The Lincoln Assassination: Crime and Punishment, Myth and Memory

Edited by Harold Holzer, Craig L. Symonds, and Frank J. Williams

Fordham University Press, New York, NY, 2010. 259 pages, $27.95.

Reviewed by Henry Cohen

The introduction to this collection of essays notes that Abraham Lincoln's murder, coming "at the end of a brutal, punishing four-year war, and in the midst of widespread national rejoicing at the restoration of piece, … seemed so gratuitous, so irrational, and so utterly un-American that it defied logic. …" The nine essays in *The Lincoln Assassination*—all of them excellent—explore, in the words of the introduction, "the legal, cultural, political, and even emotional consequences of the assassination."

The first essay in the book, which is by two of the book's editors (Harold Holzer and Frank J. Williams), is titled, "Lincoln's Deathbed in Art and Memory: The 'Rubber Room' Phenomenon." After Lincoln was shot at Ford's Theatre on Apr. 14, 1865, six days after General Lee's surrender at Appomattox, he was carried across the street to the Petersen boarding house, where he was placed on a bed in a small room, which may be viewed by tourists today. Lincoln died the next morning. Beginning less than two weeks later, lithographs of the deathbed scene began to be produced as memorials and for profit. Holzer and Williams' essay reproduces more than a dozen of these, and shows how, in the successive pictures, the deathbed room grew larger and larger—thus, the "rubber room" phenomenon—until one such picture portrayed 47 people in the room—far more than could have fit in it at one time. But accuracy was not the concern; symbolism was. For example, although Vice President Andrew Johnson had not been at the scene, he had to be included in the picture to symbolize the peaceful succession in the face of crisis.

After Lincoln died, he was carried by train to Springfield, Ill., for burial. In the book's second essay, Richard E. Sloan writes that the "train bearing Lincoln's casket, along with the funeral party, traveled 1,600 miles and stopped in 10 grief-stricken cities between Washington, D.C., and Springfield, Illinois, over a 12-day period." But Sloan's essay is about the funeral in New York City, which followed the casket's being transferred to a ferry at Jersey City, and then conveyed in two funeral processions in Manhattan, from the ferry dock to as far uptown as 34th Street. The funeral car was led, according to the Sloan, citing the *New York Times*, "by sixteen black horses shrouded in black and sixteen African-American grooms," or, according to a description in the caption of a picture accompanying the essay, "by 16 gray horses richly caparisoned with ostrich plumes and cloth of black trimmed with silver bullion." Sloan reports that "[a]t least half a million people witnessed the solemn Lincoln funeral procession in New York, more than in any other city. Approximately 100,000 men marched in it. Between 110,000 and 120,000 people gazed upon Lincoln's face at City Hall."

In "Not Everybody Mourned Lincoln's Death," Thomas P. Lowry tells of soldiers, sailors, and a few civilians who were prosecuted for having expressed approval of the assassination. Many of those he cites received a year or two in prison, but two received 10-year sentences. One of the two had said, "I wish he had been killed long ago"; the other had said, "I'm glad the old son of a b[----] is dead." James Walker of the 8th California Infantry combined these two sentiments, saying, "Abraham Lincoln was a long-sided Yankee son of a b[----] and ought to have been killed long ago." For this, Lowry writes, Walker was sentenced to be shot by a firing squad, but, after claiming that, "[w]hile serving in Mexico I was wounded in the head by a musket ball, and when I drink to excess I have no recollection of what transpires," his sentence was mitigated—Lowry does not say to what.

Another man who expressed approval of Lincoln's assassination suffered extralegal capital punishment. Thomas P. Turner, in his essay, quotes an Associated Press manager:

> I heard the crack of a revolver and a man fell in the center of the room. His assailant stood perfectly composed with a smoking revolver in his hand, and justified his action by saying: "He said it served Lincoln right." There was no arrest, no one would have dared arrest the man. He walked out a hero. I never knew who he was.

John Wilkes Booth was killed 12 days after he shot Lincoln. Eight of his alleged co-conspirators were subsequently tried and convicted by a military tribunal consisting of nine military officers, only one of whom was a lawyer. Four of the defendants were condemned to the gallows, and four to prison terms. As this book's essays by Frank J. Williams, Edward Steers Jr., and Richard Nelson Current all relate, five of the nine officers on the military tribunal recommended that the one female defendant, Mary Surratt, be granted clemency, but she was hanged after the chief prosecutor, Judge Advocate General Joseph Holt (the subject of a biographical essay in this book by Elizabeth D. Leonard), apparently concealed the clemency recommendation from President Andrew Johnson.

Frank J. Williams writes:

> Whether it was politically astute to try the conspirators before a military commission or whether the conspirators received fair trials before the commission, which they did not, is not the issue here. The question is whether the United States had the legal right to try the conspirators [who were civilians] before a military commission in the first place.

Williams addresses that question, as well as the same question as it applies today to the prisoners at Guantánamo

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Bay. The temptation to compare the situation in 1865 with that of today must have been hard to resist, but Williams should have resisted. He does not have the space in an essay about the Lincoln assassination to address the current situation in the depth it requires; the circumstances today are continually changing; and, finally, present-day politics unavoidably come into play. Williams writes, for example, that President Obama's reversal of "his original determination to end the military commissions was an act of political courage. Surely the president … knew the ire such a decision would draw—especially from his most ardent campaign supporters." This statement opens up Williams to the argument that perhaps President Obama was not particularly concerned about his most ardent campaign supporters, because he knows that they have nowhere else to turn. Perhaps, instead, Obama was concerned to immunize himself from charges from the right that he is soft on terrorism. It would have been better not to have opened this can of worms in a book about the Lincoln assassination.

