



FDR AND THE JEWS

BY RICHARD BREITMAN AND ALLAN J. LICHTMAN

The Belknap Press of Harvard University Press, Cambridge, MA, 2013. 433 pages, \$29.95.

Reviewed by David Heysfeld

Although 69 years have passed since the end of World War II, a bitter debate continues about the adequacy of President Franklin D. Roosevelt's actions to oppose the Nazi program to exterminate the Jews. In *FDR and the Jews*, Richard Breitman and Allan J. Lichtman have made a major contribution to our ability to judge FDR's efforts. The authors examine in exhaustive detail the relevant issues our government faced. These included increasing the opportunities for refugees to immigrate to the United States, British-administered Palestine, or other countries; condemning Nazi persecution of Jews; bombing the Nazi death camps; and encouraging the establishment of an independent Jewish state in Palestine.

To assess FDR's performance, Breitman and Lichtman sort out the decisions FDR made himself, occasions where he knew of lower-level decisions and did not intervene, and lower-level decisions of which he was not aware. This is a difficult exercise. FDR did not have a taping system and did not live to write memoirs. He ran a disorderly administration, and he did not always want his role on Jewish issues to be known to the public. Many of Breitman and Lichtman's

evaluations are taken from the letters and recollections of government officials and private citizens who dealt with FDR. These sources are not always reliable; the persons meeting with FDR sometimes had their own agendas when reporting on the meetings, and FDR, as a skillful politician, sometimes created a misleading impression that he was on the side of the person with whom he met. Breitman and Lichtman recognize these problems and evaluate the evidence judiciously. They develop a convincing analysis of FDR's actions and motivations.

Overall, Breitman and Lichtman give FDR mixed grades, concluding that he did more to help the Jews than any other world leader did, but that there were further steps he could have taken. Interestingly, on some of the issues for which FDR has been most severely criticized, particularly the failure to bomb Auschwitz or the rail lines leading to it and the failure to let the refugee ship *St. Louis* land in the United States, Breitman and Lichtman largely exonerate the President.

Wisely, the authors examine FDR's actions in the context of the political realities of his era. One important consideration is that, at the time FDR was in office, it was not considered legitimate for one country to be involved with how another country treated its own citizens within its borders. This was the approach of the Wilson administration, which was unwilling to deal with the Turkish government's killing of more than a million Armenian people, despite impassioned pleas from Ambassador Henry Morgenthau Sr. (the father of FDR's Treasury secretary, Henry Morgenthau Jr.) and former President Theodore Roosevelt. TR's pleas for intervention on behalf of the Armenians after he was out of office stood in stark contrast to his refusal when he was President to protest to the Russian government about the pogroms killing thousands of Jews.

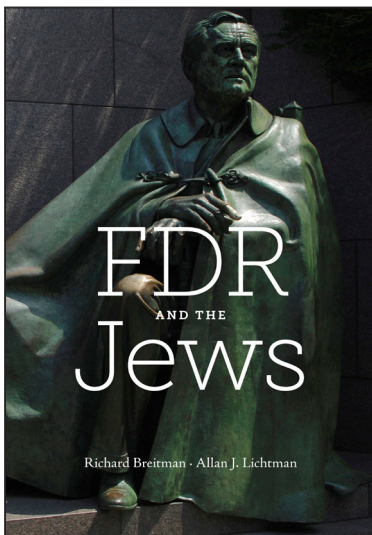
The domestic political climate in which FDR worked also placed serious limits on his ability to increase immigration to help Jews escape the Nazis. Congress had imposed severe restrictions on immigration in response to concerns arising from a strong surge in immigration from Southern and Eastern Europe from 1890 to 1920.

There were widespread perceptions that many of these immigrants, who included 2 million Jews, were of poor moral character, unwilling to assimilate, and, particularly in the case of Jews, were socialist or Bolshevik agitators. Some high-level government officials shared these prejudices and expressed them publicly. In 1920, in a report to a congressional committee, Wilbur J. Carr, director of the State Department's Consular Service, claimed that Eastern European Jews were "filthy un-American and often dangerous in their habits," economically and socially "undesirable," and prone to become "political and labor agitators."

