

Borderline Americans: Racial Division and Labor War in the Arizona Borderlands

By Katherine Benton-Cohen

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

Shadows at Dawn: A Borderlands Massacre and the Violence of History

By Karl Jacoby

Penguin Press, New York, NY, 2008. 358 pages,
\$32.95.

Sunbelt Justice: Arizona and the Transformation of American Punishment

By Mona Lynch

Stanford University Press, Stanford, CA, 2010.
267 pages, \$24.95.

REVIEWED BY JON M. SANDS

These three books illustrate that, when it comes to controversial policies toward immigration, labor, and crime and punishment, there is nothing new under the Arizona sun. *Borderline Americans* examines the Bisbee Deportation of 1917, in which about 1,300 immigrant workers were illegally deported by the Phelps Dodge Corporation in an effort to break a contentious labor strike in the Arizona copper mines. The book traces the shifting identifications of the deported Hispanic and Eastern European immigrants and what it meant to be an American. *Shadows at Dawn* examines a violent episode from territorial days, known as the Camp Grant Massacre of 1871, which saw a vigilante multinational band of town leaders from Tucson, with Indian assistance, kill nearly 150 Apaches wrongly suspected of raiding a local ranch. This book deals with cultural biases and prejudices in an imaginative re-creation of this long-forgotten skirmish. The third book, *Sunbelt Justice*, looks at Arizona's policies of punishment and incarceration, using the state as a case study for the

argument that the Sunbelt, at the forefront of the conservative ascendancy of the last 40 years, pushed forward penal policies that were exceedingly harsh, mandatory, and lengthy. Why and how this occurred, and its social and budgetary consequences, are presently being debated. Each of these books offers insights into how we define one another in times of crisis and transformation.

Borderline Americans: Racial Division and Labor War in the Arizona Borderlands

"Are you an American?" This question was asked in Bisbee, Ariz., a mountainous mining town two hours southwest of Tucson, on the morning of July 12, 1917. The questioner was Cochise County Sheriff Harry Wheeler, who asked the question of those he suspected were foreign. His efforts were in service to the county's principal economic power, the Phelps Dodge Corporation, which owned several copper mines in the area and faced labor unrest. Many of the town's respectable folk, including members of the clergy, were deputized and armed by Phelps Dodge to quiet the unrest. By mid-morning, 2,000 men had been arrested, 90 percent of whom were immigrants, mostly from Mexico and Eastern Europe. (In addition to the nearly 200 who were American-born, almost another 300 of them had become U.S. citizens.) The men were then deported—not to Mexico, but to New Mexico. Loaded onto cattle cars, they were transported by rail across the state and dumped off in the New Mexico desert with the warning, "Don't come back." They didn't. The army took care of them for three months, then the men scattered across the United States.

Borderline Americans is Katherine Benton-Cohen's perceptive study of the Bisbee Deportation and of how definitions of race, identity, and belonging change over time and through conflict. Here, in the mountains and mining towns of Arizona, amidst cutthroat competition, labor struggles, and social stratification, fears turned combustible and ignited. "Are you an American?" became code for "Are you like us?"

Benton-Cohen, a practitioner of

"new Western history," deftly weaves together descriptions of labor strife, mining practices, the environment of the mountainous Southwest, and the diverse ethnic groups that populated the area. She traces how these groups came to see one another and how Anglos identified such groups as either American-friendly or dangerously foreign, redrawing the borderlines as circumstances changed. For much of the 19th century, Mexicans were regarded as American and accepted into the culture and community. As a result of the Gadsden Purchase in 1853, Mexicans had recognized property and legal rights, and this recognition made them "white" in the eyes of the Anglos. This acceptance extended to Mexican-Americans and to Mexican nationals, who were an economic presence. Their foreignness was not seen as a threat. Benton-Cohen persuasively posits that it was only when economic conditions started to change, and mining came to Cochise County, that Mexicans came to be regarded as suspect borderline Americans and dangerously "foreign." Mining led to the influx of Eastern European immigrants in the early 20th century and the stirring up of concern on the part of the Anglos. Eastern European miners were single men who lived communally and were segregated from the town. They were regarded as ethnically inferior and, as such, a threat to American identity. When they began to organize and demand better pay and working conditions, they were seen as dangerous. To undercut union organizing, the mining companies brought in Mexican workers, who were seen as reliable, compliant, and not as a threat or un-American—at least not yet.

The mining companies' strategy was at first a success, as union activity concentrated solely on the Eastern European workers, and the Mexican miners were disdained as scabs for accepting far lower wages. The companies instituted a two-tier scale for wages: low for the Eastern European miners and lower still for the Mexican workers. Mining for all was still back-breaking labor performed in terribly unsafe conditions for wages that were barely enough to sustain

anyone. It was only when the Mexican workers began to organize with the Eastern Europeans, through the efforts of the strident Industrial Workers of the World (better known as the Wobblies), that the mine owners, law enforcement, and townspeople lumped both groups together as dangerously radical and foreign.