Why were the eight alleged conspirators tried by a military commission, even though they were civilians? In his essay, Edward Steers Jr. notes that the government hoped to prove "that John Wilkes Booth had been the tool of a larger conspiracy whose perpetrators were the leaders of Confederacy." The government thus viewed the assassination as a continuation of the Civil War. Furthermore, the District of Columbia—the site of the assassination and the trial—was still operating under martial law, and, Steers writes, "many of its residents actively worked in support of the Confederacy." It seems reasonable, Steers suggests, that the possibility of jury nullification was uppermost in the mind of Secretary of War Edwin M. Stanton when he decided to try the accused before a military commission.

Steers reports that, when prosecution testimony as to meetings between Booth and other conspirators with Jefferson Davis and other Confederate leaders was exposed as fabricated, the government abandoned its efforts to prove a larger conspiracy, and focused on the eight defendants on trial.

Michael W. Kauffman, in his essay in *The Lincoln Assassination*, warns that the 5,010 handwritten pages of testimony from the 371 witnesses at the trial of the eight alleged conspirators constitute an unreliable source of information for historians. This is because of the restrictive rules of evidence favoring the prosecution that were in place in 1865. The rule on "defendant declarations," for example, precluded out-of-court statements of the accused from being used in his own defense or against anyone but himself. Another rule restricted the defense from introducing any evidence except in response to evidence that the prosecution had introduced. This rule was so restrictive that, after a prosecution witness testified that two of the defendants had met with John Wilkes Booth on Jan. 15, the defense was not permitted to bring in a witness to testify that the meeting actually took place on Dec. 23; this was because the prosecution had not introduced evidence about a meeting on Dec. 23. As a result, the trial transcript makes it appear as if the defense denied that any meeting at all had occurred.

The final essay in *The Lincoln Assassination* is the only one that is not new. It is a chapter from Richard Nelson Current's 1958 book, *The Lincoln Nobody Knows*, and opens by imagining that Lincoln was not assassinated but served a second term and died of illness in 1881. Current suggests that, in his second term, Lincoln would have held the nation together by his willingness to compromise. For example, in Current's imaginary history, Lincoln would not accept the Radical Republicans' proposal that, to hold political office, Southerners be made to swear that they had never supported the rebellion. (This so-called "ironclad oath" actually became law but was struck down by the Supreme Court in 1866 and 1867.) Current imagines, however, that Lincoln did sign legislation (the actual Reconstruction Act of 1867, which Congress passed over President Andrew Johnson's veto) that the Radical Republicans had sponsored to give the vote to all African-American men—this despite Lincoln's own inclination to limit the vote to those who were "very intelligent" or had served the Union cause as soldiers. This was in fact Lincoln's inclination, as he stated in his final speech, on Apr. 11, 1865.

Current then discusses some legends that grew up around the assassination, such as that Booth really escaped, and that Booth had high-placed abettors in the assassination scheme, including Jefferson Davis, Andrew Johnson, and Secretary of War Edwin M. Stanton. Current writes:

> Whatever help Booth had, the crazy actor surely was the prime mover of his crazy plot. Its shape reveals the workings of his diseased mind. The deed must be done in the theater, before the eyes of a crowd, because the actor had to have an audience. The theater was not a logical place, or would not have been for an assassin whose sole concern was to kill and flee.

Current concludes by discussing how the fact that Booth shot Lincoln on Good Friday, the day that Jesus was crucified, has led to parallels between the two martyrs frequently being drawn.

The essays in *The Lincoln Assassination* (except for the final one) were all initially presented at a 2005 symposium of The Lincoln Forum, an assembly of students and scholars that meets every November at Gettysburg to discuss Lincoln's life. Its website is thelincolnforum.org. **TFL**

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Confidence Game: How a Hedge Fund Manager Called Wall Street's Bluff

By Christine S. Richard

John Wiley & Sons, Hoboken. NJ, 2010. 336 pages, $27.95.

Reviewed by Christopher C. Faille

In April 1960, New York Gov. Nelson Rockefeller signed a bill that

created the New York State Housing Finance Agency (HFA). The HFA was provided with a capital reserve fund obtained through rents and other operating income; the sole purpose of the fund was to secure the HFA's bonds. On advice from a young private sector attorney with a big future, John Mitchell, the bill also included some novel language about the relationship of the fund to the state. It did not say that the fund was to be backed by the full faith and credit of the state of New York. But it did say that, if HFA executives foresaw a shortfall in funds, they were to inform the governor, who was to inform the legislature.

It didn't take much reading between the lines to infer that the governor and the legislature would be expected to *do something about it* if the HFA was running short of cash and its executives informed them of the fact. The bonds that the HFA went on to issue, then, had the implicit rather than the explicit support of the state. These have come to be known as "moral obligation bonds." Christine Richard, the author of this study of the bond insurance industry and the downfall of its central player, quotes Rockefeller, who, with characteristic enthusiasm, called the arrangement "the greatest system ever invented."

Richard also quotes an interview that Mitchell gave in November 1984 to a bond-industry publication. Mitchell was by this time both a former U.S. attorney general and an ex-con, but he was happy to talk about his good old days as a lawyer and municipal bond guru. The interviewer asked him whether it is a valid criticism that "moral obligation" bonds circumvent the democratic process by allowing executives to commit to taxpayer support of projects with just a wink and a nod, rather than with full legislative approval. Mitchell replied, "That's exactly the purpose of them."

