

Last Rites

By John Lukacs

Yale University Press, New Haven, CT, 2009.
208 pages, \$25.00.

REVIEWED BY JEFFREY G. BUCHELLA

In his study of the late diplomat and public intellectual George Kennan (*George Kennan: A Study of Character* (2007)), John Lukacs referred to the English author Jean Rhys as having written that a novel has to have a plot, but a life doesn't have any. This is largely true, wrote Lukacs, in part because the novelist "intends every event or act or word to have eventual consequences, whereas in a man's life so many consequences are unknown and unexpected and unintended. Yet there are times when certain consequences are decisive enough so that, in retrospect, they give a definite form to the history of a life, as if that had a 'plot.'"

Although Lukacs applied this observation to the life of George Kennan, we may also relate it to Lukacs. *Last Rites* reveals the consequences of his having started life as a child of war-torn Europe and having later decided to emigrate to the United States. An accident of fate, followed by a conscious decision, helped to define the plot of the life of this respected American historian and writer.

John Adalbert Lukacs was born Lukács János Adalbert in Hungary in 1924, soon after Adolf Hitler made a name for himself with his unsuccessful Beer Hall Putsch. By the time Lukacs was 16 years old, Hitler was menacing the continent, Winston Churchill had been named Prime Minister of Britain, and Europe had begun its wrenching struggle with Nazism. Lukacs came of age as this war of unparalleled violence swept away the Thousand Year Reich as well as much of the pre-existing European order, and it is this great historical transformation that has provided much of the backdrop for the ideas and themes that Lukacs has explored in his more than 30 books.

After Germany surrendered, Lukacs remained in his native country only briefly, as a new reality dawned: Eastern Europe's troubles would continue as a result of Stalin's encroachments. At 22, Lukacs left Hungary, eventually arriving in Philadelphia more than 60 years ago, where he has made a career chronicling the history of 20th-century Europe and America, with trenchant studies of some of its key figures, including a multi-faceted analysis of Churchill's contributions (*Churchill: Visionary, Statesman, Historian* (2002)), and an incisive survey of the varying historical perspectives on Hitler as well as signature reflections on the nature of history itself (*The Hitler of History* (1997)). *Last Rites* is Lukacs' second self-described "auto-history," by which he means that it is a history of his thoughts and beliefs more than it is a routine autobiography. The first auto-history, *Confessions of an Original Sinner* (1990), included a description of the scene he found in 1946 when, as a young man who had left nearly everything behind, he arrived at Philadelphia's main train station and stepped out into a cold December night. He soon began to work as a history teacher at Chestnut Hill College, a small Catholic college in the city, where he would remain for the rest of his academic career and become chairman of the department.

In the intervening years, Lukacs has accrued a reputation as a singular historical thinker and writer. He stated at a lecture that he meant this new slim volume as a final observance for what he calls the "Modern Age," a historical era that closed roughly with the end of the 20th century, and the final chapter of *Last Rites* is titled "Ave atque Vale," Latin from a poem by Catallus, meaning "hail and farewell." But *Last Rites* also represents the approaching end of Lukacs' writing career and a personal summing up—the often intimate reflections of a man, now aged 87, mindful of his mortality, seeking to locate his life and era in its proper place in history.

To Lukacs, the end of the modern

age marks a transition from a 500-year era that commenced roughly with the end of the middle ages and that gave birth to two principal intellectual achievements: the invention of the scientific method, and the development of historical thinking. Concepts critical to the first achievement have come to inform our understanding of the second, but not without creating some confusion as well. For Lukacs, human knowledge, such as the knowledge derived from peering through a telescope at a distant galaxy, is "personal and participant." Descartes was wrong: there is no mind-matter dichotomy, and no such thing as "objective" reality. Reality is what we perceive, yes, but also, *when and how we perceive it*, and is therefore inextricably a product of our perceptions as well as the perceptions of our fellows living in societies, cultures, and geographies existing in various points in space and time. History, because it is always a product of human perception in a given present moment, is both ephemeral and obscure.

Lukacs' views on the nature of history are part of a continuing inquiry. In 1938, the French intellectual Raymond Aron wrote his doctoral thesis at the Sorbonne attacking so-called "historical positivism" and arguing that history is substantially a product of subjective human experience. As an example of this phenomenon, and so as to demonstrate the force of the subjective, Lukacs points to the political culture of Nazi Germany, especially in the 1930s, when he says that many Germans, the most educated people in the world at that time, believed that they were freer than they had ever been before.

It follows, writes Lukacs, that material realities do not determine history: "The human mind intrudes into, it complicates the very structure of events." This said, however, Lukacs also rejects a dogmatic subjectivist view of history, and for purposes of illustration, points once again to Nazi Germany. For at least a century before the rise of the Third Reich, he writes, leading German philosophers had for-

mulated theories of historical idealism, which Hitler and his protégés understood to mean that human will, married to ideas that are true, superior, and strong, would inevitably triumph. In other words, they embraced the belief that a disciplined subjective intent would change the world, in accordance with their fondest dreams. The Nazis were, of course, not bound to triumph, inevitably or otherwise, notwithstanding their fierce fantasies and determined energies. The Nazi drama illustrates the vulnerabilities and dangers of subjectivism as a philosophy of history. Ideas and intentions alone cannot determine destiny, but neither can history be understood as a set of causes and effects in a continuous linear chain of material events. In the end, Lukacs, paraphrasing Kierkegaard, concludes that any full understanding of history, like pure truth, is the property of God alone.