In 1924, in response to anti-immigrant feelings, Congress limited European immigration to 2 percent of each country's percentage of the U.S. population in 1890. This reduced the German quota to 26,000 a year. When FDR took office, resistance to immigration had become even stronger in the face of domestic unemployment of greater than 20 percent. Even in 1938, after the violence against the Jews during Kristallnacht, 83 percent of Americans opposed expanding the quotas. The conventional wisdom, which was confirmed by some legislative actions, was that, if Congress was asked to increase immigration, the opposite would happen, and legislation suspending all immigration or at least decreasing the quotas would be enacted.

Anti-Semitism in the United States was another political reality. A poll in 1938 showed that 45 percent of Americans thought that the Jews had too much power. The "radio priest," Father Charles Coughlin, made frequent claims to his audience of 20 million that Jewish bankers were responsible for the Depression. Jews found it difficult to get jobs in many professions and to buy houses in many neighborhoods. In this environment, FDR would pay a political price if he supported measures to help the Jews. He would also accrue little political gain, because he had the overwhelming support of Jewish voters anyway, and he continued to receive their support even when he failed to take actions that Jewish leaders proposed.

In addition, responding to Jewish concerns might also have undercut FDR's efforts to mobilize public opinion to sup-



port aid to the Allies at war with Germany before the United States entered the war, and to support our participation in the war in Europe afterwards. The American opponents of intervention, such as Charles Lindbergh, argued that involvement in the war was not in America's overall interest but only in the interests of the Jews and the British. Nazi Germany made the same claims. More Americans would have believed these accusations if FDR took too many steps to respond to Jewish concerns.

Another consideration for FDR was the public's perception of what the Nazis had done to the Jews and what they were likely to do if unchecked. During the 1930s, the Nazis engaged in violence against the Jews, deprived them of civil and economic rights, and imprisoned large numbers of them. But it was not until the war began and Germany gained control of large areas in Eastern Europe and the Soviet Union that it began its campaign to round up all Jews and kill them. There was no CNN or YouTube to make the public aware of the horrors of the death camps. Many people found it impossible to believe that a civilized nation would engage in a systematic program to exterminate millions. As Samatha Power, the current U.S. ambassador to the United Nations, has explained in her Pulitzer Prize-winning *A Problem from Hell: America and the Age of Genocide*: "The vast majority of people simply did not believe what they read [about the Nazi death camps]; the notion of getting attacked for being (rather than for doing) was too discomfiting and too foreign to process readily. A plot for outright annihilation had never been seen and therefore could not be imagined. The tales of German cremation factories and gas chambers sounded far-fetched." Public acceptance was further hindered by recollections of Allied propaganda in World War I planting untrue accounts of Germany running death camps to produce lubricants and glycerin from the dead bodies.

Breitman and Lichtman rebut the charge that FDR was anti-Semitic. No anti-Semitic remarks have been attributed to FDR other than his expressions of sympathy with Stalin's anti-Semitic views, which he presumably made as a tactic to gain Stalin's support in negotiations. Before he became President, FDR had criticized anti-Semitism and supported a Jewish homeland in Palestine. As President, FDR relied heavily on Jewish advisors, including Samuel

Rosenman, his speech writer and counsel; Benjamin Cohen, the drafter of much of the New Deal legislation; Supreme Court Justice Felix Frankfurter; and Henry Morgenthau Jr. A record 15 percent of FDR's appointments were Jewish.

Breitman and Lichtman evaluate FDR over four periods of his presidency and find considerable differences in his response to Jewish concerns during each. During FDR's first term, following his election in 1932, FDR was, according to the authors, a "bystander" to Nazi persecution and declined to support increased immigration or to create disputes with Germany, for fear of jeopardizing his programs for recovery from the Depression. He did, however, tell Hitler's economic advisor Hjalmar Schacht that Nazi persecution of Jews endangered U.S.-German relations.

