reading. Some may find that it has too many footnotes, but, if you don't like footnotes, you can ignore them, although then you will miss, for example, the footnote on Pope Leo XIII's Papal Encyclical on Capital and Labor (*Rerum-Novarum*) in 1891. Such is Frank Wilner's knowledge of labor and railroads.

Although virtually all the practitioners I know do not want the Railway Labor Act changed, it remains controversial, and attempts might be made to change it; Wilner, therefore, might have added a little more from the other side. The National Mediation Board has established a commission to study the law, similar to the one chaired in 1994 by John T. Dunlop, a former secretary of labor and dean at Harvard University. That commission recommended no changes.

The labor movement has more political horsepower these days. For example, the Obama administration has appointed a rail union president as the administrator of the Federal Railroad Administration and a former president

of the Air Line Pilots Association as administrator of the Federal Aviation Administration, and the Association of Flight Attendants is seeking to change the National Mediation Board's rules governing elections in order to unionize Delta Airlines' flight attendants.

Frank Wilner has written a comprehensive history of an exciting industry, with enough reference material for a seasoned lawyer. *Understanding the Railway Labor Act* is a fascinating mix of railroad culture, union crafts, and economic history. Wilner also has a wry wit, and signs his name with the title, "Writer in Residence, Portner's Brewery," which was a popular saloon in Old Town Alexandria, Va. **TFL**

Francis J. Duggan was the editor of TRANSLAW, the publication of the Transportation and Transportation Security Law Section of the Federal Bar Association, of which he is a former chair and remains a board member. He was also assistant vice president of the Association of American Railroads, assistant secretary of labor, and chair and member of the National Mediation Board. He practiced law with a firm that represented a railroad and an airline and is currently the president of Victims of Pan Am Flight 103 Inc.

Justice at Guantánamo: One Woman's Odyssey and Her Crusade for Human Rights

By Kristine A. Huskey with Aleigh Acerni
*Lyons Press, Guilford, CT, 2009. 285 pages,
\$24.95.*

REVIEWED BY ELIZABETH KELLEY

When I began *Justice at Guantánamo*, I anticipated that its focus would be on representing detainees. Instead, this highly readable book is largely a lawyer's coming-of-age story. Indeed, Kristine Huskey does not begin telling of her Guantánamo experiences until page 133.

Nonetheless, I felt compelled to continue reading, because Huskey's coming-of-age story spoke to me in so many ways: the challenge of a female lawyer to establish herself in what is still a male-dominated profession, to

balance idealism with making money, and to juggle personal relationships with professional obligations.

Huskey takes us on her journey from her childhood in Alaska to living in war-torn Angola, backpacking through the Far East, eking out a living in New York City as a dancer, model, and bartender, completing undergraduate work at Columbia University, and enrolling in law school at the University of Texas at Austin.

This lengthy presentation of her professional and personal journey may put off some readers, causing them either to skip ahead to the Guantánamo portion of the book or to abandon the book altogether. But it may endear other readers and give them more of a context in which to place Huskey's struggles and achievements in representing her clients at Guantánamo.

For many years, Huskey practiced at the Washington, D.C., office of Sherman and Sterling. Her specialty was international law—primarily negotiating business deals and representing corporate interests. Consequently, representing a group of Kuwaiti men held without charges at Guantánamo was a novel experience for her. Most prominent law firms in New York and Washington, D.C., refused to get involved in detainee cases because of the possible backlash from their corporate clients. And indeed, many lawyers were ambivalent about the rights of those being held at Guantánamo—as many Americans are today.

Yet for Huskey, the issue was not about politics; it was an issue of fundamental fairness:

This did not necessarily make me a die-hard liberal. I wasn't then, and am not now. When I speak about my work with the detainees at Guantánamo, I am careful to say up front that my parents were in the U.S. Army, that my dad fought in Vietnam, and that both of my grandfathers fought for the United States in World War II. Sometimes I mention that before the 2008 primaries, I was registered to vote as a Libertarian. I even joke that some of my best

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friends are Republican. In truth, I am surrounded by Republicans: My parents vote Republican; ... my dear law school friend ... is a Republican; and, also, my boyfriend through the six years of my Guantánamo representation (who is now my husband) is a *staunch* (with a capital “S”) Republican. In short, I like Republicans. Without explicitly saying so, I tell my audiences not to write me off simply because I think prisoners held by our American government have a right to counsel and a fair trial, that they too have a right to “justice,” even if they have been accused of terrible acts. I did not get involved with this case out of a desire to promote liberal values. I simply felt then (and still feel now) that it was the right thing to do.

With that approach as her ethical compass, Huskey describes her journey up and down the federal courts as she and her colleagues struggled to define the scope of their clients’ rights. Her description of the obstacles these attorneys faced even to meet with their clients is sobering: security clearances, special travel arrangements to Guantánamo, searches, and language barriers, to name a few. As in many cases that are long and arduous, her clients grew frustrated and desperate. They launched a hunger strike and wanted to abandon their legal struggle. Huskey was forced to confront the conflict between her ob-

ligation to represent one of her client’s wishes and her own feelings:

Our visit in October was even more difficult than the last. Fawzi ... [was] even worse off than before. Fawzi, though being forced, was still losing weight and was down to about a hundred and ten pounds. His weight would drop to ninety-seven pounds within two weeks.

“The feeding tube is just another instrument of torture,” Fawzi told us. “They use restraints on me, force my head back, and shove in tubes that are too big; they make me bleed and vomit. I just want to have some control over my own body. It’s all I have left.”

We listened to everything Fawzi had to say, took detailed notes, and drafted an affidavit with him, which he signed for us to submit to the court. Fawzi himself was conflicted; he wanted better conditions and a chance to prove his innocence, and, at the same time, he wanted us to petition the court to have the feeding tubes removed so he could die. ...

In the meantime, I continued my quest to get as much information as possible, consulting with several doctors. One doctor in particular had just the kind of background we knew would be

persuasive to a judge. Dr. Stephen Xenakis was a psychiatrist and retired brigadier general, the exact combination of medical expertise and military knowledge that we needed. I felt sufficiently at ease with him to confide my ethical dilemma: respecting Fawzi’s autonomy and his right to die, while at the same time recognizing that his parents didn’t want him to die, we didn’t want him to die, and that Fawzi himself probably didn’t want to die either. But again, maybe he did; how were we supposed to know?

After a few years, Huskey, apparently suffering from burnout, took a position as the director of the National Security and Human Rights Clinic at the University of Texas at Austin School of Law. Certainly, the legal world is richer for the contributions she made. And certainly, in her position at the University of Texas, she will make further contributions. But I cannot help but believe that her work at Guantánamo came at great and untold personal cost to her. **TFL**

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