By March 1917, the Wobblies had organized the miners sufficiently to call a strike. Mine owners immediately called for federal intervention to break the strike, citing radical elements that were both anti-American and determined to stall preparations for World War I. When federal support was not forthcoming, the mining companies decided to take matters into their own hands. Phelps Dodge was the largest and most powerful company, and its president, Walter Douglas, was virulently anti-union. He enlisted the other mine owners and town leaders in the strike-breaking and ethnic-cleansing deportation plan.

The deportation grabbed the attention of the nation, but not in the way one would expect. Editorials condemned the deportation; however, the press also blamed the deportees for fomenting violence and causing the deportation! The deportees, for their part, beseeched the federal government for protection and permission to return home. The federal government had to do something in the aftermath, and, predictably, formed a commission. In October 1917, President Wilson appointed the secretary of labor to head it. The commission quickly held hearings and a mere month later issued its report, condemning the deportation as illegal and recommending the protection of labor's rights to organize. The recommendations, again predictably, made no impact. By that time, the United States was embroiled in World War I, and its collective attention was focused "over there."

Yet the deportation controversy did not go away. In 1918, a year after the deportation, the Department of Justice charged 21 mining executives, county officials, and law enforcement officers, including Sheriff Harry Wheeler, as well as Walter Douglas, the president of Phelps Dodge. The prosecution was quickly stymied, however, when the

federal district court dismissed all the charges on the ground that no federal laws had been violated. On appeal, the U.S. Supreme Court agreed. In *United States v. Wheeler*, 254 U.S. 281 (1920), the Court held that the federal government had no authority to enforce the rights of the deportees. An eight-to-one majority concluded that the states possessed the reserved power to deal with the way citizens resided, came, and went, and that only in cases of state discriminatory action would the federal government have a role. Arizona, unsurprisingly, did not bring any prosecutions. Civil suits were filed, but most were dropped or settled for paltry sums after the first jury accepted the defendants' argument that the deportation was justified and constituted good public policy.

Although the presidential commission was ignored and the prosecutions fizzled, a young assistant secretary of labor who assisted at the hearings was impressed. The young man, on leave from the faculty of Harvard Law School, came to play a prominent role in Franklin D. Roosevelt's New Deal and still later as a Supreme Court justice. He was Felix Frankfurter.

In 1941, a case came to the Supreme Court arising from yet another labor dispute in Bisbee. After the union had been broken in 1917, mining unions had all but ceased to exist in Arizona until the right to collective bargaining was granted under the New Deal's National Industrial Recovery Act and Wagner Act. In 1933, a small union was organized and, in 1935, a strike was launched against the Copper Queen mine, the site of the Bisbee Deportation. The strikers were fired and blacklisted, the union filed a lawsuit, and the case made its way to the Supreme Court. In *Phelps Dodge Corp. v. National Labor Review Board*, 313 U.S. 177 (1941), the Court held that Phelps Dodge could not blacklist the workers and that the workers were owed back pay. *Phelps Dodge* was a key precedent for establishing protection for union members from blacklists. The opinion was written by Justice Frankfurter who, it would be fair to say, knew a great deal about Bisbee mining and labor practices.¹

Benton-Cohen has written a compel-

ling account of the Bisbee Deportation, presenting a nuanced tracing of the shifting relationships among ethnic groups during times of economic and social transformation. It is well worth remembering, therefore, how happenstance some boundaries and identities are. One such boundary is commemorated by a nondescript brass plaque at a rest stop, about a half-hour's drive from Phoenix, on the interstate highway leading to Tucson. The plaque marks the northern demarcation of the Gadsden Purchase of 1853 and notes that the purchase was the last major territorial acquisition in the contiguous United States, adding almost 30,000 square miles to Arizona and New Mexico. Without that purchase, one realizes, the rest stop could very well have been the present port of entry into the United States, and Bisbee would be well into Mexico.

Shadows at Dawn: A Borderlands Massacre and the Violence of History

Like Katherine Benton-Cohen, Karl Jacoby is a practitioner of the new Western history. His subject is the Camp Grant massacre, which was the 1871 assault on an unarmed Apache encampment 60 miles northeast of Tucson. It was a skirmish that past historians might have regretted but regarded as the price to be paid for being in the way of manifest destiny. In such grand movements, as these historians saw them, conflicts were bound to happen, and the deaths, though tragic, were perhaps inevitable. Jacoby rescues the incident and uses it as a case study of culture clash. His explanation of how and why such violence happened forgoes grand themes in favor of examining the justifications of the time and those employed in historical memory.

Jacoby takes a Rashomon approach in recounting the massacre from the perspective of each ethnic group. The groups are the Tohono O'odham Indians, who had long been established in southern Arizona; the Mexicans or Vecinos ("neighbors," as Jacoby calls them); the Americans; and the Apache (or Nnee)—all of which have blood-stained hands. Jacoby begins with an

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exploration of the violence on the frontier that includes the clashes between these groups. He describes the wantonness and the sheer brutality of life out west. Killing, torture, and maiming were rampant. Every group that ventured into south central Arizona used violence to advance its aims.