On immigration, U.S. laws passed in the 1920s established a quota for Germany of about 25,000 a year. During the early 1930s, however, fewer than 5,000 a year were admitted under the German quota, far below the number of German Jews who wanted to immigrate. The main reason the quota was not filled was the Hoover administration's strict interpretation of a provision in the law that a visa would not be granted to any person likely to become a "public charge." Prospective immigrants would have to show that they had assets to support themselves if they could not find a job in America. For many, this was impossible because the Nazis confiscated the assets of Jews who wanted to emigrate. Yet officials in FDR's State Department supported and implemented these limitations. Secretary of State Cordell Hull opposed any actions that might antagonize Nazi Germany and make it more difficult to get the free-trade agreements that Hull strongly supported. Secretary of Labor Francis Perkins strongly opposed the State Department's actions and proposed alternatives, but FDR declined to get involved in the dispute between the two departments. He also declined to issue an executive order, drafted by Felix Frankfurter, undoing the Hoover administration's interpretation of the law. Breitman and Lichtman conclude that FDR "missed an opportunity to ease visa restrictions imposed by a former president whose policies FDR had otherwise repudiated."

The second period of Roosevelt's presidency that Breitman and Lichtman consider was from 1936 to 1939. With his reelection

in 1936 by an overwhelming majority, FDR apparently felt more able to respond to Jewish concerns. The State Department liberalized the immigration regulations so that applicants could be denied admission only if it was "probable" that they would become public charges, changing the Hoover standard of "possible." Applicants were permitted to meet the standard by demonstrating that distant relatives were willing to support them. FDR did not leave any record of having participated in the change, but he had set a target of increasing admissions to 10,000 a year, still well below the legislative quota. In fiscal year 1937, German immigration increased to 10,895, and in fiscal year 1939, the German-Austrian quota of 27,000 was filled.

In 1936, FDR supported Jewish efforts to gain a homeland in British-administered Palestine. FDR publicly supported a Jewish homeland and privately opposed British efforts to mollify Arabs in Palestine by curtailing Jewish immigration. FDR played a major role in convening the international Évian Conference that tried, but failed, to get countries around the world to accept more Jewish immigration. FDR also initiated formal and informal discussions with Central and South American countries, urging them to accept substantial numbers of Jewish refugees. These efforts resulted in about 40,000 Jews emigrating from 1938 to 1941, which Breitman and Lichtman characterize as more than a token number, but much less than needed to make a substantial dent in the problem.

In 1938, German persecution of the Jews was raised to a new level with Kristallnacht, when the government sanctioned and encouraged a pogrom that killed at least 91 Jews, destroyed 267 synagogues, damaged and looted more than 7,000 Jewish-owned businesses, and sent 30,000 Jewish men to concentration camps. FDR denounced the violence as unbelievable in a 20th-century civilization. FDR also recalled the U.S. ambassador to Germany. He was the only world leader to so respond.

The third period that Breitman and Lichtman examine is from 1939 to 1943, when, they conclude, FDR's efforts on behalf of the Jews all but disappeared. At the beginning of this period, FDR was working to gain support from a bitterly divided public for assistance to the Allies against Nazi Germany. After the attack on Pearl Harbor, FDR needed public support to give

priority to defeating Germany, rather than Japan, who had attacked us. Breitman and Lichtman conclude that, during this period, FDR was afraid to take action that would support the contentions of the Nazis and extreme isolationists that he was working for the interests of Jews rather than those of the United States. As our entrance into the war drew near, another concern arose: If the United States followed liberal policies in allowing immigration of refugees, Germany would use the opportunity to send spies and saboteurs into our country.

These considerations led FDR to back away from efforts to increase immigration. When he did not become involved in congressional efforts to allow the immigration of 10,000 refugee children, these efforts failed. During the early years of the war, FDR allowed immigration policy to be controlled by Assistant Secretary of State Breckinridge Long. Long was strongly anti-immigrant, and in his diary he noted with pride that he had gained approval to send cables to U.S. counsels in foreign countries that would “practically stop immigration.” Breitman and Lichtman characterize Long as “ambitious, anti-immigrant, and underhanded,” as well as xenophobic. They assert that in testimony to Congress he overstated the number of refugees who had been admitted to the United States since 1933 by “at least 250 percent.” Long centralized control of visas in Washington, resulting in the denial of about 40 percent of applications. In 1941, less than half of Germany’s quota was filled, “even as hundreds of thousands of Jews desperately sought exit from Europe.” In one of the policies used to restrict immigration, the State Department ordered consular officials to deny an application to any person with close relatives in areas under Axis control, claiming that threats against such a person’s relatives could be used to induce him to spy. This policy prevented Anne Frank’s family from obtaining visas. Another issue was whether Jews in Nazi-occupied countries could qualify for visas as “political refugees.” Long’s policy was that only prominent persons who had antagonized the Nazis would qualify. Breitman and Lichtman strongly criticize FDR for deferring to Long: “Long’s commitment to reducing the influx of purportedly dangerous foreigners effectively undermined FDR’s professed commitment to the cause of Jewish and non-Jewish refugees.”