More than most contemporary historians, Lukacs' works convey an understanding that history is far more than a detritus of facts and tales from the past. As Thucydides was reputed to have said, history is philosophy learned from examples. Lukacs devotes his energy to seeing beyond the relatively superficial. He looks beneath the surfaces of history, at times even to inquire into the very nature of the human condition.

Such inquiries need not resort exclusively to grand abstractions, and, in *Last Rites*, Lukacs does not linger on macroanalysis. In fact, his writing is most engaging when he turns his attention to the details of his life, with personal reflections on his marriages, his family, and his religious convictions. If his early life was marked by the loss of geographic and historical worlds, his personal life has also included loss, which he discusses with sensitivity and restraint.

Why is he, John Adalbert Lukacs, writing this book? The question causes Lukacs to reflect on his life as an emigré historian and to survey the lives and works of his colleagues, living and dead. He quotes the French Catholic novelist and essayist George Bernanos: "a civilization disappears with the kind of man, the type of

humanity, that has issued from it." In important ways, Lukacs represents a chapter in the story of human civilization that is now coming to an end: the last of a generation who walked the earth before the radical political and cultural transformations wrought by World War II. He sees in his personal story, and in the story of his time, a parallel, inexact to be sure, with that of another writer, Friedrich von Reck-Malleczewen, the son of a Prussian nobleman and author of a diary of the Nazi era that was published posthumously, after Reck-Malleczewen's murder at Dachau by *Genickschuss* (shot in the back of the neck) in February 1945. *Diary of a Despairing Man* recorded Reck-Malleczewen's thoughts as an heir to the dying tradition of German aristocracy, passionately evoking the horrors of the rise and rule of Nazism—a political movement that was contemptuous of many German traditions, and that promised the *Volk* a revolutionary new world in which their old values would no longer be needed. Lukacs' identification with Reck-Malleczewen underscores an important theme in *Last Rites* and in Lukacs' *oeuvre*: modern political and social evolution has often thrown out the good with the bad. World War II's destruction of the old European order was not an entirely positive development.

Lukacs describes himself in *Last Rites* as "a remnant reactionary." In fact, he defies easy categorization and, even when applying the term "reactionary" to him might have some accuracy, it would have to be shorn of its current popular and pejorative connotations. Lukacs insists that an accurate general definition of a reactionary is someone who believes that the clock must be set back, *now and again*, in order to restore time-honored values and standards. This is so because the claim that new ideas and methods will lead the way to a better world is not always borne out. To be a reactionary, in the best sense of the term, involves the exercise of wisdom as a defense against folly. It often requires courage. The Nazis disappeared into the whirlpool of history, but only after Reck-Malleczewen involuntarily preceded them—the

price paid for resisting their vision of a Thousand-Year Reich. Hitler promised "progress," among other things—reason enough, says Lukacs, to be ever skeptical of the siren song of revolutionaries. Hitler's promise of progress is also reason to rethink the very meaning of "progress," which is a way of looking forward that often contains within its vision a willingness to discard the past and its traditions for something decidedly wanting.

Lukacs describes himself in *Last Rites* not only as a "remnant reactionary," but also as "a remnant self-proclaimed bourgeois." As with the term "reactionary," however, his understanding of "bourgeois" differs from popular notions, to the extent that any such notions continue to exist at all. The term "bourgeois" does not mean philistinism, he says, but rather, it denotes taste, intelligence, material comfort, and culture. George Kennan may have been an attractive subject for Lukacs in part because he and Kennan shared many perspectives and values. It is fair to say that Kennan was also a traditionalist, a bourgeois, and even a reactionary, in the best sense of those words as Lukacs understands them.

Lukacs' distinct personal history has contributed to his having become a detached and astute observer of his adopted country. He has little use for what he considers the debased nomenclature used to characterize current political developments in the United States. Indeed, Lukacs illustrates the difficulties with such terms as conservative or reactionary. He sees nothing conservative in what he prefers to call American nationalism. He detected in George W. Bush a fixation on his role as commander in chief—an anomaly in American history—and concluded that the President's infatuation with all things martial was reminiscent of the Roman Republic when Octavian, placing similar emphasis on his military credentials and authority, relied increasingly on the military for his political legitimacy. History may not repeat itself, Lukacs says, but *conditions* do, and "it is more difficult to be free than not to be free: but that is

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a perennial human predicament.”

Lukacs is a traditionalist, but his concerns transcend the political. When he mourns the decline of what he calls community, he recalls the once intact beauty of the countryside where he has lived for 65 years. When he first settled in the United States after the war and began teaching in Philadelphia, he built a home in what was then rural Chester County. *That* world, he recounts, has all but vanished. A five-fold increase in population since 1900, and all the social and technological changes that have accompanied a fast-growing and modernizing nation, have swept away a once-bucolic landscape, as well as the traditions that held together rural life. Lukacs knows that he lives in a world transformed, a world now but a dim memory of what he experienced as a young professor. Even then that world was itself remote from the one that the Pennsylvania Impressionists were painting of an unspoiled eastern countryside near the turn of the 20th century. This American tradition is separated yet further from the world of Lukacs’ Hungarian ancestors and their centuries-old landscape and culture.