Jacoby follows the actors in the Camp Grant massacre against this background. The Tohono O'odham, which had a long and contentious history with the Apaches, had established farming and grazing and had withstood the exploitation, diseases, and rapacity of the two other dominant groups—the Mexicans and the Americans. Although established in the area since the 17th century, the Mexicans were anxious about the increasing numbers and power of the Americans. The Mexicans sought to keep their lands and rights and to jostle for a place at the Tucson power table that was already crowded with Americans. The Americans came to the territory seeking new wealth in the mountains and from ranching. The American army, fighting skirmishes and small but vicious wars with the Indians throughout the West, was hard-bitten and calloused. Finally, the Apaches moved into the region after being pushed from the North and the East. They struggled to survive as a tribe against American encroachment and sought an accommodation with the federal government under its new policy of peaceful co-existence. The Apaches agreed to give up raiding and warfare in exchange for food and a reservation. However, the promised food was insufficient and the reservation could not support them; if the Apaches had stayed on the reservation, they would have starved. They had no choice but to raid. Jacoby argues that to expect the Apaches to stop the raiding that was so much a part of their culture was impossible. The Apaches, for their part, were puzzled that they could not take what was surely an abundance owned by the others when their people were starving.

An Apache raid took place in spring 1871. On March 20, an Apache party

swooped down on the Tubac ranch owned by Mr. Leslie Wooster and his Mexican consort, Trinidad Aguirre, whom the newspapers discreetly called Mrs. Wooster. They were killed and their cattle were stolen. Newspapers decried the rising violence of the Apaches and called for retribution. Because the army seemed unwilling to take the necessary steps to defend Tucson and its surrounding communities, town leaders took matters into their own hands. More than 100 American and Mexican men gathered, were deputized, and set out after the Apaches. The Mexicans aligned with the Americans because their economic and social well-being was tied to cooperating with the Americans. The Tohono O'odham also joined the Americans, seeing an opportunity both to strike a mortal blow against its foes and to cozy up to the Americans.

In the early morning of April 30, 1871, a month after the Apache raid on the Tubac ranch, this large multinational, vengeful band came upon an Apache encampment in Aravaipa Canyon, roughly 70 miles northeast of Tucson. The dawn attack was quick and bloody. In a matter of minutes, the force killed nearly 150 Apaches, all but eight of whom were women and children, as most of the men were away at what Jacoby calls a "healing ceremony or celebratory dance." The encampment was unarmed and the victims were mostly asleep. It was not much of a fight.

Outside of Arizona, the attack was decried as a massacre. President Ulysses S. Grant said it was "purely murder." Seen as a challenge to the domestication policy, the federal government prodded the local authorities to prosecute the attackers. It took six months and a threat of imposing martial law on the territory for the U.S. district attorney to bring charges. In October 1871, for the first time in a federal court, non-Apaches were charged with the murders of Apaches.

In a chapter titled "Justice," at the center of the book, Jacoby gives an account of this first-ever murder trial. Mining the newspaper accounts of the well-covered trial, Jacoby conveys

the atmosphere in Tucson. The 100 defendants were confident because, although the attack was regarded as an unprovoked act of war by the military and as murder by many in the East, it was not clear that the citizens of Arizona believed that any crime had occurred. Before arraignment, all 100 defendants had a group photograph taken in front of the courthouse—a most unusual mug shot, indeed. Rather than try all 100, Jacoby writes, "it was agreed" to try only the mayor of Tucson "and let whatever judgment he received be applied to the rest of the defendants." This was certainly an unusual, not to mention unconstitutional, approach, but Jacoby provides no details about who proposed it, how it was agreed upon, or the court's role in it. In any event, the approach served to handle the large number of defendants, and the defendants' agreeing to the arrangement apparently bespoke their confidence in being acquitted. Also indicating such confidence was their choice of defense counsel: the Pima County district attorney.

The trial began on Dec. 6, 1871. The prosecution's witnesses were the Army officers who discovered the massacre's aftermath. The defense called a string of witnesses who, one by one, described the numerous Apache raids the communities had endured and the supposed linkage of the raiding parties to the encampment. The claim of a linkage was easily broken on cross-examination, as witnesses had trouble identifying the time, place, manner, or even the identities that would show the connection. Jacoby emphasizes that the Tohono O'odham, Mexicans, and Americans attended the trial, but that no Apaches were in the courtroom. Even the victims were only identified as "John Doe Apache" or "Mary Doe Apache."

On Dec. 11, 1871, the judge remanded the case to a Tucson jury. In instructing the jury, the court all but excused the Tohono O'odham's actions, explaining that "both the Apache and Papago nations are tribal organizations with codes of their own concerning peace and war. ... By the barbarous codes of both nations, the slaughter of

their enemies, of all ages and sexes, is justifiable.” The court then proffered the following self-defense instruction:

The government of the United States owes its [Tohono O’odham], Mexican, and American residents in Arizona protection from Apache spoliation and assault. If such spoliation and assault are persistently carried on and not prevented, by the government, then the sufferers have a right to protect themselves and to employ force enough for the purpose. It is also to be added that if the Apache nation or any part of it persists in assailing the [Tonoho O’odham], or American, or Mexican residents of Arizona, then it forfeits the right of protection from the United States.

The jury took 19 minutes to return a verdict of not guilty.