Breitman and Lichtman are not critical, however, of FDR’s actions during the 1939

voyage of the St. Louis that has since gained iconic status as a demonstration of America’s indifference to the plight of the Jews. The St. Louis left from Hamburg with 937 German-Jewish refugees destined for Cuba. When Cuba refused them admission, the ship sailed north, passing close to Florida. Breitman and Lichtman conclude that, under U.S. immigration law, there was no legal basis for the passengers to be admitted to the United States. U.S. officials helped Jewish charitable organizations to persuade Britain, France, and the Netherlands to accept the passengers. This was generally acceptable to the Jewish community. Sadly, when the Nazis overran these countries, about 254 of the 937 passengers perished in concentration camps.

In Breitman and Lichtman’s fourth period, from 1943 until his death in 1945, FDR again became active on Jewish issues, supporting efforts to rescue the Jews who had survived in Europe, strongly condemning anti-Semitism, and supporting a Jewish homeland in Palestine. Breitman and Lichtman believe that FDR’s change is attributable to his growing awareness that, despite his efforts to concentrate on winning the war by avoiding controversial Jewish issues, there would not be a quick collapse of Germany. He became aware that some European Jews could be saved, but not if the State Department remained in charge. FDR created a new War Refugee Board to save Jews.

In its efforts to save the approximately one million Jews in Hungary whom the Nazis planned to send to Auschwitz, the War Refugee Board put pressure on Hungary’s government by threatening postwar punishment for cooperation with the Nazis. This pressure was a factor in Hungary’s decision to suspend deportations for a few months. The War Refugee Board worked with Raoul Wallenberg and others to get protective documents for Jews from neutral countries such as Sweden and Switzerland. Breitman and Lichtman conclude that the board’s efforts may have helped to save 200,000 Jews.

An issue that has generated much controversy is the rejection of proposals to bomb Auschwitz itself or the rail lines leading to it. Breitman and Lichtman conclude that there is no convincing evidence that FDR was ever involved in consideration of these proposals, and that he always left it to the military to select targets for strategic bombing. The War Department and military commanders rejected the proposals without extensive consideration, primarily on the grounds that

missions for humanitarian objectives would divert aircraft that could be used for military and economic targets. Breitman and Lichtman also point out that, at the time that these decisions were made, major Jewish groups were not calling for the bombing of Auschwitz or rail facilities. In addition, bombing Auschwitz was problematic because it would have killed Jewish prisoners, giving the Nazis a propaganda weapon. Moreover, bombing Auschwitz or the rail lines would not necessarily have ended the killing of Jews. Exterminating the Jews was a major war aim of the Nazis, and, as Breitman and Lichtman note, they “could shoot as well as gas Jews.” Between the closing of the last death camp, Auschwitz, in January 1945, and the end of the war in April, the Nazis murdered an estimated 250,000 Jews.

During this period FDR also supported a Jewish homeland in Palestine. He had been largely silent on this issue in the early war years when there were concerns over antagonizing Arab states that might then help the Nazis. After the Yalta Conference in 1944, FDR, although exhausted and in declining health, traveled to Egypt to meet with Ibn Saud, the King of Saudi Arabia, in what turned out to be a futile effort to persuade Ibn Saud to accept a Jewish homeland in Palestine.

Breitman and Lichtman conclude that, although their balanced assessment of FDR’s policies may not be consistent with some current opinion, it is generally consistent with the views of American Jews of Roosevelt’s day. American Jews of the 1930s and 1940s “revered the president, [but] were not blind to his limitations or the constraints under which he operated. ... [H]e was the first president to intervene part of the time on behalf of their oppressed brethren abroad. ... [W]ithout his leadership, the resistance to Nazi aggression would have been much weaker than it was, perhaps even fatally so. For Jews, he posed a far better choice than the political opponents of his era. ...” Breitman and Lichtman make the important point that, in evaluating FDR, we should consider the record of his successors, who have had the benefit of “knowledge of Western failures during the Holocaust, [but have] typically responded feebly or worse to genocide on their watch.” ☺

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FATHER, SON, AND CONSTITUTION: HOW JUSTICE TOM CLARK AND ATTORNEY GENERAL RAMSEY CLARK SHAPED AMERICAN DEMOCRACY

BY ALEXANDER WOHL

University of Kansas Press, Lawrence, KS, 2013. 486 pages, \$39.95.

