

***Military Justice in Action:
Annotated National Defence
Legislation***

By Gilles Létourneau and Michel W. Drapeau

Carswell, Toronto, Ontario, 2011. 1761 pages, \$114.14.

REVIEWED BY EUGENE R. FIDELL

Every new military law book is cause for celebration, but this is especially true of *Military Justice in Action: Annotated National Defence Legislation* by Gilles Létourneau and Michel W. Drapeau. Létourneau is a justice on Canada's Federal Court of Appeal and a member of Canada's Court Martial Appeal Court, and Drapeau is a retired Canadian Forces officer, who now practices law in Ottawa and teaches military law. *Military Justice in Action* is the successor to the same authors' 2006 *Canadian Military Law Annotated*. The question is why this book should be of interest to readers in the United States or other countries.

The short answer is that Canada's experience with military justice in recent times has been both event-filled and instructive. The history of Canada's military justice system has been marked by legal cases—some large, some merely fascinating—and by important legislative developments. Taken together, they provide a rich tapestry that shows how a robust democracy applies its most cherished constitutional values and its best thinking to the challenge of reconciling the competing demands of national defense, limited public funds, and the need to ensure public confidence in the administration of justice. All three branches of Canada's government have played important roles in that process, and American leaders might study this history and learn from it. Indeed, "if I were a rich man," as Tevye the milkman sings in "Fiddler on the Roof," I would give copies of *Military Justice in Action* to the U.S.

secretary of defense, Pentagon general counsel, judge advocates general, and every member of the House and Senate Armed Services Committees and Joint Services Committee on Military Justice. And, if I were a *powerful* man, I would require each of them to submit a book report. Being neither, I'll have to content myself with hoping that these decision-makers—or someone with whom they work—sees this review and buys the book.

Why is *Military Justice in Action* worth this attention? On one level, it's simply very interesting. It includes the governing Canadian statutes and regulations as well as case summaries and the authors' commentaries. Beyond this, it demonstrates that there are ways to ensure good order and discipline and administer justice in the armed forces other than the institutional path to which the United States has been committed. I will offer five of many possible examples.

First, probably the core characteristic of American military justice is the important role that commanders play. Ours has been a command-centric system from the beginning, with commanders playing such pivotal roles as selecting the members of the court martial panel that functions, more or less, as the jury (10 U.S.C. § 825(d)(2)). Canada, like some other countries in the common law tradition, has shifted that responsibility away from commanders to a court martial administrator (National Defence Act § 165.19(1)). Whether the United States should move to a random-selection model rather than the current command-hand-picked model is not the point of mentioning this. Rather, the point is simply to suggest that there are other ways to handle this threshold step in the military legal process, and that such reforms have proven workable to a neighboring country that takes its defense function and tradition every bit as seriously as we do.

A second difference between Canadian and United States practice is Canada's requirement that a court-martial be unanimous when determining guilt or innocence (sentencing is

done by the judge). In our system, unanimity is required only in capital cases; in normal courts-martial only a two-thirds vote is required to convict, and only a two-thirds vote is required to fix the sentence, unless the sentence is more than 10 years, in which case a three-quarters vote is required (10 U.S.C. § 852). When the necessary vote is not achieved in the merits phase of the case, the accused is acquitted and the case is over. By contrast, Canada requires unanimity "in respect of a finding of guilty or not guilty, of unfitness to stand trial or of not responsible on account of mental disorder" (National Defence Act § 192(2)), and retrials are permissible when the members do not reach a unanimous decision (National Defence Act § 192.1). This is obviously like the civilian model in the United States, in which a hung jury allows the prosecutor to retry the defendant.

A third difference between Canada and the United States concerns judicial independence. In this, Canada led the way, starting with the landmark decision of the Supreme Court of Canada in *The Queen v. Généreux* [1992] 1 S.C.R. 259. That case held that the previous system of at-will military judges failed to provide the measure of independence required by the Canadian Charter of Rights and Freedoms. Since then, Canada has wrestled with how best to achieve that independence, both through repeated judicial decisions and by action of Parliament. The most recent chapter in this saga occurred only last year, when Parliament enacted the Security of Tenure of Military Judges Act (S.C. 2011, c. 22)—one of the shortest pieces of legislation I have ever read. Here is its operative language:

- (2) A military judge holds office during good behaviour and may be removed by the Governor in Council for cause on the recommendation of an Inquiry Committee established under regulations made by the Governor in Council.
- (3) A military judge ceases to

hold office on being released at his or her request from the Canadian Forces or on attaining the age of 60 years.

(4) A military judge may resign from office by giving notice in writing to the Minister. The resignation takes effect on the day on which the Minister receives the notice or on a later day that may be specified in the notice.