The story does not end there. Jacoby recounts the aftermath, or the “memory,” as he calls it. The Tohono O’odham soon regretted the assistance they had provided the Americans and Mexicans. The Americans laid claim to the water rights that fed the Tohono O’odham irrigation and diverted the streams, which plunged the Tohono O’odham into destitution on an increasingly inhospitable reservation. The Mexicans soon found their economic interests increasingly eclipsed by the Americans and their cultural status marginalized. The Americans recast the massacre as self-defense. As for the Apaches, they live on the San Carlos reservation in southeastern Arizona—one of the poorest reservations in the United States—where, to this day, they recall the massacre in their rituals and traditions.

History, it is said, is written by the victors, but both Benton-Cohen and Jacoby—to their credit—give voice to the defeated, killed, forgotten, marginalized, and displaced. To recover these voices, both authors have looked to narratives outside the traditional sources of archives, newspapers, and memoirs (although they seem to have exhaustively researched those sources). Jacoby, in particular, has sought collective memory in oral traditions

and in imagining motives. There is some concern with such an approach, unmoored from the historical record per se, yet it offers up a rich narrative, told from the perspective of the different ethnic groups, not only of the massacre but also of its repercussions and memories. Jacoby justifies his approach as follows:

In the end, then, the Camp Grant Massacre, like so much of the past, is best understood as a palimpsest of many stories. A multitude of narratives flows into and out of the events of April 30, 1871: tales of genocide; tales of the Mexican north and the American West, of O’odham and Nnee homelands; tales of survival, accommodation, and cultural reinvention. Not only do these narratives offer different interpretations of the past, but those who told them expressed themselves through a variety of formats: the mnemonic calendar stick chronicles of the Tohono O’odham; the missionary reports, family stories, and songs of the Spanish and Mexicans; the oral histories of “long ago” of the Apache; the lectures and books of the Anglos. We can judge these accounts for their faithfulness to an always incomplete historical record, and we can acknowledge that all attempts to narrate the past are at once processes of remembering and forgetting, in which the creation of a coherent story is achieved by prioritizing certain events over others. But we cannot confine ourselves to a single one of these narratives without enacting yet another form of historical violence: the suppression of the past’s multiple meanings.²

Sunbelt Justice: Arizona and the Transformation of American Punishment

Nationally, Arizona’s incarceration rate ranks close to the top. Yet, not so long ago, Arizona had one of the lowest rates of incarcerated offenders. How and why this changed is the subject of Mona Lynch’s discerning study, *Sunbelt Justice: Arizona and the Transformation of American*

Punishment. Lynch examines Arizona as a reflection of a national trend toward harsher punishment; as a case study of outsized wardens, infighting institutions, conniving governors, and panic-stricken citizens in an increasingly culturally conservative and volatile social setting; and as an exemplar of the new Sunbelt way of criminal justice.

The Sunbelt was the forefront of what Lynch labels the New Right’s ascendancy. The New Right criticized big government and social welfare spending, while stressing “values” and national defense. This brand of conservatism has been credited with bringing law and order to the political foreground on the state and national levels and playing a significant role in shaping penological policies and practices. The Sunbelt states, in particular, embraced an especially severe approach to punishment.

Lynch selects Arizona to study for several reasons. The state saw the New Right’s political ideologies play out in response to the state’s extensive social, cultural, and economic transformation. The state’s Anglo historical traditions and cultural norms resounded with the New Right and helped reshape punishment policies and practices to provide a solution to the perceived penal crisis that had emerged in the state. The people of Arizona tended to distrust government in general and the federal government in particular and to have a sense of Arizonans versus “outsiders” and a tradition of tough, no-frills punishment.

Rolling up her sleeves and employing a straightforward chronological narrative, Lynch sets forth all that one wants to know about penal reform over the last half-century. The enforcers of penal policy from statehood in 1914 through the 1960s were the wardens of Arizona’s prisons. Their rule was law, and Lynch describes their mighty influence on state legislators. However, as the state grew and the prison population increased, a movement for centralized state control also grew and the Arizona Department of Corrections (ADOC) was established in 1968. Under a number of direc-

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tors imported from outside, ADOC sought to enact penal reforms and an approach to rehabilitation. These efforts ran up against the stalwart opposition of institutional players and politicians who wanted tightfistedness in budgets and strict punishments rather than expensive penal welfare programs and perceived coddling. The results predictably escalated tensions, and opposition to prison reforms became a platform for politicians. Twenty years of lawsuits and federal intervention in the prison system led to resentment. Increasingly, state politicians campaigned on law-and-order platforms and against the prisoners. The ADOC, under the control of Republican governors, resisted the intervention of the federal court. Ultimately, a coalition made up of a Republican governor (Fife Symington), an ADOC director (Sam Lewis), and a Republican attorney general (Grant Woods) helped draft and supported federal prisoner litigation “reform,” which was introduced by Sen. Jon Kyl (R-Ariz.) and enacted as the Prison Litigation Reform Act. The act sharply curtailed prisoners’ lawsuits, restricted federal court intervention, and undermined the monitoring of consent decrees intended to ameliorate prison conditions.