In early 21st century lingo, we might say that the HFA was expected to be too big to fail, and the events of 1960 forecast the credit crunch of 2007 and the crash of 2008. Richard's book helps us connect some of these dots.

The Bond Insurance Industry

At heart, *Confidence Game* reminds us that the bond insurance industry grew up in Mitchell's shadow. Although "bond insurance," as the name suggests, typically provides an extra level of security to the buyer of bonds—that is, to investors—it is (for historical reasons that don't require discussion) generally marketed to the issuers. Issuers of bonds get them insured so that they can get triple-A ratings from the credit rating agencies. The "moral obligation" bonds provided a marvelous marketing opportunity to one segment of the bond insurance industry. After all, if a bond were backed by the full faith and credit of the state of New York or of the United States, then there would be no point to the sale of insurance against the default of that bond—the taxpayers would stand behind such a bond. But what if a bond is not formally backed by the taxpayers but is only implicitly backed by the taxpayers? In such a case, it seems, there is room for bond insurers, who would do only formally what the taxpayers were doing substantively. Given the "moral obligation" of governments, the issuers could purchase this insurance very cheaply, and everybody was happy.

The problem (as we can see quite clearly in hindsight) was that the absence of risk was an illusion, and that, while certain bond issuers, municipalities, and quasi-public entities marketed this no-risk illusion to their investors, the insurers were marketing it to those issuers as well as to their own investors. Such was the business plan—and in time the problem—of the Municipal Bond Insurance Association (MBIA), the largest of the firms that moved into this market, founded in the early 1970s.

MBIA didn't run into its first serious trouble until 1998. In that year, the Allegheny Health, Education, and Research Foundation (AHERF) found itself in impossible straits. When none of the affected governmental agencies came to its aid, AHERF filed for bankruptcy protection in Pittsburgh that July. The filing cited $1.3 billion in debt. This was the largest nonprofit healthcare institution ever to enter bankruptcy.

What happened to the moral obligation behind AHERF's bonds? Richard quotes an MBIA official thus: "We did not understand that while most hospitals are essential, not all hospitals are essential." AHERF was not too big to fail, and MBIA was on the hook for $320 million.

But this is why insurance companies exist, right? MBIA must have had reserves and made the payout, right? Or, perhaps, one might suppose, it had contracted with a reinsurer, which in turn would have the reserves.

Actually, MBIA borrowed the money to pay out on AHERF's bonds. Yes, it borrowed the money *from* three reinsurers (AXA Re Finance, Converium Reinsurance, and Munich Re)—but it was in fact a loan in each case, arranged subsequent to the AHERF bankruptcy. A contract entered into after the referenced event can't properly be considered insurance (or, in this case) reinsurance against that event.

The AHERF finagling, for the purpose of smoothing out the books and preserving what Richard calls a "no-risk illusion," caused a shakeup in the top posts at MBIA, and one of the board members, Jay Brown, became its new chairman and chief executive.

Enter Bill Ackman

Four years later, in 2002, MBIA came under the scrutiny of short seller Bill Ackman. Ackman issued a research report entitled, "Is MBIA Triple-A?" His answer to the titular question was an emphatic "no." Ackman didn't put together this report because, as a caring human being, he wanted to warn potential investors away from the company. He put it together because he saw an opportunity to make a lot of money betting on a fall in MBIA's stock price, and because, if his report attracted a lot of attention, he could accelerate the process. Still, such negative research is not stock manipulation if it sticks to the truth.

The gist of Ackman's report was that MBIA had moved outside of its "traditional business of guaranteeing municipal debt" and had become too dependent on the trickier markets of "structured finance transactions," but that the size of its reserves did not reflect the change. The no-risk illusion had fooled the illusionists. The report combined this operational critique with

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some accounting issues and concluded: "In sum, we believe that the combination of accelerated revenue recognition of guarantee and advisory fees, the company's immaterial levels of reserves, and its deferral of a substantial portion of the company's operating expenses cause MBIA's [officially booked] earnings to overstate significantly the company's true economic earnings."

It took years, but the stock-price collapse on which Ackman had bet finally came. The AHERF matter, and others, became common knowledge and in combined form such stories hurt MBIA's once-sterling reputation. Further, the whole business model came into question. Its insurance was acting as a seal of approval for a lot of dubious economic instruments, helping to generate bubbles in such instruments. As disillusion with those instruments finally arose, so did suspicion of the insurer. In late 2007, the share price of MBIA nose-dived from above $60 to below $20 in about 10 weeks. The price of MBIA's co-leader in the small bond-insurance world, Ambac Financial Group, dived likewise.

Locking in Profits

Our narrative began with one former governor of New York and now we have arrived at another. Early in 2008, then Gov. Eliot Spitzer became involved in a frantic and complicated effort to prop up the bond insurers, because they were both regulated by his state's Insurance Department and because he feared grave systemic danger should MBIA and Ambac simply disappear.

Shortly after midnight on Feb. 14 (Valentine's Day), Spitzer left Room 871 at the Mayflower Hotel, where he had had an assignation with a high-priced call girl, an arrangement known to the Federal Bureau of Investigation. The following morning, Spitzer testified at a hearing of a committee of the U.S. House of Representatives about bond insurance.