In his study of Dietrich Bonhoeffer’s book *Letters and Papers from Prison*, Martin E. Marty observed that “biographers look for turning points, basic decisions made, accidents, or other extraordinary events in the lives of their subjects.” Lukacs left the world of old Europe in the aftermath of what he called *The Last European War*, in a 1976 book of that title. Unlike other such emigrés, he did not become a historian of his native people, although he retained connections, tangible and otherwise, to that world. He wrote about Hungary (*Budapest 1900: A Historical Portrait of a City and its Culture* (1988)), he has frequently traveled to England and Hungary to conduct research, he taught in France in the early 1960s, and he maintained contact with the people he knew when he departed Hungary in 1946. In the wake of the collapse of the Iron Curtain, he was invited to attend the opening of the

first democratically elected Hungarian parliament. He has received honors from his home country, and his translated works now sell in Budapest bookstores. That an earlier civilization has passed away is evidenced by what he has seen for himself: Hungary has become more like the United States, which left its bourgeois period behind long ago.

Lukacs’ decision to leave Europe for the United States in 1946 was a turning point in his life, which placed him in a position to reflect thoughtfully on the differences as well as similarities in these two worlds. As Wallace Stevens once wrote, “All history is modern history,” and Lukacs is mindful of the continuity in human experience. In this respect, his Catholicism has been important to his worldview, with, as he has written elsewhere, “its perhaps unique and deep understanding of human nature—an understanding that human beings are fallible, and inherently flawed, and among their constitutional flaws include their many limited capabilities, and among these, their inability to understand the world fully, or to bring to the writing of their own history any degree of truth.” Among the evidence for this, he says, are the many ruling ideas and achievements of the last 500 years that have proved to be “wrong, antiquated, false: the ideas of Progress, of Objectivity, ... of Materialism, of Uniform Equality,” and even the Enlightenment itself (although Lukacs does not find these ideas “entirely wrong: what was, and is still, wrong is their institutionalization, the acceptance of their formulations as absolutes”). As it was for Dostoevsky, reason alone is insufficient for Lukacs, and it is, for him, a great error to turn to it over faith.

The historian is, at best, a flawed being, undertaking a search for understanding, which will often be thwarted. The search itself, however, may be a rewarding journey of partial illumination, and even with hints at salvation. Lukacs quotes Thackeray in *Henry Esmond*: “As there are a thousand thoughts lying within a man that he does not know till he takes up the pen to write.”

Jean Rhys may have been correct that a human life doesn’t have a plot, but John Lukacs’ life has had a definite form. He has been a modern day lamplighter, helping to provide the reader a view back along the darkened path we are leaving behind us, and enabling us to peer, often only dimly, into the way forward. He has, at the very least, offered to see us to our station of departure, where we may embark, with the benefit of a fellow traveler’s words of experience that are set down in this wonderful volume. **TFL**

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Blind Spots: Why We Fail to Do What’s Right and What to Do About It

By Max H. Bazerman and Ann E. Tenbrunsel

Princeton University Press, Princeton, NJ, 2011. 191 pages, \$24.95.

REVIEWED BY CHRISTOPHER FAILLE

This book begins promisingly, with insightful discussions of ethical philosophy, and then detours into a tired cartoonish view of the issues of business regulation. The authors, Max Bazerman, a professor at Harvard Business School, and Ann Tenbrunsel, a professor at the Mendoza College of Business, University of Notre Dame, seem to believe that for-profit corporations are rather vicious creatures that always need to be controlled by government. Most examples of how “we fail to do what’s right” to quote the subtitle of *Blind Spots*, turn out to be, at least in the final chapters of the book, examples of regulations that were not imposed. “What to do about it,” to quote the rest of the subtitle, always turns out to be a matter of re-

jiggering the political system to make it easier to impose regulations.

This habit of mind constitutes a blind spot of its own, but the authors seem to believe that their own eyesight is excellent.

One example: accounting and auditing issues. Bazerman and Tenbrunsel make the point that auditors have been too cozy with the corporations they audit, and thus unhelpful to outside investors. From this, they leap immediately to the conclusion that the federal government has to do more to improve the system of financial accounting. The only question about, for example, the Sarbanes-Oxley Act of 2002, which in their description “imposed a variety of reporting requirements on public companies that many senior executives viewed as excessive government regulation,” was whether it went far enough in doing so. To them, sadly, the answer is no, such measures never go far enough, because “the larger corporate world hasn’t been particularly interested in improving auditors’ independence.” That’s true enough, but the auditors themselves might well be interested in improving auditor independence, and might even have the means to accomplish that, were they working in a more laissez-faire environment. The authors’ blind spot, however, prevents them from asking whether government is the problem, and whether “doing what’s right” might not mean undoing frameworks the government has established and upheld for decades.

Stock Options and the FASB

Consider accounting for stock options, and the way this practice fed into the 1990s dot-com boom. Stock options were part of the compensation package for many of the high-tech start-ups that gave those years their distinctive flavor. The firms issuing options did not carry the value of the options on their income statements as an expense, and by not doing so, but by bookkeeping as if there were such a thing as a free lunch, they allowed themselves to show a profit sooner than would otherwise have been the case, and this in turn helped keep the original investors happy, while allow-

ing the managers to bring in new investors.

That was the argument, when arguments came to be necessary, for continuing to use stock options without calling them an expense. Yet it was also the argument for calling them an expense. This is because the obvious problem with stock options was that they diluted the value of the company’s equity. At some point some of the options will be exercised and this will increase the amount of stock outstanding, almost by definition driving the share price down.

Crucially, in 1993 the Financial Accounting Standards Board (FASB) in Norwalk, Conn., announced that it was considering a rule that would have installed option expensing as part of the generally accepted accounting principles in the United States. The FASB was and remains a private organization, created by the accounting industry itself in 1972. It was created as the successor to an earlier group called the Accounting Principles Board, also a private self-regulatory body, which had been around since the 1930s.