At the same time, the Arizona criminal justice system was overhauled to ensure determinate sentencing. The legislature kept ratcheting up sentences, so that punitive punishments led to sky-rocketing prison populations. The criminal justice system, contends Lynch, was being used as a means of social control. The 1980s and 1990s represented a time of supposed new threats to the social order. The dangers from commerce in drugs and from violent crime were whipped up and exploited to increase punishments and to impose harsher incarceration conditions. Arizona itself was moving to a service economy, with a large influx of new residents who had minimal attachment to local communities. It was a ripe time to push the supposed need for “get-tough” policies, and politicians did so by hitching people’s fears and anxieties to cultural issues. Lynch’s

statistical analysis reveals, quite starkly, that African-Americans and Hispanics in Arizona were imprisoned at rates far higher than their percentage in the population. “The Arizona case,” Lynch writes, “can be seen as an exemplary case of ground-level, late twentieth-century penal change emanating from the Sunbelt.”

Arizona’s get-tough policies influenced not only the nation, but also had an international impact. ADOC Director Terry Stewart resigned his position in 2002 so that he could be appointed by U.S. Attorney General John Ashcroft to be one of the corrections advisors for Iraq. In May 2003, Stewart helped set up the Abu Ghraib prison in Iraq and provided training for local officers, all of whom had questionable records on abuses and violations with respect to their own systems. We are well aware of the legacy that ensued.

Lynch’s study is clean, straightforward, and focused, although it can be dry, even when, like me, you have lived through some of the events she describes. In addition to covering recent history, *Sunbelt Justice* contains a great deal of political science analysis. An interesting example is her discussion of the role of symbolic policies in fostering the increase in punitive punishments. Crime became an easy campaign issue, as state officials bolstered their careers by stoking fears among the many new residents of the state in their freshly constructed suburbs. The symbolism of harsh punishment is exemplified by the present sheriff of Maricopa County, Joe Arpaio, with his chain gangs, tent cities, and pink underwear for inmates.

Sunbelt Justice was published this year but does not follow events past 2006 and, in the book, Lynch looks to the future, which is interesting, if a bit dangerous. She wonders, for example, whether then governor Janet Napolitano could change Arizona’s legacy of severe punishment by bringing in a reformer from out of state. This did not have time to happen, because President Obama appointed her secretary of the Department of Homeland Security in 2009. Lynch also ponders whether the cost of incarceration,

which is ballooning the budget, will cause the GOP-controlled legislature to rethink long sentences, especially for nonviolent offenders, as it will be difficult to preserve Arizona’s low-tax heritage while implementing tough-on-crime platforms. The jury is still out on this. More prescient is Lynch’s wondering about whether the immigration issue would play out in the old patterns of symbolic politics, with a call for harsh measures, a view of fiscal waste, a perspective of Arizona versus the outsiders, and a rejection of the federal government. It sounds pretty much on point to me. **TFL**

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Endnotes

¹There is a further Arizona connection. One of Justice Frankfurter’s last clerks, Professor Paul Bender, is on the faculty at the Sandra Day O’Connor College of Law at Arizona State University. Bender is a former dean of the law school, and served as principal deputy solicitor general of the United States in the Clinton administration.

²Even the naming of the massacre was a recasting of events, which supports Jacoby’s theme that there were varying narratives of the event. The massacre occurred in Arvaipa canyon, but it has been given the name of the closest army fort, Camp Grant. It is so named even though the army had nothing to do with the massacre and was some distance away from Camp Grant; the army investigated the atrocity and provided witnesses for the prosecution; and Camp Grant was where the Apaches had gone for rations and it served as an outpost for the government’s new peace policy with the Indians.

Lion of Liberty: Patrick Henry and the Call to a New Nation

By Harlow Giles Unger

Da Capo Press, Cambridge, MA, 2010. 336 pages, \$26.00.

REVIEWED BY CHARLES S. DOSKOW

On March 23, 1775, when Patrick Henry was debating in the Virginia House of Burgesses concerning the state's response to the most recent British outrage, he uttered one of the most famous declarations in American history: "Give me liberty or give me death." Today he is remembered for that, but for not much more. In fact, he was one of the prime champions of American independence and, along with John Adams, one of the two most forceful voices for severance from the British Crown in 1776.

Henry was a Virginian, but not of the coastal crowd. A lawyer, farmer, and political activist, he was the most celebrated orator of his day. Questioning whether the word "eloquence" sufficed to describe Henry's speaking ability, Thomas Jefferson described Henry's "magic" as "impressive and sublime, beyond what can be imagined." The tales of his verbal prowess were legion, and many are recounted in this excellent biography by Harlow Giles Unger. Jefferson, however, added to the words just quoted a statement that was not entirely laudatory. He said that, while Henry "was speaking it always seemed directly to the point. When he has spoken ... it produced a great effect, and I myself had been highly delighted and moved, but I have asked myself when he ceased, what the devil has he said?"

Unger has also written a biography of James Monroe, and like that book, *Lion of Liberty* focuses on the American Revolution and the Federalist period, with a scope far wider than the life of its subject. As such, the book will be valued by all who have an interest in the birth of this nation and the origins of our government.

Patrick Henry was born in 1736 in Hanover County, Virginia. (The book has a detailed chronology; it would be good if every biography had one.)

George Washington was born four years earlier, also in Virginia, but on the Potomac in tidewater country, to the east. The two were well acquainted and had an enduring mutual respect.