His efforts of that period helped stabilize the market price of both Ambac and MBIA. The stock charts for each company show a plateau there. But, on March 11, 2008, the *New York Times*' Web site ran a story that said that Spitzer had been linked to a prostitution ring. Of this Richard writes, "It seemed almost certain that without Spitzer's prompting, Ambac would have lost its triple-A rating. What if the bond insurers required more help in the future? There was at least one way to trade the news of Spitzer's downfall, and that was to sell the bond insurers. … Relief had been short lived." It was widely expected that these two companies could not sustain themselves if they could not keep their own credit rating top-notch. Of what value is bond insurance—in essence, solvency insurance—from a company whose own solvency is subject to question?

In May, Moody's, one of the credit-rating agencies upon which MBIA's triple-A rating most depended, increased its projections for losses on home equity loans. MBIA had backed nearly $19 billion of these securities.

On June 4, Moody's took another step, announcing that it was actively reviewing the credit profile of both MBIA and Ambac and warning that MBIA's rating might go as low as single-A. When Moody's made this announcement, Ackman was at his grandmother's 90th birthday party, madly communicating with associates by Blackberry, instructing them to liquidate his fund's short positions on MBIA, thereby locking in huge profits.

The boom fell on Thursday, June 19, when Moody's downgraded MBIA and Ambac. Amazingly enough, the two bond insurers survived. They are smaller and chastened, but they live on in 2010.

A Moral to the Story

So that's our story. It has everything: two controversial governors, a Watergate connection, and a touch of sex. Is there a moral to this story? Something tight and Aesopian?

Richard is innocent of any responsibility for my own conclusion, but here it is: I see this story as a lesson in one of the ways in which reasonable-sounding government policies go wrong and prove to have, in the course of time, utterly unreasonable results. The reasons for the creation of the New York HFA all surely sounded reasonable, after all. Rockefeller wanted to leverage private capital to build affordable housing. Mitchell's language about the HFA's informing the governor of potential shortfalls allowed him to do this. The new type of bond that was created seemed to provide, for certain insurance entrepreneurs, a no-lose business opportunity. Yet the businesses that emerged from that safe harbor sailed out from it to take on many other, unsheltered, risks. In time, as these risks were realized, one of the components of the great credit crunch and Wall Street crises of 2007–2008 came into play.

Good intentions are no protection against lousy results. **TFL**

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New York's Poop Scoop Law: Dogs, the Dirt, and Due Process

By Michael Brandow

Purdue University Press, West Lafayette, IN, 2008. 349 pages, $ 29.95.

Reviewed by Jon M. Sands

"It shall be the duty of each dog owner," reads New York Health Law § 1310, "to remove any feces left by his dog on any sidewalk, gutter, street, or other public area." This language, from what is known as the "poop scoop law," made it mandatory for dog owners to bend over and pick up or scoop up their dogs' excrement. Enacted in 1977 at the state level, this code sought to clean up an ongoing health problem, quality-of-life issue, and just plain mess. It was a subject that set neighbor against neighbor, unleashed vehement emotions, caused local politicians to run for cover (or, more accurately, step gingerly), and filled the pages of newspapers. It was a law that police, who grumbled, were ordered to enforce. And it was a law that soon became a model for innumerable municipal ordinances across the country. Michael

Brandow writes the definitive account of how to teach old dog owners new tricks: Persevere enough to enact a statute and follow it with discipline through law enforcement and the treat of carefree strolling. *New York's Poop Scoop Law* describes how a real civic problem was brought to heel.

What importance can a history of the poop scoop law have? Considerable importance when one thinks of its consequences. Brandow's history of the poop scoop law is a mutt of a book: part sociological study, part urban history, part guide for community organizing, and part legal history. It has heroes, cowards, politicians stepping in it (literally), and dog owners flinging it (figuratively and literally). It presents a portrait of New York City life in the late 1970s, seen from the sidewalk up. Brandow writes as a community activist who was involved in the campaign to pass the law. He seems to have attended every local neighborhood meeting, read every letter to the editor (at a time when there were a lot of newspapers), and captured all the twists and turns of passing controversial legislation sponsored by fervent advocates and opposed just as strenuously, with each side clamoring that the fate of city life was at stake. Brandow's product resembles a shaggy dog story—overly long—but his dogged approach results in a doggone thorough account.

The 1970s saw many problems besetting big cities, especially New York City. Crime, racial tensions, lost jobs, "white flight," and so-called improved urban redevelopment all affected city life. Strangely, or maybe not so strangely, one of the most contentious of these problems—seriously—was dogs. There was a proliferation of dogs in the city. It seemed that those who stayed in the city had to have their dogs. It was estimated that, in the 1970s, over half a million pounds of canine feces were being deposited—daily. People were stepping over dog crap whenever they ventured out. There seemed to be no way to stop the piles from piling up. An old ordinance, forbidding the depositing of any "offensive animal matter" referenced only slaughterhouse offal and carrion and had been stretched to become a "curb law" that no one enforced, much less followed.

Into this mess stepped various activists, who railed against the mounting waste. Some activists clamored for a total ban on dogs (no, it was not supported by all cat owners). Others sought to have federal authorities assume responsibility, turning to the U.S. Environmental Protection Agency. Judging by local accounts, some neighborhoods formed vigilante groups to patrol the streets, harassing dog owners who failed to curb their dogs and, in some instances, blaming innocent dog owners for deposits left by others. Brandow quotes city residents who recall the days of changing their shoes before entering homes or offices, and of how parks and walks became fecal minefields. The stench rose from the sidewalks in the dog days of August. And the police ignored the problem.