The accounting profession, then, had created its own bodies of self-criticism. Why? Because financial accounting that does not serve to accurately communicate information to the actual or potential investors has no reason to exist, so sensible self-policed rules are in the industry’s self-interest. In precisely that spirit, the FASB in 1993 decided that the goal of providing accurate information required that it rewrite its standards to treat as an expense the value of stock options awarded as compensation.

Immediately, prominent politicians roared. Sen. Joe Lieberman (D-Conn.), a senator from the state where the FASB has its headquarters, sponsored a Senate resolution declaring that the new proposed accounting standard would have “grave consequences” for entrepreneurs.

On March 25, 1994, roughly 3,000 people gathered at the San Jose Convention Center in San Jose, Calif., protesting the threat that those distant Connecticut bean-counters posed to Silicon Valley’s beloved stock options. Kathleen Brown, the state treasurer,

and daughter of the once-and-future governor, addressed the crowd and shouted, “Give stock a chance.” The crowd loved it.

Lieberman, Brown, and like-minded folks did manage to kick up enough of a fuss that the FASB backed down and continued to allow Silicon Valley companies to pretend that they were treating themselves and their employees to a free lunch when they gave out stock options.

So, to review: The accounting industry set up a system for regularly updating its standards. In the early 1990s it applied that system in a way that might have helped us all avoid the worst excesses of the Internet bubble. Politicians forced accountants to abandon their own efforts in this line, and those excesses came. In the wake of the damage when that bubble burst, the politicians created a new system, in the Sarbanes-Oxley Act, through which they tried to do the sort of thing that they wouldn’t let the accountants do for themselves.

Bazerman and Tenbrunsel don’t mention the FASB at all, and from their distorted account of accounting/auditing issues they reach the following skewed conclusion: “It makes more sense to begin with a truly independent system than to add patches to an existing, corrupt system.”

Unfortunately, a workable independent system did exist until Brown and Lieberman (and many others I’ve left out of the above account in a spirit of mercy) corrupted it.

Sometimes It Takes a Rocket Scientist

Such sophisms in the final chapters of this book are so maddening in large part because, as noted, the earlier portions of *Blind Spots* promised something better. Early on, for example, the authors discuss a meeting held on Jan. 27, 1986, when engineers and managers from NASA on the one hand, and from contractor Morton Thiokol on the other, met to decide a simple question: whether the launch of the Challenger the next day should be cancelled because of low temperatures and the concern of some of the Morton Thiokol engineers that O-ring

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difficulties had been connected with low temperatures.

The decision made that evening cost seven lives on the morrow. Bazerman and Tenbrusel observed that many of the engineers—both the NASA and the contractor’s engineers—didn’t know that cancelling the launch was the right thing to do—not because they were hell-bent on the next PR payoff, of putting a “teacher in space” with all the prepared fanfare, but because they didn’t have the benefit of our hindsight and because many “on both teams saw no clear observable pattern regarding the O-rings.”

They didn’t see it because they were looking at too narrow a body of data. Problems with O-rings had been detected in seven out of the 24 launches of a space shuttle up to that date. They looked at data from those seven launches and could not see a definite pattern indicating that low temperatures meant trouble.

Startlingly, though, if they had looked at the temperature data from all 24 launches, both those with and those without subsequent reports of O-ring trouble, the correlation of temperature and O-ring difficulty would have been quite clear. Their error was a failure to broaden their base of data. This points us toward a real lesson. There is a natural human tendency, after one has framed a question in a certain way, to look for only such evidence as fits naturally within the frame. Because our frames are necessarily artificial, and reality often and rudely ignores them, this is a tendency we need to learn to resist. Had the engineers in that room expanded their frame, seven deaths might have been averted. Likewise, had Bazerman and Tenbrusel expanded their frame, they might have had much more of interest to say about why we fail to do what’s right and what to do about it. **TFL**

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The Fundamental Holmes: A Free Speech Chronicle and Reader

Edited by Ronald K. L. Collins

Cambridge University Press, New York, NY, 2010. 417 pages, \$95.00 (cloth), \$29.99 (paper).

REVIEWED BY LOUIS FISHER

Ronald Collins, a professor at the University of Washington School of Law in Seattle, has long played a leading role in explaining and defending the First Amendment. His other books include *The Trials of Lenny Bruce* (2002, with David Skover) and *We Must Not Be Afraid to Be Free: Stories of Free Speech in America* (2011, with Sam Chaltain). In *The Fundamental Holmes*, Collins focuses on the complex writings of Oliver Wendell Holmes Jr. (1841–1935), placing Holmes’ works in their historical and biographical context. The book also includes some of Holmes’ letters, speeches, articles, and opinions for the Massachusetts Supreme Judicial Court and the U.S. Supreme Court, as well as excerpts from his books.

The Fundamental Holmes begins with Holmes’ profound experience fighting in the Civil War. In April 1861, as soon as the war started, he withdrew from his senior year at Harvard College to enlist as a private in the New England Guards. He returned to Harvard on May 25 to graduate on July 17. A week later, he was commissioned first lieutenant in Company A of the Twentieth Regiment Massachusetts Volunteers. During the course of the war he was wounded three times: at Ball’s Bluff in Virginia, at Antietam Creek, Maryland, and at Fredericksburg, Virginia. The second wound was caused by a bullet through his neck. Left for dead, he was found that evening “wandering aimlessly.”