What this language means, in a nutshell, is that Canadian military judges now enjoy life tenure through the age of 60. This is in sharp contrast with the crazy quilt that currently exists in the United States. Here, the Supreme Court held that the Due Process Clause of the Fifth Amendment permits military judges to serve without the protection of a fixed term of office (a situation Justice Scalia thought would never be tolerated in a state court system; see his concurring opinion in *Weiss v. United States*, 510 U.S. 163, 198–199 (1994)). Nothing in the Uniform Code of Military Justice mandates fixed terms of office for military judges, and only the Army and Coast Guard have elected to establish such terms, albeit of very short duration and with loopholes. The result is that, in the United States, a person who is tried before a judge from one of those services gets a better assurance of judicial independence than does a person tried by a Navy, Marine Corps, or Air Force judge. So much for “uniform” justice.¹

A fourth difference concerns the appellate structure in the two nations. Both Canada and the United States have civilian appellate courts for military justice, but the Court Martial Appeal Court of Canada is composed entirely of judges who regularly and primarily serve on other civilian courts, whereas the judges of the U.S. Court of Appeals for the Armed Forces (CAAF) are appointed specifically to that court and cannot serve on other courts, even though, in the event of recusals or vacancies, judges of the regular (Article III) federal courts can be designated to sit on the CAAF (10 U.S.C. § 942). The implications of these divergent arrangements are worth pondering.

Is it desirable as a matter of public policy to have the top court of the military justice system closely stitched into the general appellate judiciary? Does having judges whose only function is to decide military appeals encourage discrepancies between civilian and military jurisprudence? To be sure, Canada’s military justice appellate caseload is far smaller than that of the United States, but the data indicate that the CAAF has been deciding surprisingly few cases on full opinion.² Recently, the CAAF has averaged only about one case per judge per month, suggesting that it would be far from irrational in this era of increasing governmental austerity to consider whether this court’s functions could be made part-time, as is true of the Court Martial Appeal Court of Canada.

Finally, the Canadian approach to long-range oversight of the military justice system offers a model quite different from what American military justice scholars and practitioners are used to. Congress has not held significant military justice hearings in 30 years. The statutory Code Committee, which is supposed to conduct an annual comprehensive survey on the operation of the Uniform Code of Military Justice and report on the number and status of pending cases as well as make recommendations on uniformity of sentencing policies, amendments to the statute, and other matters it deems appropriate (10 U.S.C. § 946), has long been viewed as vestigial. When the private National Institute of Military Justice sought to fill this gap with its Cox Commission,³ its work received little attention from Congress⁴ and was largely dismissed by the military. By contrast, Canada has had the wisdom to sponsor serious and thorough outside evaluations, most notably the one conducted by retired Chief Justice Antonio Lamer,⁵ which led to important changes. I am sure that there are reformers as well as reform resisters in uniform in both countries, but I cannot help but feel that, on the whole, the Canadian Forces are more open to change than are their counterparts on this side of the border.

Military Justice in Action is a mon-

ument not only to the diligence of its authors but also to the strength of the system they present and analyze. As I wrote to Chief Justice Lamer, “As you know, military justice practitioners and scholars in the United States are taking an increasing interest in the developments in other countries’ systems, and Canadian developments have been at the top of the list. Canada has much to be proud of in this area.”⁶ If anything, my conviction in this regard is stronger a decade later. American students of the field will profit from the second edition of Justice Létourneau’s and Colonel Drapeau’s book—either by considering whether various practices of the United States or Canada are superior or by enriching their understanding of the increasingly different path to which we in the United States thus far remain committed, or both. **TFL**

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Endnotes

¹See Eugene R. Fidell, *Military Law*, 140 DAEDALUS No. 3, 165, 169–170 (Summer 2011).

²See Eugene R. Fidell, *The Next Judge*, 5 J. NAT’L SEC. L. & POL’Y 303, 305 (2011).

³The 2009 report of the second phase of the Cox Commission may be found at militaryreporters.org/wp-content/uploads/2009/10/cox-report-body.pdf.

⁴A noteworthy exception is that, as the Cox Commission recommended, Congress required courts-martial to have at least 12 members in capital cases. Art. 25a, UCMJ, 10 U.S.C. § 825a.

⁵The Lamer Report is available at www.cfgb-cgfc.gc.ca/documents/LamerReport_e.pdf.

⁶Quoted in the Lamer Report at 1 n.2 and App. F.

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Giant in the Shadows: The Life of Robert T. Lincoln

By Jason Emerson

Southern Illinois University Press, Carbondale, IL, 2012. 600 pages, \$39.95.

REVIEWED BY HENRY S. COHN

Jason Emerson's *Giant in the Shadows* is a long-awaited, refreshing look at Robert Todd Lincoln, the only one of Abraham and Mary Todd Lincoln's four sons who lived beyond his teen-age years. Born in 1843 at the Globe Tavern in Springfield, Ill., where Abraham and Mary Lincoln boarded for \$4 per week, Robert was not subject to any major parental supervision. He enjoyed a carefree, undisciplined childhood in Springfield.