Henry practiced law in Virginia and owned and managed a succession of farms. He had a habit of moving every few years and was constantly in need of legal work to bolster his finances as he rode an elevator between prosperity and debt. His family was also a constant concern; he fathered 18 children with two wives and was periodically required to undertake responsibility for one nephew or another. Unger suggests that his "descendants may well number more than 100,000 today."

Henry's fame as a lawyer took off with his success in the Parsons' Cause case in 1763, three years after his admission to the bar. He was retained by a group of farmers who faced financial disaster if they were required to pay the full damages awarded against them after their loss in a trial brought by the churches to collect rent. Henry's eloquence resulted in a jury verdict of one penny, and the triumphant farmers "hoisted him to their shoulders and carried him out of the courthouse in triumph."

His public career began when he was elected to the Virginia House of Burgesses in 1765, where he served with great distinction through 1776. He was credited with ending the domination of the Burgesses by a clique of tidewater families and with securing recognition of the state's rural interior interests. Elected governor of Virginia in 1776, he was re-elected to one-year terms in 1777, 1778, and 1784 and was sent to the Continental Congress in 1774. In the Revolutionary War, he had a brief and inglorious military career, which remained a sore point with him. Throughout this period he was the voice of Virginia—first for independence, and then for the interests of the state. His stature was unquestioned.

Patrick Henry's influence on the national scene came to a screeching halt with the adoption of the Constitution. Although elected a Virginia delegate to the Constitutional Convention of 1787 (he ran second only to Washington in the voting for delegates), Henry

declined to participate, giving no reason.

His reason, however, was well known. He had never favored centralized national power; his support for independence represented only rejection of English power. He was concerned, accurately, that the convention would produce a strong central government at the expense of the states. His opposition was feared by Madison and other supporters of the adoption of the Constitution. Henry believed that the convention would be controlled by men of great wealth who would dominate the economy to the detriment of western farmers and ordinary folk. Madison wrote to Washington at this time, "Mr. Henry's disgust exceeds all measure."

Unger cites the aborted Jay Treaty as a fundamental cause of Henry's disenchantment. In negotiating with Spain, John Jay, the American delegate to Spain (and later the first chief justice of the United States) had been willing to sacrifice navigation rights on the Mississippi River for trade benefits that the New England and Mid-Atlantic states favored. (Unger calls this "an incomprehensible misstep.") The Senate ultimately rejected the treaty, but Henry was permanently embittered by the willingness of the northern states to ignore the interests of Virginia and the interior of the country.

Thus, while Washington, Jefferson, Hamilton, and Madison were creating a new government, Henry, like Achilles, sulked in his tent. By refusing to attend the convention, Henry forfeited much of the influence he might have had on the new Constitution. He could never accept the centralization of power the document represented, and he spent his political capital in the bitter convention battle over ratification. That fight was lost when the convention ratified the Constitution, and Virginia became the 10th state to ratify it.

Henry's insistence on a bill of rights in the new Constitution, however, bore fruit when Madison, in the first House of Representatives, fulfilled a campaign promise (forced on him by Henry and others) to add the first 10 amendments to the Constitution.

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But Henry refused to take part in the new government. Although President Washington urged him to accept a seat in the Senate, Henry refused. He also declined other national offices offered by Washington, who continued to hold him in high regard despite their differences over the Constitution. When Henry's term in the Virginia House of Burgesses expired in 1791, he declined to run for re-election, and he never again held public office.

Henry died on June 6, 1799, six months before Washington, and is buried at Red Hill, his last residence and farm. The Patrick Henry National Memorial is located there, near Brookneal in Charlotte County, Virginia. If one locates Charlotte, Hanover, Louisa, Prince Edward, Campbell, and Halifax Counties on a Virginia map (which is something this book could use), the part of this country that Henry loved will be defined.

Unger tells his tale well, in part because he spends many pages detailing the history of the times. Unger calls Henry, with justification, "one of the most important and most colorful of our Founding Fathers."

Any biography of a founding father must address the question of slavery. Like the other founding fathers from Virginia on south, Patrick Henry was a slaveholder and depended on slave labor to work his fields. Like Jefferson and unlike Washington, Henry did not free his slaves in his will, perhaps because at his death he left a widow with small children. An appendix in *Lion of Liberty* includes a letter from Henry to a Quaker leader in 1773, in which he refers to slavery as an "abominable practice" and "a species of violence and tyranny." He describes himself as "drawn along by the general inconvenience of living here without [slaves]. ... I believe a time will come when an opportunity will be offered to abolish this lamentable evil." He shared this view with Washington, who called slavery "an evil ... which requires a remedy." Both wished for a plan of emancipation, but neither could envision it in practical terms. **TFL**

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The Genie in the Machine: How Computer-Automated Inventing is Revolutionizing Law and Business

By Robert Plotkin

Stanford University Press, Stanford, CA, 2009.
270 pages, \$29.95.

REVIEWED BY CHRISTOPHER C. FAILLE

Patent law is all about striking a balance. If too much can be patented too easily, the resulting monopolies and licensing requirements clog the arteries of commerce. If not enough can be patented or if the costs of doing so become onerous, then incentives for innovation wither away. Debates about patent law often take shape around this question: Does existing policy embody the golden mean, or does it err on one side or the other?