Holmes drew many conflicting thoughts from the Civil War. He did not view it as a holy war, in the sense that one side was necessarily superior to the other. In a speech he gave on

Memorial Day in 1884, he said: “we equally believed that those who stood against us held just as sacred convictions that were the opposite of ours, and we respected them as every man with a heart must respect those who give all for their belief.” He added a moral justification for fighting on either side: “to act with enthusiasm and faith is the condition of acting greatly.” Further: “as life is action and passion, it is required of a man that he should share the passion and action of his time at peril of being judged not to have lived.” Later, in “The Soldier’s Faith,” a Memorial Day speech he gave in 1895, Holmes justified giving one’s life to a cause one does not understand: “in the midst of doubt, in the collapse of creeds, there is one thing I do not doubt, that no man who lives in the same world with most us can doubt, and that is that the faith is true and adorable which leads a soldier to throw away his life in obedience to a blindly accepted duty, in a cause which he little understands, in a plan of campaign of which he has little notion, under tactics of which he does not see the use.”

Collins analyzes these speeches by Holmes to put them in the context of what happened after the Civil War: the mad dash to make personal fortunes. “In a world grown fat by the pursuit of money, Holmes (a man of means) called for a more vibrant contact with life.” Collins sees in many of Holmes’ letters a disdain for “political or religious zealots, be they antiwar socialists or antislavery abolitionists,” but Holmes had his own enthusiasm and zealotry for risking one’s life in military action. Some of his contemporaries saw his speeches as glorifying war, but Holmes rejected such criticism: “Fancy my speech of last Memorial Day [“The Soldier’s Faith”] being treated as a jingo document!” Yet his speeches continued to promote a spirit of jingoism: “It is worse to be a coward than to lose an arm. It is better to be killed than to have a flabby soul.” As Collins notes: “His use of words with contradictory meanings aside, and his abhorrence of the jingo spirit notwithstanding, Holmes had

little sympathy for pacifists and anti-war zealots.”

A passage in “The Soldier’s Faith” seems to anticipate and support the profession of eugenics: “I can imagine a future in which science shall have passed from the combative to the dogmatic stage, and shall have gained such catholic acceptance that it shall take control of life, and condemn at once with instant execution what now is left for nature to destroy.” Collins flags this sentence and links it to Holmes’ opinion in *Buck v. Bell* (1927), which upheld the mandatory sterilization of Carrie Buck on the mistaken belief that she, her daughter, and her mother were all enfeebled. Holmes insisted: “Three generations of imbeciles are enough.” Holmes relied in part on military service to justify his opinion: “We have seen more than once that the public welfare may call upon the best citizens for their lives. It would be strange if it could not call upon those who already sap the strength of the State for these lesser sacrifices, often not felt to be such by those concerned, in order to prevent our being swamped with incompetence.” How can the military draft justify mandatory sterilization? Holmes offered other inept analogies: “The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes.” In 2002, Virginia governor Mark Warner formally apologized for the state’s policy of eugenics, under which some 8,000 people were involuntarily sterilized from 1927 to 1979. Nationwide, the practice affected an estimated 65,000 Americans.

Collins traces Holmes’ doctrines on free speech during time of war, starting with his opinion for a unanimous Court in *Schenck v. United States* (1919) and leading to his dissent in *Abrams v. United States* (1919). In *Schenck*, Holmes argued, “The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic.” As Collins points out, there was no claim that the circulars at issue in *Schenck* “were false—they were largely matters of political opinion.” By equating the fire metaphor with the political antiwar circulars,

“Holmes invited the mind to skip a few analytical jumps and then a few more.” In his book, *Fighting Faiths* (1987), Richard Polenberg explains that the trial record showed that “few inductees ever received the circular and that none who did, and who testified, were influenced by it.” To Collins, there was “little or anything in the trial record to show that the defendant’s circulars created a proximate and real danger,” or what Holmes in *Schenck* had called “a clear and present danger.” Collins quotes from scholars who differ as to whether, in creating the “clear and present danger” test, Holmes intended to reformulate the customary bad tendency test, or instead did not believe that liability should be imposed on speech merely because it had a bad tendency.

Shortly after *Schenck*, Holmes wrote two more opinions that upheld the use of the Espionage Act to convict critics of World War I: *Frohwerk v. United States* and *Debs v. United States*. These two decisions, like *Schenck*, were issued in March 1919 and were unanimous. On Nov. 10, 1919, the Court decided *Abrams v. United States*, upholding the convictions of five Russian immigrants for violating the Sedition Act. Breaking with the majority, Holmes penned his famous dissent. He continued to say that the power of government to punish dissent “undoubtedly is greater in time of war than in time of peace because war opens dangers that do not exist at other times.” But, he added, “the principle of the right to free speech is always the same.” Although he regarded the creed of the defendants to be one of “ignorance and immaturity,” he now saw free speech in a different light: “But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.”

He noted that the United States “had shown its repentance for the Sedition Act of 1798, by repaying fines that it imposed.”

This thoughtful and stimulating book reminds us how often judicial rulings are the product more of emotion than of close reasoning. Judge Richard Posner called Holmes “the most eloquent judge who ever wrote.” However, eloquence and snappy sentences (“Three generations of imbeciles are enough”) may disguise a ruling poorly grounded in facts and reason. As Posner notes, some of Holmes’ greatest literary triumphs are not “well reasoned” opinions or “logically organized” or attentive to the “factual record.” Readers (including sitting judges) may be charmed by “enchanted rhetoric.” In a letter to Felix Frankfurter, Holmes criticized an article published by John Wigmore, a scholar of the law of evidence. To Holmes, the article “wasn’t reasoning but emotion.” There is much of the latter in the writings of Holmes as well as of other judges. It is a quality of the judiciary that should be kept in mind. Respect for the Supreme Court is appropriate, provided it implies an independent capacity to judge the reasoning and merits of a ruling. Respect, in that sense, yes. Deference and acquiescence because the Court has the last word? No. **TFL**

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Dealings: A Political and Financial Life

By Felix G. Rohatyn

Simon & Schuster, New York, NY, 2010. 292 pages, \$27.50.