It would take the efforts of three mayors—John Lindsay, Abe Beame, and Ed Koch—along with a state senator and an assemblyman, who grew tired of tracking feces everywhere, to enact a law that made owners responsible not only for curbing their pets but also for actually removing the waste. John Lindsay had begun the effort, asking that owners train their dogs to defecate on newspapers (an editorial comment?) in their apartments and homes. That proposal went nowhere—Lindsay was barking up the wrong tree. Abe Beame sidestepped the issue, ordering study after study, in the face of growing coalitions beseeching the New York City Council to get something done. However, the City Council was unwilling to touch the issue, believing, probably rightfully, that the distemper of dog owners would not only put them in the doghouse, but would likely lead to their being scooped out of office. The City Council allowed the tail to wag the dog, as opponents of the poop scoop law barked that handling feces was disgusting, humiliating, and presented a public health risk. Movement came when a coalition of community activists, such as the Coalition for Dog Control, joined forces with local block associations that wanted to protect patches of green park and flower beds, and also with increasingly concerned providers of municipal services (including the New York City Sanitation Department, Police Department, and Animal Control Services), to get the bill passed at the state level. The politicians who sponsored the legislation were opposed by dog owners and various humane societies and animal rights groups. The state legislature—which included a hearty anti-New York City sentiment—narrowly passed the law, but made it applicable only to cities with a population of 400,000 or more, which, besides New York City, then included only Buffalo. The hero of the account was the newly elected Mayor Koch, who told state politicians that, if the bill passed, he would enforce it—and he did.

Koch, to his credit, began issuing summonses to dog owners. The fine was $25 (now higher), and Koch disclosed the number of violations monthly. In the first year, there were nearly 5,000 citations. The book has humorous descriptions of investigations, trials, and excuses. Koch made enforcement a priority, and he got results. Sure, the police growled, and there was civil disobedience. Humane societies predicted widespread abandonment of dogs, which did not come to pass. Elderly groups stood up to warn of a rise in back problems from having to stoop and scoop. No such increase occurred. Lawsuits were filed; one of the more incredible suits alleged a violation of religious freedom, citing the requirement of picking up feces on the Sabbath. One Jewish group compared the ordinance to the Nazis' Nuremburg laws. Other lawsuits attacked the statute's lack of an intent requirement and its strict liability. All came to naught. But enforcement, coupled with a widespread public education program, resulted in the law's being accepted.

The law also fetched unexpected benefits. The creativity of inventors led to a boom in patent applications. Instead of better mousetraps, inventors turned to better pooper scoopers. New security devices sought to tame the threat of domestic terriers. Brandow humorously describes some of the more outlandish contraptions. Seen any handheld, personal flame-throwers incinerating dog waste on *your* morning walks lately?

Thirty-three years (231 dog years)

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have passed, and the ordinance can be judged a success. Indeed, other cities rushed to emulate the New York law. The Chicago City Council, for example, asked its legal department to draft a similar bill. The council was informed that Chicago already had such a law on its books, but that it was not being enforced. The lesson taken is that the ordinance must have the support of the executive, must be enforced, and must be accompanied by an education offensive. Cleaning up after one's dog must be viewed as a civic responsibility with which one is expected to comply; to ignore one's dog's dumping on the sidewalk must be seen as violation of the social code. The pressure that results from this is the most effective enforcement mechanism. Indeed, there appears to be some backsliding in New York City and elsewhere (in East Hampton, Long Island, for example, as reported in the *New York Times* on June 11, 2010). Rather than angry letters to the editors, local Web postings complain about inconsiderate dog owners and name names (or at least breeds). There is even a service that affords one to match the DNA from fecal remains with the individual dog and its guilty owner. That seems a bit rabid.

After reading this book, I took my dog for a walk in a park near my home. I stopped and read the sign that admonishes dog owners and custodians (a nice legal touch) to clean up after their pets. The sign's fine print lists the relevant ordinance and the penalties for violators. I made sure I had my plastic bags with me. **TFL**

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Tocqueville's Discovery of America

By Leo Damrosch

Farrar, Straus and Giroux, New York, NY, 2010. 304 pages, $27.00.

Reviewed by Nathan Brooks

"The years 1815 through 1848," writes historian David S. Reynolds in his recent book, *Waking Giant: America in the Age of Jackson*, "were arguably the richest in American life, if we view the whole picture of society, politics, and culture." During these years, the United States, having survived its extremely difficult birth, was spreading its democratic wings to ascend in various fields—from science to business to agriculture. Despite this bustling activity, most Europeans of the period viewed America as a strange backwater; from Trollope to Dickens, visitors from the Old World found little in America to admire and much to deride.

In 1831–1832, however, the Frenchman Alexis de Tocqueville, together with his companion, Gustave de Beaumont, traveled across Jacksonian America in order to learn from its citizens how to save the Old World. Based on his observations during these travels, Tocqueville wrote his masterwork, *Democracy in America* (published in two volumes in 1835 and 1840), destined to be widely quoted for the next 175 years but, despite its brilliance, rarely read.

In his new work, *Tocqueville's Discovery of America*, Leo Damrosch offers a sort of traveler's guide to Tocqueville's classic, connecting some of *Democracy in America*'s most memorable passages to specific points on Tocqueville's itinerary. Damrosch offers introductions to several topics: a portrait of Jacksonian America, though not a particularly penetrating one; an excavation of *Democracy in America*'s origins, though not a particularly deep one; and a look at Tocqueville the man, though not a particularly searching one. Still, both long-time students of Tocqueville and those who have yet to read a page of *Democracy in America* will find plenty in Damrosch's book to admire and, I hope, to spur them to dig deeper.