Reviewed by Vincent R. Johnson

In *Father, Son, and Constitution*, Alexander Wohl brings to life two major figures of American law: Tom C. Clark and his son Ramsey Clark. The story focuses primarily on the middle third of the 20th century and the many heated constitutional challenges that arose during that era. From the early 1940s to the late 1960s, one or both of the Clarks held prominent federal government positions in Washington, D.C.

With an engaging literary style, Wohl perceptively examines not merely the lives and careers of Tom and Ramsey Clark, but the key roles they played in the issues of their day. At so many different junctures, over several decades, the Clarks were at the center of the constitutional struggles that defined the legal balance between the exercise of individual rights and the maintenance of public order.

Tom Clark was President Harry S. Truman's close friend, his attorney general from 1945 to 1949, and his law-and-order appointee to the U.S. Supreme Court in 1949. Evolving into a moderate among the liberals on the Vinson Court, he helped to pave the way for the desegregation of public education. As a member of the Warren Court, he was an important voice in a judicial revolution that transformed American society through an expansive recognition of individual rights and a broad construction of the Commerce Clause. During his 18 years on the nation's highest tribunal (1949 – 1967), Tom Clark wrote 214 majority opinions, including most famously *Mapp v. Ohio*, 347 U.S. 643 (1961), which held that illegally obtained evidence cannot be used in state criminal proceedings.

Ramsey Clark was assistant attorney general (1961 – 1965), first for President John F. Kennedy and then for President Lyndon B. Johnson, and thereafter deputy attorney general (1965 – 1967) and attorney general (1967-1969) in the Johnson

administration. In those roles, he made a major contribution to the drafting and passage of the Voting Rights Act of 1965 and the Civil Rights Act of 1968. Known for his liberal positions on issues central to the Bill of Rights during the tumultuous late 1960s, Ramsey Clark later became a leading critic of the U.S. criminal justice system and a champion of persons oppressed and accused around the globe.

Honoring the tradition of lawyers' fearlessly defending unpopular clients, Ramsey Clark represented many controversial people, including Supreme Court Justice William O. Douglas, Vietnam-era peace activist Philip Berrigan, politician and conspiracy theorist Lyndon LaRouche, and the Palestine Liberation Organization. He also represented notorious figures, such as Slobodan Milosevic, Radovan Karadzic, and Saddam Hussein. Ramsey Clark's name has long been synonymous with professional integrity, though he has had more than his share of detractors. For example, Richard Nixon, in his 1968 presidential campaign, attacked him as soft on crime.

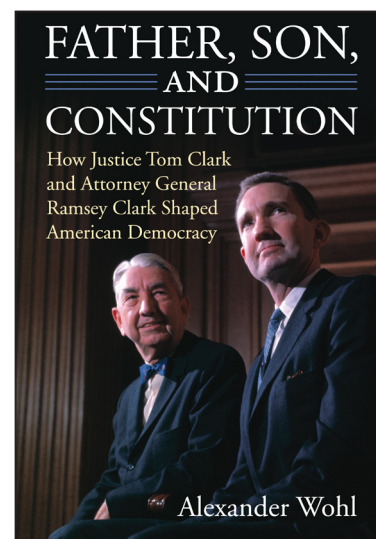
Tom and Ramsey Clark were both colorful figures who attracted loyal followers and lived in interesting times. But they were different types of men. Whereas Tom Clark was the amiable pragmatist and "gregarious extrovert," Ramsey Clark is an introspective and "impractical" idealist. They also had very different life experiences. For example, Tom Clark—the only Texan and only graduate of the University of Texas School of Law ever appointed to the U.S. Supreme Court—did not leave Texas until he was 18. By contrast, Ramsey, a graduate of the University of Chicago Law School, had traveled on five continents and in 75 countries before he was 19 (as a diplomatic courier in the Marines)—and even now in his 80s continues to trot the globe.