REVIEWED BY JOHN C. HOLMES

In 1940, 12-year-old Felix Rohatyn fled with his Jewish mother and stepfather from Nazi-occupied France. In *Dealings: A Political and Financial Life*, he reports that he would not have lived to tell his tale but for a chance occurrence: a soldier at the German checkpoint waved the family's car through, apparently so as not to hold up the long line of cars while he lit a cigarette. After a year's stay in Brazil, the family moved to the United States. In 1947, at Middlebury College in Vermont, Rohatyn flunked out of the physics program and took time off to work for his father, who had remained in France and re-established his brewing business. Deciding that neither beer nor France was to his liking, Rohatyn finished his studies at Middlebury and looked for a job.

Fate brought him to the then relatively small investment banking firm of Lazard Frères (today Lazard Ltd.) on Wall Street, where he worked for the princely sum of \$37.50 per week, compiling monthly evaluations of clients' accounts. After spending a year with the firm, he was drafted into the army and sent to Germany. Rohatyn relates "sharing the barracks with young men from all around the country and from disparate backgrounds, ... and [starting] to take an active interest in my new country's political life. ... After what I had seen in ravaged postwar Europe, I became a staunch Democrat, committed to the party's guiding principle that government needed to play an activist role in improving its citizens' lives."

Returning to Lazard Frères, where he would remain for the next 40 years, Rohatyn came under the guiding influence of its chairman, André Meyer, whom he found a "brilliant, autocratic ... man with a volcanic temper." He was assigned to the slow-paced,

stodgy section of currency trading. However, he sought and obtained a job in the section on mergers and acquisitions, but had to agree to take a cut in pay from \$15,000 to \$10,000 and to enroll in night courses at NYU. Diligent and intelligent, at age 32 he was made a junior partner in the firm and embarked on his career in deal-making as an investment banker.

Rohatyn's first deal began as a proposed favor by Meyer for his friend, Gen. David Sarnoff, chairman of RCA, who wished to obtain Avis Rent-A-Car as a part of his growing conglomerate. Initial attempts to acquire Avis failed despite Rohatyn's frequent travel and negotiations throughout the United States and Europe. Nevertheless, Rohatyn, having gained a thorough knowledge of Avis and insight into the growing need for car rental companies, was able to fashion a deal to exploit Avis' potential, and Lazard took over Avis. Under the motto of "We try harder" and an aggressive makeover of company management, Avis proceeded to become profitable and to challenge Hertz, whose revenues had been five times as great as Avis'. In the process, Rohatyn learned much about the process of deal-making and the importance of personal relations and honest negotiations. Lazard's \$5 million investment in Avis was worth \$20 million five years later when it sold the company to ITT.

The 1960s and 1970s—often referred to as the "go-go" years—were a fortunate time for Rohatyn. He became acquainted with Harold Geneen, president of the expanding conglomerate ITT, and was instrumental in working with Geneen in ITT's acquisition not only of Avis, but of Canteen, Grinnel, Rayonnier, Levitt and Sons, Continental Baking, Scott Seed, Pennsylvania Glass, and Airport Parking. He also convinced Geneen to pursue Hartford Fire Insurance, one of America's oldest companies, which had a strong, conservative, cash-heavy balance sheet. Although ITT made a stock swap offering well above the value of Hartford's stock, it took more than two difficult and combative years before Hartford allowed itself

to be acquired for a record \$1.5 billion. Then, Rohatyn writes, just as the merger was about to be formalized, the IRS "insisted that ITT must dispose of the thousands of Hartford shares it had bought up in the open market before the IRS could rule on the tax-free aspects of the transaction." Meyer arranged for an Italian bank to purchase the stock, satisfying the IRS. However, shortly after the acquisition was consummated, the Justice Department's antitrust division, led by Richard McLaren, entered the picture, intent on divesting ITT of Hartford because, Rohatyn writes, "in McLaren's wrongheaded thinking, corporate bigness was by definition always anti-competitive." There followed a series of meetings, congressional investigations, and newspaper broadsides from critics, such as Jack Anderson, about political interference by ITT in such things as arranging the place of the Republican convention in exchange for favorable treatment in the antitrust settlement. Rohatyn writes that he was caught up in a political battle in which truth was an unimportant aspect. He concluded that, despite the sometimes bruising battles in business, "politics was a much rougher business than business."

In 1970 Rohatyn was appointed chairman of the New York Stock Exchange's Surveillance Committee, widely known as the "Crisis Committee." It worked to supply financing to companies that were facing bankruptcy, and it saved Lockheed Aircraft, among others, although some (usually smaller) firms were left to declare bankruptcy. This activity led to Rohatyn's role in an even larger problem: saving New York City from bankruptcy. Promised by Democratic Party chairman Bob Strauss that a fix would take only three or four weeks, Rohatyn would spend the next 18 years working to restructure the finances of New York City. During the 1960s, Rohatyn writes, "the city's short-term debt was nearly zero. By 1975, the debt was nearly \$6 billion—a truly astounding sum." The basic problem was that municipal unions had negotiated extraordinary benefits,

and the city was spending far more than it was receiving in taxes and subsidies. "For all practical purposes," Rohatyn writes, "in May 1975, the city was left without financing." By June 18, it would require \$900 million or have to file for bankruptcy. Moreover, it could not look for assistance from the federal government, because President Ford, running for election, had portrayed New York as a profligate, liberal bastion that should not receive a federal bailout.