Ostensibly, Tocqueville and Beaumont traveled to America to study the young republic's prison system. In reality, however, they were seeking a temporary escape from the latest in a series of political storms that periodically rocked France and, more specifically, Tocqueville's aristocratic family. Several times in the previous decades, Damrosch notes, members of the Tocqueville clan had lost their heads to the democratic movement's guillotine, and the dawn of the 1830s once again brought ominous skies.

In seeking shelter in America, however, Tocqueville also hoped to learn from the world's only successful democracy. Given his family history, Tocqueville had come to believe not only that the rise of democracy in Europe was inevitable, but also that the Old World powers had no idea how to make the transition to democracy work. Tocqueville was an aristocrat who knew that aristocracy was dying; he feared democracy but accepted its ascension as inevitable. Put simply, Tocqueville looked at America not with an admiring eye, but with a desperate one. To keep his beloved Old World from consuming itself in the flames of revolution, he looked to the New World—the one place that appeared to thrive in the chaos of democracy.

Tocqueville was able to look past Americans' coarseness and lack of manners that so bothered other visitors to the United States. Damrosch interestingly attributes this ability in part to the fact that Tocqueville was not skilled enough in English for the American way of speaking to burn his aristocratic ears. However, if Tocqueville's facility with American English was not masterful initially, he had every opportunity to rectify that. Almost from the moment they first arrived in America, Tocqueville and Beaumont were in demand on the social circuit. Americans were not accustomed to being studied by Europeans, and so this supposed prison study became a source of national pride. As a result, Damrosch illustrates, the two Frenchmen enjoyed audiences with many prominent Americans—from John Quincy Adams to Andrew Jackson.

Tocqueville's first major stop was New York City, and there he formed several impressions about Americans that would continue to surface throughout his trip: they loved money too much, their women were frustratingly chaste, and the entire nation seemed to be made up of the middle class. Here Damrosch shows us some of the

faults in Tocqueville's method, as he sometimes overgeneralized, extrapolating large-scale pictures from relatively limited fields of view. As Damrosch points out, New York City was not the hotbed of equality of conditions that Tocqueville described; on the contrary, its wealth was concentrated in the hands of a small group of incredibly wealthy families.

Once out of the big city, Tocqueville and his companion headed upstate, catching the first of many glimpses of the weird and wild side of Jacksonian America. The tradition of religious freedom had spread west, and the two travelers saw dancing Shakers, religious revivals, and other signs of evangelical fervor throughout the frontier. But modernity was spreading west as well and, as Damrosch notes, Tocqueville was surprised to see the land of *The Last of the Mohicans* cleared for crops, roads, and development. Eventually reaching the outpost of Detroit and beyond, he found the rustic forest settings he had read about, but the apparent war being waged on the forest had a lasting effect on the two Frenchmen, Beaumont in particular.

Of course, much of the forest was being cleared for agriculture, and Tocqueville had many opportunities to meet American farmers. Far from the blue-collar yokels he was expecting, the farmers he met were opportunistic and surprisingly cultured. They were savvy capitalists and speculators, Tocqueville observed, and furnished prime examples, which would pervade *Democracy in America,* of the American love of money. In the farmers Tocqueville also saw what would become another recurring theme of his great work: the uniformity of thought exhibited by Americans. In Tocqueville's eyes, every American spoke the same language, shared the same mores, and espoused the same egalitarian ideals. Damrosch rightly points out that the future waves of immigration would change this dynamic, but clearly Tocqueville had glimpsed one of the United States' most enduring qualities: the ability to assimilate varied peoples under the fold of a few unifying ideals.

After seeing the wilderness, Tocqueville and Beaumont reversed course to Boston, and what they found there challenged some of their notions regarding the pervasiveness of equality in the United States. The most European and aristocratic city in Jacksonian America, Boston presented Tocqueville with a valuable opportunity to see the interaction of democratic and aristocratic ideals, which was of such importance to his purpose of saving the Old World. In Boston, Tocqueville conversed with John Quincy Adams and—perhaps most significantly—Jared Sparks. According to Damrosh, it was Sparks who planted the seed in Tocqueville's mind that the American faith in majority thought could have dangerous consequences; Tocqueville later built on this idea for his famous discourse on the tyranny of the majority in democratic societies.

Tocqueville soon made his way back west, where frontier Ohio—a virtual laboratory of democracy—seems to have had a significant effect on his thinking about America. The pages in which Damrosch describes this are some of the best in his book. Damrosch notes, "This is what Tocqueville had been waiting for: a region with hardly any past in dizzying transition, inventing itself with ferocious energy." Tocqueville was witnessing the best about America just before he headed south to see the worst.

Tocqueville's thoughts on race in America remain some of the most thought-provoking on this topic, and Damrosch does an excellent job of placing these thoughts in context. Tocqueville's whirlwind journey south came shortly after Nat Turner's rebellion and the nullification crisis arising from South Carolina's 1832 Ordinance of Nullification. These were both defining episodes for the slave-holding Southern states, where tensions were high. Tocqueville also came into contact with Choctaw Indians traveling the Trail of Tears after the Indian Removal Act. Despite his short time in the Southern states, Tocqueville saw and heard enough to draw conclusions—both tragic and prescient—that are still studied today.