Although both father and son shared a commitment to American democracy, they approached constitutional questions from different starting points. Tom Clark was on the right or middle of the political spectrum, and Ramsey Clark was on the left. The issues with which they dealt—such as discrimination, wiretapping, and membership in subversive organizations—grabbed the headlines. The chief virtue of *Father, Son, and Constitution* is not that the book tells a good story—which it does—but that

it offers lessons in how to seek answers to public questions in a principled fashion consistent with the rule of law.

Wohl has had the good fortune to follow in the literary wake of Mimi Clark Gronlund, the daughter of Tom Clark and sister of Ramey Clark. In 2009, Gronlund published an excellent book, the first major biography of her father, *Supreme Court Justice Tom C. Clark: A Life of Service*, which I reviewed in the November/December 2009 issue of *The Federal Lawyer*. Although *Father, Son, and Constitution* inevitably retraces some of the same ground covered by Gronlund in her book, it deepens and expands her analysis of events and issues, and includes much new material. For example, Wohl's book reflects the dozens of hours of interviews that Ramsey Clark granted to him to assist the project. Ramsey is raised from a minor supporting role in Gronlund's biography of her father to a principal subject receiving equal treatment with his father in *Father, Son, and Constitution*.

Wohl's story proceeds from Pearl Harbor and World War II (including fraudulent war contracting, the Nuremberg trials, and the Marshall Plan), to the Cold War (including loyalty programs, subversive organizations, and the Alger Hiss case), to desegregation (including Southern resistance, presidential action, and pivotal Supreme Court decisions), to the problems that beset President Johnson's efforts to build the Great Society (including race riots, war protests, and assassinations). At each juncture—regardless of whether the historical events are familiar or faded—Wohl's account is vivid and fresh, as when he explains how dramatically Tom Clark's life



changed when he gave up being attorney general for a seat on the Supreme Court. Wohl captures the dilemmas behind the issues that dominated the news, the alternatives that were available to key decision makers, and the consequences that followed from the choices they made.

As civilian coordinator of the Alien Enemy Control Program, Tom Clark played a role in the internment of Japanese-Americans, for which he later publicly apologized. Wohl engages in a careful review of the uncertain nature of Clark's job, the daunting political and logistical complexities, and numerous comments later made by several of the principals with whom Clark had worked. On the basis of this research, he concludes that "Clark ... may have been the wrong person in the wrong place at the wrong time for this assignment."

Nowhere is Wohl's critical eye more effective than in scrutinizing the late author Merle Miller's undocumented assertion that Truman once said in an interview that his appointments of Tom Clark as attorney general and Supreme Court justice were "my biggest mistake." Wohl's exhaustive review of the evidence is devastating to Miller. It not only casts serious doubt on whether the aging former President ever uttered such a comment, but it shows why it would have been inconsistent with virtually every aspect of the long and faithful Truman-Clark relationship, which spanned three decades.

Father, Son, and Constitution is a timely book. Many of the key constitutional issues in our digital age and the ongoing war on terror are merely updated versions of struggles that were fought at mid-century. Those battles, like today's, sought to define the proper balance between individual rights and personal privacy on the one hand, and national security on the other. *Father, Son, and Constitution* contains a rich trove of historical analysis that can inform the handling of constitutional issues now and in the future. ☉

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THE INVENTION OF MURDER: HOW THE VICTORIANS REVELLED IN DEATH AND DETECTION AND CREATED MODERN CRIME

BY JUDITH FLANDERS

St. Martin's Press, New York, NY, 2013. 556 pages, \$26.99.

Reviewed by Michael Ariens

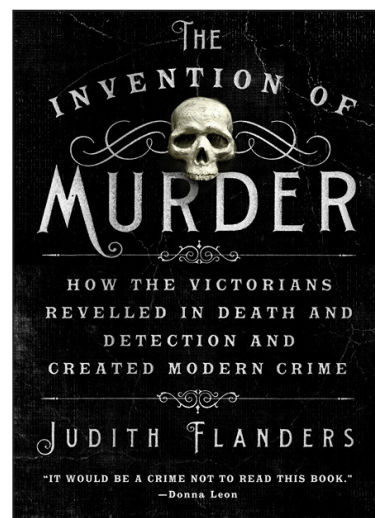
The Invention of Murder, by Judith Flanders, is an extraordinary achievement—an exhaustively researched history of 19th-century Great Britain, written with verve. Flanders uses the conceit of murder, and the stories she tells of murders, to immerse the reader in 19th-century legal, cultural, and social history. It is a superb and engrossing study.