As Rohatyn assembled his team to save New York City, he discovered that things were even worse than he had been led to believe. His first act was to create the Municipal Assistance Corporation (MAC), a state agency that Rohatyn would chair from 1975 to 1993. MAC would have power to issue bonds having the full faith and credit of the state. Rohatyn next convinced the banks that their long-range interests lay in providing the capital to back the bonds. Crisis after crisis emerged that made it difficult to hold together coalitions that often had conflicting interests. MAC leaned hard on the municipal unions and finally got their cooperation in laying off workers, reducing benefits, and otherwise allowing the city to work toward balancing its budget. Rohatyn discusses the many roadblocks as well as inspiring efforts that finally allowed New York City to emerge relatively healthy and vibrant from its severe financial difficulties.

While working on the New York City situation and for many years following, Rohatyn continued his amazingly successful, demanding, and often frustrating career in fashioning business deals. In 1997, as a fitting acknowledgment of his remarkable financial and diplomatic skills, President Clinton appointed Rohatyn ambassador to France, but that required another round of political intrigue, infighting, and maneuvering that temporarily left Rohatyn dumbfounded and discouraged. After the dust settled, however, he was happy to return for four pleasant years to his place of birth, proudly representing the country he had come to love and respect.

There is little reference in *Dealings*

to aspects of Rohatyn's adult life apart from his business dealings and the politics that it often involved. For example, halfway through the book, we learn that he is a single father, but later he takes his wife Elizabeth to France with no explanation given as to the change in circumstances. (The book is dedicated to his wife, their children, and grandchildren).

Anyone who likes fast-paced action and reading about celebrities and financial dealings will love this book. Rohatyn is not shy about telling all (or mostly all) of the goings-on in initiating and assisting in the big-stakes business of mergers and acquisitions, which he pioneered. Although Rohatyn has acquired a reputation for honesty and integrity in his dealings, many of those he met along the way, such as Ivan Boesky and Mike Milken, have not; nor does Rohatyn approve of those he calls corporate raiders, such as Jim Ling of Ling-Temco-Vought and Charles Bludhorn of Gulf-Western, who gave little quarter or respect to the businesses and personnel of companies that merged into their conglomerates, often through hostile takeovers.

Throughout *Dealings*, Rohatyn explains the changes that have taken place in the operations of businesses, in investment banking, and with globalization. In the epilogue, he laments the recent financial failures of nearly all the once-venerable investment firms and of the greed of many businessmen that precipitated these failures. According to Ken Auletta's blurb on the back cover of the book, Rohatyn, by contrast, was a Wall Street banker "who focused on serving clients" and "proffered advice seemingly unmotivated by greed." **TFL**

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Staying with Conflict: A Strategic Approach to Ongoing Disputes

By Bernard S. Mayer

Jossey-Bass, San Francisco, CA, 2009. 296 pages, \$45.00.

REVIEWED BY NICHOLAS TURNER

In *Staying with Conflict: A Strategic Approach to Ongoing Disputes*, Bernard Mayer scrupulously and effectively challenges conventional approaches to conflict mediation, expanding the model he proposed in his 2004 book, *Beyond Neutrality: Confronting the Crisis in Conflict Resolution*. According to Mayer, conflict specialists often seek to resolve conflicts outright before fully considering the enduring nature of the conflicts themselves. Seldom do specialists, be they divorce consultants or international peace negotiators, perceive or utilize an attribute found in many instances of peaceful relations between conflicting parties. It is an attribute that is difficult, but often necessary, to acknowledge: the parties' acceptance of conflict as part of their everyday lives. As Mayer astutely points out, many conflicts cannot and should not be resolved within a definitive time frame, if ever. This poses a problem for mediators, who are brought into a given conflict with the expectation that they will bring about a final settlement between the conflicting parties. But should seeking resolution be the only role for mediators? Using qualitative analyses and examples drawn from his breadth of experience as a mediator and professor of conflict resolution, Mayer makes a compelling argument that it should not.

Though it remains a somewhat fragmented and disorganized field, conflict resolution has developed significantly within academia and respected professional circles since the 1970s. Major contributors, varying considerably in focus and analysis, have helped bring about the emergence of an increasingly relevant and deeply complex subject. However,

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the objective of academics and practitioners alike has remained by and large the same over time. Conflict specialists, “have reached a stage ... where we are comfortable and often adept at working as third parties in time-limited, resolution-focused approaches,” Mayer writes. In proposing an alternative strategy that encourages constructive engagement in and long-term commitment to enduring conflicts, Mayer challenges specialists to step outside of their results-oriented modus operandi and consider new forms of mediation.

Mayer expounds upon his unique approach through a series of chapters that offer more circumstantial than general recommendations for dealing with conflict. He begins by redefining the challenges and opportunities that mediators should perceive before entering into conflict. Rather than anticipate potential outcomes, mediators should identify and evaluate the effects of the conflict on the disputants themselves. In other words, get to know the parties involved and the hardships they have endured. Although this may seem an obvious course of action for the mediator, Mayer points out that mediators often fail to notice and therefore bypass the deeply ingrained and disparagingly complex elements of a given conflict in favor of textbook prognoses and prescriptions. “[I]f our field is to realize its full potential to assist with the key challenges conflict presents,” Mayer writes, “we need to move beyond this zone of comfort.”