By the time Tocqueville returned to New York City to set sail for home, he had spent only a little more than nine months in the United States. But upon this apparently shaky foundation, he formed what is still the single most enduring study of the American character ever produced. To be sure, Tocqueville got plenty wrong, and the nation has changed in innumerable ways since his travels. Still, Tocqueville was the perfect person writing at the perfect moment in the perfect place. As an aristocrat, he naturally looked at democracy with a skeptic's eye, but he was smart enough to see the inevitable rise of democracy in the Old World, and the value that America offered as a subject for studying it.

Damrosch's book will not replace George Wilson Pierson's much more detailed 1938 tome, *Tocqueville in America*, as the definitive study of Tocqueville's travels, but that does not appear to have been Damrosch's intent. Damrosch has created a shorter, more accessible work that celebrates an underappreciated time period and an under-read classic, both of which offer invaluable insight into who we are today as a nation. **TFL**

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Last Words of the Executed

By Robert K. Elder, foreword by Studs Terkel

University of Chicago Press, Chicago, IL, 2010. 301 pages, $22.50.

Reviewed by Jon M. Sands

On May 13, 2010, Ohio Department of Corrections prison guards strapped Michael Beuke, a client represented by my office, to a gurney in preparation for his execution. In 1983, Beuke had been sentenced to death for murdering a driver who had stopped to pick him up; Beuke had also shot two other victims, who survived. Despite evidence of organic brain damage and drug abuse at the time he committed his crimes, Beuke, long rehabilitated, had seen his last legal challenges end and clemency denied. It was 10 o'clock in the morn-

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ing. The warden asked him if he had any last words. Beuke turned to the tinted windows from which witnesses, victims, his representatives, and lawyers, peered out. He apologized to the victims and, with the warden holding a microphone, he began to recite the Catholic rosary. He ended 17 minutes later, at which time the lethal injection procedure began. Michael Beuke died shortly thereafter. There is now talk of limiting the time allowed for last words.[1]

"Depend upon it, Sir, when a man knows he is to be hanged in a fortnight, it concentrates his mind wonderfully." When Samuel Johnson made that observation in 1777, the tradition of last words was already a rite of capital punishment. One's last words, when one is facing execution, have a special weight. These words were once loudly uttered on the scaffold to the gathered crowd; now they are whispered on a gurney to select witnesses behind tinted, one-way glass. One's last words can be contrite, consoling, or confessional. They may be angry, defiant, or simply nonsensical. Inscribing the words was and is considered significant. *Last Words of the Executed* is a book of quotations, which Robert K. Elder has assembled, poignantly, as a "riting" of wrongs.

Elder's collection of last words dates from 1659 and begins with one Marmaduke Stevenson, who, before being hanged for the crime of disobeying his banishment from Boston for preaching as a Quaker, declares that he is being punished for the sake of "conscience" and that he is at "rest with the Lord." The book ends with Michael DeLozier, executed on July 9, 2009, in Oklahoma, apologizing for the pain he caused, and hoping that his death will bring "some peace." In the 300 pages between these two quotations, arranged in chapters according to the method of execution—noose, firing squad, electric chair, gas chamber, and lethal injection—Elder quotes the condemned's words, spoken and written, along with a brief explanation of the condemned's crimes and context. The book's tone strives to be neutral as to the death penalty, but the quotations, directed to witnesses, victims, and family, speak out against this increasingly singular punishment among Western countries.

The last words of the condemned respond, in a sense, to the muted murder victims; there is no collection of last words of the victims of the condemned. This must be acknowledged. The people killed, many—in the language of the legal aggravator that allows a death sentence—heinously, cruelly, and with deprivation, died gasping, gurgling, or screaming. They had no recorded last words, or chance to prepare, and died without a valediction.

Last Words of the Executed has several recurrent themes. Many of the condemned ask for forgiveness and accept responsibility. Newfound faith is a frequent refrain. The flowery language of the 19th century gives way to terse statements in the 21st century, and the earlier references to Providence and God give way to more personal pleas to Jesus. Faith becomes a testament in the waning seconds of life. But there is anger too. "I hate your guts," spits one prisoner to the warden. "Kiss my ass," seethes another. Their anger is with the system and with racism too. The last words of African-Americans, especially in the South, give the lie to the Supreme Court's shrug in *McClesky* that, although race is statistically relevant, it is, in the end, not addressable. There is also the pragmatic acceptance of the inevitable, from "I guess there will be no call [granting a reprieve]" to "let's go." There is comic pathos as a few of the condemned, in their last moments, ask, "How about the Dallas Cowboys?," or "Go Raiders,"[2] or a Hail Mary pass: "When the Browns are in the Super Bowl in the next five years, you'll know I am up there working my magic." This last statement was uttered in April 2007, so there are two seasons to go to see if his prediction comes to pass.

The statements that challenge our present system most profoundly are those of the condemned, who, at death's door, declare their innocence. Leonel Herrera can stand for a chorus: "I am innocent, innocent, innocent. Make no mistake about this: I owe society nothing. Continue the struggle for human rights. I am an innocent man, and something very wrong is taking place tonight." If the name sounds familiar, it should be recalled that Herrera's lawyers had found evidence and produced affidavits that it was his brother, not he, who had murdered two police officers. It was this case in which the U.S. Supreme Court held that an "actual innocence" claim did not warrant a federal habeas hearing. Justice Scalia recently wrote again that the Constitution does not bar the execution of an innocent person.