Robert Plotkin, in *The Genie in the Machine*, takes a somewhat different approach. He seems to believe that the present balance is roughly right. Abstract ideas such as scientific principles cannot be patented. Practical applications of scientific principles, such as a blast furnace, can be patented. "Although it has always been difficult to distinguish between abstract ideas and practical applications, patent law did a pretty good job at keeping the dividing line clean for most of its history. In the end, it was easy enough to tell the difference. ... Try standing very close to the furnace if you question whether it is an abstract idea."

Plotkin's point, though, is that this rough balance cannot last, because it will be tested—and is now in the early stages of a test—for which its founding ideas are ill prepared. Software exists that, if fed specifications, will do a lot of our inventing for us. This software is sure to grow more sophisticated over time. If I invent such software, and then the software (if fed my specifications) invents a better blast furnace,

who gets to patent what? Do I get to patent both the inventing software and the new blast furnace?

Plotkin is concerned, naturally enough, that, if the law is understood to say that I can patent them both, then, as software becomes ever more adroit at granting wishes, those who are the quickest to file patent applications will become very wealthy—at the expense of everybody else. "If history is any indicator," he writes, we will soon see a flood of patents on artificial invention technology, [on] the inventions it produces, and [on] wishes themselves. ... [T]here is always a risk that the patents themselves will stifle innovation, perhaps because they create a 'patent thicket'—a situation in which no one in an industry can innovate without obtaining permission from a large number of other patent holders and because the cost of doing so is prohibitively high." James Bessen has written about the dangers of the "strategic patenting of complex technologies" and the risks this creates, and Plotkin cites his work.

No Dam for the Flood

Unfortunately, on the question of how to solve that problem—how to adapt the law to avoid the creation of such thickets—Plotkin has little to offer. He suggests at one point that it may be best to keep computer platforms open while allowing for exclusive rights to their applications—the title of one chapter is "Free the Genie, Bottle the Wish." But that suggestion comes to nothing because he decides it is too difficult to determine which is which. Some investors will "wish" for their genies to create sub-genies, which in turn will create other things. Will the sub-genie be a platform or an application? Free or bottled? Plotkin can't tell us.

So far as I can tell, Plotkin's only real proposal for change is buried in the middle of the book. He wants to persuade courts to change the way they understand the nonobviousness requirement of patentability.

Consider how, under present law, a patent examiner will typically look at a patent application concerning, say,

a new automobile frame with useful and novel aerodynamic qualities. (The patent application would not spell out what software has been used in the preparation of a design.) Aside from patentable subject matter, utility, and novelty (all satisfied in this example by stipulation), the examiner's chief concern will be with nonobviousness. This means: Would another automobile engineer having ordinary skill in that art regard the new design as obvious?

An "obvious" innovation would be, say, one in which the frame of some existing car model is stretched out one inch, front to back. Another auto designer, looking at that frame, would shrug and say "big deal." You don't get to patent the slight variation on that pre-existing design. But if a new frame appears really new and surprising to those with ordinary skill, then you have done something nonobvious. Congratulations; you have a patent!

This is the point where Plotkin proposes a reform. The standard by which obviousness is measured should not be simply whether an innovation seems obvious to a person of ordinary skill in the art, but also whether it seems obvious using the artificial invention software commonly used by inventors in that field. This test would be flexible, "capable of adapting to changing technology over time," because, as the available software changes, the standard of obviousness would keep pace.

That proposal is intuitively plausible. Yet it seems to fall far short of the mark, if Plotkin's goal is to protect our economy from the distortions that can and will be created by the strategic patenting of which Bessen warns. We need, I have to say, newer and fresher thought than anything on display in this book. **TFL**

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

The Litigation State: Public Regulation and Private Lawsuits in the United States

By Sean Farhang

Princeton University Press, Princeton, NJ, 2010.
302 pages, \$75.00 (cloth), \$27.95 (paper).

REVIEWED BY GEORGE W. GOWEN

In the mid-19th century, the French nobleman Alexis de Tocqueville sought the underpinnings of democracy in America. In his travelogue with that name, he enumerated, among other things American, the churches (" aflamed with righteousness"), volunteer associations ("this powerful instrument of action"), and a free press ("the constitutive element in freedom"). If he returned today, he might give emphasis to that unique expression of democracy in America: litigation.

In *The Litigation State*, Sean Farhang, an assistant professor at the Goldman School of Public Policy at the University of California, Berkeley, writes not about old-fashioned litigation—tort or contract—but rather about the explosion of private lawsuits enforcing governmental regulations. Farhang should be complimented for spotlighting this American phenomenon. He writes:

In the past decade, there was an average of about 165,000 lawsuits filed per year to enforce federal statutes in the United States district courts. These suits spanned the waterfront of federal policy, including antitrust, civil rights, labor and employment, environmental, banking, and securities/commodities exchange regulation. More than 97 percent of the suits were privately filed. At present, the role of private litigation in many important areas of federal policy in the United States is massive both in absolute terms and relative to enforcement by the national government.