Save for his central thesis, Mayer’s most valuable contributions to the field come less from his macro-level solutions than from his micro-level suggestions. Though never too specific (so as not to expose the noteworthy conflicts he himself has mediated over the course of his career), Mayer offers a number of richly described scenarios, derived from his own experiences as a mediator, that demonstrate his profound knowledge of conflict mediation and its application to a plethora of circumstances, ranging from the interpersonal to the international. Mayer’s analyses of these sce-

narios are where he truly shines, as he offers both honest and direct critiques of all the parties involved, not excluding himself.

In one such scenario, Mayer describes two managerial-level employees in a large United States government agency that perpetually avoided dealing with administrative issues surrounding their toxic professional relationship. “In private meetings with each,” Mayer writes, “I asked whether there were any concerns about the way racial issues were affecting their relationship.” Both employees acknowledged the issue of race, but neither was willing to address it in front of the other. In the wake of both employees’ leaving the department without having broached the topic in a public setting, Mayer admits, “I wondered then, and wonder now, how directive I should have been about raising the issue of race, but in the end, it was their call.” Nevertheless, Mayer concludes that the shift from passive, or subliminal, avoidance to active avoidance of the issue can be profoundly important in its own right. In this case, both parties’ independent decisions to leave their respective positions and refrain from confronting the racial issue was likely more beneficial to themselves and to the agency as a whole than if they had remained in their positions and either maintained the harmful status quo or confronted the racial issue and risked worsening it. “Whether people choose to engage or not [in a particular issue],” Mayer writes, “there is still value in working toward a more intentional and constructive decision about engagement or avoidance.”

In a more detailed scenario used to demonstrate the value in remaining open to changes in mediation objectives, Mayer describes his efforts in managing ethnic conflict in post-Soviet Bulgaria during the mid-1990s. Following the shooting of a Roma youth in the violent neighborhood of a Bulgarian municipality, Mayer relates how he and a colleague participated in a seemingly inconsequential meeting between local residents that led to a crucial decision to appoint

community liaisons to a Bulgarian social welfare agency. The appointments resulted in a robust effort to ease tensions in the community and to help residents receive important social services, in addition to establishing a “system of communication and interaction” between the municipality and neighborhood that had never before existed. Mayer asserts, “As conflict specialists we are often involved in working on issues that appear to be tangential or even unrelated to the enduring conflicts central to people’s lives.” However, as this example demonstrates, the tangential issues can be, and often are, as useful in achieving long-term goals as are the core issues themselves. Consequently, the solution to macro-level problems is frequently derived from unplanned, micro-level alterations to the situation at hand, rather than from the traditional tête-à-tête between high-ranking, well-prepared members of the conflicting parties at the negotiating table. Mayer writes that a key component of the mediator’s role should be to “remain alert to the opportunities that arise ... and to make sure these opportunities are not ignored.”

Mayer’s inclusion of these scenarios serves as a testament to the importance of having experience in the field when making qualitative social scientific arguments. In *Staying with Conflict*, it is refreshing to see so much of the author’s approach to conflict mediation stemming from efforts, both large and small, that he himself has engaged in, allowing him to blend theory and practice in a cogent and effective manner. “If we are to realize our potential for helping people to stay with conflict,” Mayer writes, “we have to deal with both conceptual and practical challenges.” His point is well taken, and serves as a reminder of one of the book’s consummate themes: conflict is both dynamic and unpredictable. Though there is undoubtedly much to be learned from past conflicts, it is impossible for mediators to derive a singular approach or catchall formula to solve conflict. Spontaneity

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and flexibility can sometimes be just as valuable as linear progress and definitive outcomes in changing the circumstances of a given conflict for the better. Guided by his own efforts, Mayer's thesis speaks to this point. Resolution is not always the outcome of successful mediation. Fostering patience within and an honest dialogue between conflicting parties is often just as, if not more, important.

To some, Mayer's unorthodox approach might seem arbitrary, if not an outright evasion of the mediator's responsibility to confront conflict head-on and achieve real results. This assessment, however, would be mis-

guided. It is the thorough understanding and nuanced handling of conflict that is both risky and worthwhile for mediators. In many cases, getting two parties in conflict to see that resolution is not the only answer is the most valuable and courageous contribution a mediator can make to an ongoing conflict, be it a personal disagreement or an international territorial dispute. Mayer's work is a manifestation of this point. **TFL**

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jored in political science and focused on United States foreign policy decision-making. The views expressed in this article are solely his own.

CYBERIA *continued from page 6*

According to most sources, those of us who already have laptops should not consider upgrading the internal hard drive at the present time. The expense substantially outweighs the benefits. Desktop owners, though, can more easily justify an upgrade to SSD and can use available software products to transfer their existing operating system to the new SSD drive. (Kingston™, for example, sells a 64 GB desktop upgrade that comes with software designed to move your operating system over to the new drive. Purchasers of other brands could use a program called Clonezilla™ to assist in the transfer.)

Currently, external SSDs in the 64 GB range are available for about \$150. An external SSD with a 32 GB capacity will probably cost about \$75. External SSDs range in size from 30 GB to a massive 256 GB. However, a 256 GB external SSD drive will cost more than \$500. Even with the advantages that have been described, it is difficult to justify the expense of a \$500 drive. However, the more modest sized external SSDs

are certainly worthy of immediate consideration by trial lawyers who cannot afford to have a hard drive crash during a court appearance.

Conclusion

Cyberian trial lawyers should give some thought to converting to a new laptop with a SSD or to purchasing an external SSD to augment their existing storage. If they can justify the expense, they might also want to add a SSD to their desktop, even if it is only to run their operating system. **TFL**

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