Innocence of the condemned, though, is rare. But what about last statements that show a person's capacity for change? The death penalty is, by its final nature, a punishment of retribution. Its harsh judgment states unequivocally that blood will have blood. To this retribution, Napoleon Beazley's response speaks for many: "The act I committed to put me here was not just heinous, it was senseless. But the person who committed that act is no longer here—I am. ... Give those men a chance to do what's right. Give them a chance to undo their wrongs. A lot of them want to fix the mess they started, but don't know how. The problem is not in that people aren't willing to help them find out, but in the system telling them it won't matter anyway. No one wins tonight. No one gets closure. No one walks away victorious."

Elder is a journalism professor responsible for proving the innocence of several death row inmates through his investigative reporting. Yet he states that he intends his book not to make an abolitionist statement. He fails in this regard. The mere collection of the words gives voice to opposition to the death penalty. By collecting these last words, Elder has transformed the speakers from inmates whose sentences have been lawfully carried out to human beings whom, rightly or wrongly, the state has put to death. One is reminded of the man walking to the gallows whom Orwell describes in his essay, "A Hanging": "[H]e stepped slightly aside to avoid a puddle on the path. It is curious, but till that moment I had never realized what it means to destroy a healthy, conscious man. When I saw the prisoner step aside to

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avoid the puddle I saw the mystery, the unspeakable wrongness, of cutting a life short when it was in full tide."

Elder's collection of last words cannot be complete. He makes a selection, and in choosing one quotation over another, he makes a political statement. I would have rather he had left out overt political proclamations, ranging from those of Nathan Hale and Mary Goode (of the Salem witch trials) to Joe Hill and the more recent declarations of Julius and Ethel Rosenberg and Timothy McVeigh. Such political expressions detract from the anonymity of the forgotten.

Elder's discussions of the methods of execution, serving as organizing themes, are insightful. Each method is touted as humane, and each reflects, in a manner, the era of its use. The changes in methods also illustrate the movement of execution from a public spectacle to a cloistered procedure, away from a shielded public. The methods strive to be painless, and recent litigation has focused on lethal injection. Yet, there are throwbacks. Utah, for example, still allows execution by firing squad for those convicted prior to 2002, if the inmate chooses this method.

In collecting these last words, Elder can rely only so much on what was transcribed. Most last words were the result of reporters' hastily scribbling down what they thought they heard, or what witnesses later recounted. And, although we all think there is a right to last words, it is a gift of the state. Pennsylvania, for example, does not provide for last words in its protocol, and neither did Ohio until several years ago. Some last words can only be spoken to the warden; others are required to be brief. It is strange to read that Chaplain Carroll Pickett, who ministered to nearly 100 death row inmates in the Texas prison system, acting on instructions from the warden, advised the condemned that there should be no Gettysburg Address (a speech known for its brevity). Pickett's last charge indeed! But last words, like last meals (Beuke asked that his be given to a homeless person), have symbolic value. With the advent of the Internet and the ability to collect last words and menus of last meals, is this collection necessary? Perhaps. It will soon be outdated, not because capital punishment will end, as then the book would have historical and social value, but because executions will continue. There will be no last last words in the foreseeable future.[3]

Our office represented Ronnie Gardner, who was executed by a Utah firing squad on June 18, 2010. His life ended with no last words. When asked if he had any final words, he said, "I do not, no." But, as a sign of the times, the attorney general of Utah used his Twitter account to get his own last words in, tweeting on his iPhone that he, the attorney general, had just given the go ahead to proceed with the execution. The five gunmen then fired at 12:15 a.m., and Gardner was pronounced dead at 12:17 a.m. **TFL**

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Endnotes

[1]*See* Kevin F. O'Neill, *Muzzling Death Row Inmates: Applying the First Amendment to Regulations that Restrict a Condemned Prisoner's Last Words*, 33 ARIZ. ST. L.J. 1159 (2001).

[2]This admonition was by Robert Comer, who was executed by the state of Arizona on May 22, 2007. Comer was a "volunteer" who had sought his execution. These last words were directed to his counsel, with whom he spent his last minutes talking about the National Football League and of the fact that they were both fans of the Oakland Raiders.

[3]For interesting aspects of the rites of legal executions, see Daniel LaChance, *Last Words, Last Meals, and Last Stands: Agency and Individuality in the Modern Execution Process*, 32 LAW & SOCIAL INQUIRY 701 (2007).

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the Court held that the "honest services" statute applied only to crimes involving bribery and kickbacks. Therefore, because Skilling and the others had been tried under the statute for other crimes, the convictions could not stand. Justice Ginsburg, writing for a majority of six, held that reading the law as covering anything other than bribes and kickbacks would raise questions of constitutional vagueness. Justice Scalia, writing for the three dissenters on this issue, argued that the Court had legislated from the bench in its interpretation of the "honest services" law. Ginsburg also wrote for a majority of five, holding that the publicity and community prejudice did not prevent Skilling from receiving a fair trial. Justice Alito wrote a separate concurrence on the right to an impartial jury; Justice Sotomayor dissented on this issue, questioning the adequacy of the voir dire in this case. **TFL**

Prepared by LII Summer Editors Jeffrey Catalano and Bret Brintzenhofe. In addition to the cases highlighted above, the decisions from the Supreme Court's entire 2009–2010 term can be found on the LII's Supreme Court website: www.law.cornell.edu/supct/.