Flanders begins with the 1811 murder of Thomas Marr, his wife, their infant, and a teenage apprentice, and she concludes with the femicides of the late 1880s attributed to Jack the Ripper. Although both events occurred in London's East End, Flanders ranges across Great Britain throughout the century. Her depth of knowledge, as demonstrated in her endnotes and bibliography, appears to encompass everything related to every murder in this place and time.

As a legal history, *The Invention of Murder* explains a number of developments in English law: the Prisoners' Counsel Act of 1836, which finally gave felony defendants the right to counsel; the speed with which executions took place in the initial absence of an appellate process; the peculiar legal prism by which infanticide was (or was not) dealt with; the right to request a change of venue due to local prejudice (known informally as Palmer's Act, and opposed by the "victualling interest"); the popularity and, later, abolition of, public hangings; the invention of policemen, skeptically called "raw lobsters" or "the unboiled" (uncooked lobsters are blue, cooked lobsters red, and policemen wore blue coats to distinguish them from the red-coated army); the rise of a detective force; the Anatomy Act of 1832, which, adopted to end the "resurrection" trade, allowed anatomy schools access to corpses; the increasing importance of expert medical testimony (and its abominable use in many cases); and the influence judges possessed in summing up criminal cases (a practice abolished by most states in the United States in the same century).

As a cultural history, *The Invention of Murder* discusses the importance in the early 19th century of broadsides—typically single sheets printed on one side—for the working classes when a tax on newspapers made them prohibitively expensive; as well as penny-gaffs, which were illegal, unlicensed plays performed in disused shops turned into theaters and attended almost exclusively by children under 16, and entertaining up to 50,000 persons per day in London alone. Licensed theaters in London also made available more than 50,000 seats nightly. The plays they showed used murder, often recent murders, to entertain their vast audience.

Penny-bloods were small booklets about murder and mayhem (often, Flanders notes, involving either dashing highwaymen or evil aristocrats) sold, as one might expect, for a penny, and popular with much the same audience that attended penny-gaffs. Penny-bloods were later called penny-dreadfuls, and were abhorred by the middle class, which found other ways to embrace the same violence, as by attending murder trials or reading fiction written to their tastes. Flanders links the rise of newspapers to their coverage of murders, demonstrating statistically the astonishing amount of coverage to murders given by even the most respectable papers. She explains clearly the importance of melodrama in the earlier part of the 19th century, with its stock characters and the triumph of justice. Melodrama was displaced by sensation-fiction, which often made a gentleman of standing the murderer. Sensation-fiction was in turn displaced by the detective novel, as exemplified by Sherlock Holmes, the amateur who bests the police. Flanders provides a magnifying lens



allowing the reader a better understanding of Charles Dickens and Wilkie Collins, among others, as sensation-novelists who collected and reflected middle-class sensibilities and who took historical events and fictionalized them. She also examines the publishers' sophisticated understanding of both their working-class and middle-class audiences, particularly how newspapers, serialized novels, and plays characterized victims and the accused. Flanders casts a cold, bright light on the lengths to which the newspapers would go to sell themselves; they were centers of gossip, not purveyors of fact.

As a social history, *The Invention of Murder* gives the American reader a deeper understanding of how class affected considerations of crime, victim, and offender. Flanders demonstrates how and why the working class was suspicious of the police, both at their inception and through the end of the 19th century, and why the middle class, in the middle of the century, began to admire the police. Flanders uses the Jack the Ripper case as a study in class distinctions, for London's East End, where he operated, was a working-class and poverty-stricken area bereft of police and the shame of middle-class Londoners.