In other words, in the past decade there were over a million and a half lawsuits enforcing federal laws, only three percent of which were prosecuted by federal agencies. The

balance—97 percent—was "prosecuted" by private individuals. Although Farhang does not use the analogy, this seems an updated version of the marshal in the Wild West deputizing citizens to enforce the law.

Why does Congress mobilize private litigants for regulatory implementation? Farhang cites three types of groups that push for statutes allowing for private enforcement of federal laws: associations of lawyers seeking opportunities for remunerative litigation, issue-oriented citizens' groups, and the Democratic Party in the service of its core constituents. Farhang notes that, in addition to wishing to satisfy these groups, Congress seeks to shift the cost of implementation of regulatory legislation from the state to the private sector.

Congress also has a political reason: Whereas the executive branch wishes to have as much power as possible, Congress wants to limit that power and give some of it to the private sector.

Farhang cites the Civil Rights Act of 1964 as an example of this phenomenon. With respect to that statute, "[c]onservative Republican legislators explicitly articulated apprehension about ideologically biased abuse of administrative power as a reason to prefer private lawsuits over administrative implementation." In 1991, however, when amendments to the 1964 act were being considered under a Republican administration, it was the Democrats who lauded private enforcement: "Both the House and Senate reports on the bills that led to the [Civil Rights Act] of 1991 emphasized that private enforcement litigation was intended, in the compromise of 1964, to be a central part of the enforcement scheme for federal employment discrimination laws."

Farhang is generous, perhaps to a fault, in citing other scholars and in indulging in statistical methodology beyond the ken of the average lawyer. He writes:

Applying the Dickey-Fuller and Augmented Dickey-Fuller unit root tests to the raw series reveals evidence of nonstationarity in

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REVIEWS *continued from page 71*

the dependent variable and several of the independent variables (*Partisan Seat Share, Presidential Distance, and Congressional Ideology*).

Farhang is at his best in the chapters of *The Litigation State* that address private enforcement of the civil rights laws. In his final chapter, he concludes on a note echoing the uniqueness of American democracy:

As distinguished from the cen-

tralized bureaucratic European model of state strength, a great deal of American regulatory state control has taken the form of radically decentralized intervention by an army of litigants and lawyers licensed by the state and paid bounty by defendants at the state's command. Because of the distinct structure of American political institutions, America's regulatory state has taken a distinct form—one importantly dependent upon private litigation. **TFL**

George W. Gowen is a partner in the New York law firm of Dunnington, Bartholow & Miller LLP. His areas of practice are trust and estates, corporate law, and sports law. He was an adjunct professor at the New York University Graduate School of Business and has served on United Nations commissions, as counsel to leading sports organizations, and as chair of environmental and humane organizations.

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Skinner v. Switzer (09-9000)

Appealed from the U.S. Court of Appeals for the Fifth Circuit (Jan. 28, 2010)

Oral argument: Oct. 13, 2010

Florida convicted the petitioner, Henry Skinner, of capital murder and sentenced him to death. Although Skinner admits that he was present at the scene of the murders, he maintains his innocence. Skinner now seeks access to biological evidence for DNA testing, which he claims will prove that he is innocent of the murders. After unsuccessfully filing two habeas corpus claims, Skinner filed a 42 U.S.C. § 1983 claim to attempt to gain access to the evidence. The Fifth Circuit denied Skinner's motion to stay his execution, but Skinner appealed that decision and the Supreme Court agreed to hear Skinner's case. The Court must now decide whether a demand for access to biological evidence may be brought under 42 U.S.C. § 1983, or whether the claim falls within the realm of habeas

corpus law and was thus improperly filed. The Supreme Court's decision will not only decide Skinner's fate but also clarify the scope and procedure of habeas corpus claims. Full text is available at topics.law.cornell.edu/supct/cert/09-9000. **TFL**

*Prepared by Sara Myers and John Sun.
Edited by Kate Hajjar.*

Snyder v. Phelps (09-751)

Appealed from the U.S. Court of Appeals for the Fourth Circuit (Sept. 24, 2009)

Oral argument: Oct. 6, 2010

Fred W. Phelps, Shirley L. Phelps-Roper, and Rebekah A. Phelps-Davis, the respondents, protested at the military funeral of the son of Albert Snyder, the petitioner, holding signs saying "God Hates the USA," "Thank God for 9/11," and other phrases. Snyder successfully sued the Phelpses for intentional infliction of emotional distress, invasion of privacy by intru-

sion upon seclusion, and conspiracy, and the jury awarded Snyder \$2.9 million in compensatory damages and \$8 million in punitive damages. On appeal, the Fourth Circuit Court of Appeals overturned the jury verdict, holding that the Phelpses' statements were protected under the First Amendment and thus could not be subject to a civil lawsuit. The Fourth Circuit reasoned that the statements should be protected because they are rhetorical hyperbole, as opposed to verifiable fact, and because the statements address matters of public concern. Snyder has appealed the decision to the Supreme Court. The Court's decision in this case will implicate individuals' free speech and privacy interests and the states' interest in protecting their citizens through tort law. Full text is available at topics.law.cornell.edu/supct/cert/09-751. **TFL**

Prepared by Priscilla Fasoro and Justin Haddock. Edited by Joanna Chen.

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