The victims, killers, witnesses, and wrongly charged whom Flanders describes are persons whose frailty and strengths are shown in equal and humane measure. Flanders brings to horrifying life the many miscarriages of justice of a dyspeptic legal system. One powerful example is the 1835 execution of Eliza Fenning, whose "terrible story was inextricably bound up with class anxiety, with fear of the mob, with hierarchy and social structure." Fenning was a 21-year-old servant who was wrongly tried and convicted of attempted murder by arsenic poisoning of her employers and other servants. Flanders cogently explains that it was Fenning's perceived lack of character—as well as the "facts," as claimed by the newspaper the *Observer*, that "*her father and mother are both from Ireland, and ... are BOTH ROMAN CATHOLICS*" (her parents were Dissenters)—that led to her conviction in 10 minutes after a biased summation by the judge. Flanders notes the institutional legal constraints that made Fenning's defense tragically ineffectual. Before the Prisoners' Counsel Act of 1836, felony defendants were "forbidden access to any legal counsel at all," though

some unofficial consultation was allowed. Further, closing arguments by the defendant were not permitted, although Fenning was allowed to speak (but not under oath, because defendants were then incompetent witnesses in both Great Britain and the United States), and she simply and plaintively declared her innocence. At this time, newspapers were coming into their own, and competing papers divided on Fenning's guilt based on whether their readership was middle class or working class, loyalist or not. The Fenning case was one of the first to generate a pamphlet that used science to show the utter lack of proof of Fenning's guilt. Testimony in the case showed that the poisoned dumplings must have contained 1,800 grains of arsenic, when five grains was a fatal dose, yet no one died. Though many believed Fenning innocent, fear of the mob led officials to execute her. Flanders sums up, "Eliza Fenning was born too early."

Flanders regularly offers droll commentary: "In 1845 Robert Blake, a twenty-six-year-old grinder (he sharpened blades), deserted his wife in Birmingham and ran off to London with Harriet Parker, aged thirty-five, taking his two children, Amina and Robert, aged six and three, with him. They lived in the inappropriately named Cupid's Court, a tenement behind Golden Lane, in the City, and were averagely unhappy." And, in discussing a novel based on a "not proven" Scottish murder prosecution, she writes, "The novel also contains the splendid line: 'I am obliged to say now that ... I cannot marry a person whom I believe guilty of a murder.' A rule to live by." One of Flanders' *bête noires* is the incompetent medical doctor and prosecution skill, Alfred Swaine Taylor: "As always, however, Taylor was prepared to commit himself on contradictory (or no) evidence." Such tart observations are found throughout the book.

Flanders' research offers nuggets of information on almost every page. For example, though the *Oxford English Dictionary* dates the first printed use of "detective novel" to 1924, she found a reference to it in the 1860s. And she notes that the early meaning of "detect" or "detective" was not "to investigate" or "investigator," but "to watch" or be "watchful."

I have but one small bone to pick. Flanders extensively discusses the 1840 murder of Lord William Russell by Benjamin François Courvoisier, in which the butler did it. Courvoisier was tried, convicted,

and executed. The case became a cause célèbre in England and the United States because the public learned that Courvoisier had confessed his guilt to his barrister, Charles Phillips, during the trial. Phillips informed one of the two trial judges of the confession, and was told to continue to defend Courvoisier. After his conviction, Courvoisier publicly confessed his guilt, including his statement of such to his barrister during the trial. The public was outraged. Flanders writes, "Then as now, if he had admitted to murder, his barrister had a legal obligation to report this to the court." This is not the law in England now, nor was it then. The lawyer had and has the obligation not to introduce false evidence (remember that Courvoisier, as a defendant, was incompetent to testify), but must continue to defend his client zealously, including requiring the government to prove its case beyond a reasonable doubt.

The Invention of Murder is a significant addition to British legal history, as well as broader 19th-century British history. Just as importantly, it is a great read. ☉

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ADDITIONAL BOOK REVIEWS

In addition to the book reviews in the paper copy of this issue of *The Federal Lawyer*, bonus reviews are included in the online version of the magazine. The following reviews are available at www.fedbar.org/magazine. ☉

THE PSYCHOPATH WHISPERER: THE SCIENCE OF THOSE WITHOUT CONSCIENCE

BY KENT A. KIEHL

Reviewed by Christopher Faille

THE LAW IN NAZI GERMAN: IDEOLOGY, OPPORTUNISM, AND THE PERVERSION OF JUSTICE

EDITED BY ALAN E. STEINWEIS AND
ROBERT D. RACHLIN

Reviewed by Jon M. Sands and Felicitas Rieger