Robert graduated from the best schools—Phillips Exeter Academy and Harvard University—and then attended Harvard Law School for one term. After that, he moved to Chicago, where he read for the law in the offices of a law firm and took law courses at the University of Chicago. He became an accomplished attorney and real estate investor. One of his major clients was George Pullman, and Robert later became president of the Pullman Company, an innovative business that supplied railroad sleeper cars. His net worth came to be in the millions. Although he refused numerous times to become a candidate for President, he served as secretary of war under President James Garfield and his successor, President Chester Arthur, and as U.S. minister to Great Britain under President Benjamin Harrison. The *Boston Herald* lauded Harrison's appointment of Robert Lincoln as "the most important and the wisest appointment" Harrison had made.

In 1868, Robert married Mary Harlan, the daughter of a U.S. senator from Iowa. Robert met Mary when he was 20 years old and living with his parents in Washington, D.C. Robert and Mary had three children—a boy and two girls. The family lived comfortably in Chicago until Robert retired from Pullman in 1911, after which they

moved to Washington, D.C. Robert also built a palatial residence in Manchester, Vt., which he named Hildene, where he could play endless rounds of golf and stargaze from his observatory, a tower-like structure adjacent to his mansion. Like his father, Robert was a social animal and knew how to tell a good story. He often traveled to the American West and throughout Europe with his many friends.

But there is much more to the biography of Robert Lincoln than his public and private achievements. His life has generated debates and feuds since the 1870s, resulting mostly in negative assessments of him. Emerson's book, drawing on the extensive research he undertook for more than 10 years, strives for accuracy and tries to set aside the legends that have diminished Robert's reputation to this day. Emerson is convinced that Robert Lincoln is entitled to more respect than he has customarily been accorded.

Emerson's biography of Robert Lincoln has several major themes. The most prevalent is that, both publicly and privately, Robert Lincoln's life was touched by death. Even after Robert's death in 1926, his wife shocked the country by refusing to allow Robert to be buried in the Lincoln tomb in Springfield, Ill., where Abraham, Mary, and Robert's three brothers lay. She declared that Robert was an important man in his own right and deserved "his own place in the sun." Having served on Gen. Ulysses S. Grant's staff during the Civil War and being the last surviving witness of the surrender at Appomattox, he was buried at Arlington National Cemetery, with a view of the Lincoln Memorial, which he had helped dedicate in 1922.

Tragedy first struck Robert when he was almost seven years old, when Eddie, his only sibling born at the time, died at the age of three. In 1862, Robert's 12-year-old brother Willie died at the White House of typhoid fever. In 1871, Robert's brother Tad, for whom Robert had served as guardian after their father's assassination, died at the age of 18, with Robert then 28. Robert's own son, the promising Abraham Lincoln II, died in England in

1890, also at the age of 18, from incompetent treatment of a swelling on his shoulder and a subsequent infection. Robert, then 47, reluctantly served out his term as minister, but his wife and daughters left England and returned to her family's Iowa home.

And, of course, there were the assassinations. Contrary to hearsay that began while he was still alive, Robert was not physically present when his father, Garfield, or McKinley was shot. Robert Lincoln was not a jinx, as one legend had it. Actually, as Emerson shows, Robert was in the White House on April 14, 1865, resting from his duties as an aide to Gen. Grant. He always regretted that he had turned down his father's invitation to accompany him and his mother to Ford's Theatre. He was in the railroad station when President Garfield was shot but was not accompanying Garfield in the waiting room, where the attack occurred. Robert entered the scene a few minutes later, and, as secretary of war, immediately took on the duties of his office to direct military personnel. In 1901, Robert and his family arrived in Buffalo for the Pan American Exposition, only to be told that President McKinley had been struck by a bullet some five hours earlier. There is no question, according to Emerson, that each of these incidents affected Robert Lincoln psychologically throughout the rest of his life.

Emerson raises other challenging questions about Robert. Did he properly care for Abraham Lincoln's papers? There was a rumor that Robert was hiding letters about his father's first love affair, with Ann Rutledge. Emerson demonstrates, however, that, although Robert often burned his own records, he was scrupulously careful with Abraham Lincoln's. Robert would keep Abraham Lincoln's files with him wherever Robert was residing, shipping the papers between his winter homes in Chicago or Washington and his summer home, Hildene. In fact, in 1923, he donated the entire collection of his father's papers to the Library of Congress, where they had been stored since 1919. He also took steps to trace the original texts of the Gettysburg

Address, which had passed into non-official hands. After a curious incident in which Abraham Lincoln's body was almost stolen from its Springfield tomb, Robert made sure that the remains were fully preserved under multiple steel and concrete layers.

Was Robert a virulent anti-unionist? Was he a racist? He certainly did not support the union movement. He defended the arrests for murder of two union activists at the Chicago 1886 Haymarket riot and attacked the Illinois governor who later issued the men a pardon. He advised his client, George Pullman, during and after the Pullman strike of 1893 and appeared before the 1894 U.S. Strike Commission to support him. But Emerson denies the allegations raised in Chicago newspapers after the strike was crushed that Abraham Lincoln would have been ashamed that his son had advised Pullman to starve the employees into submission. According to Emerson, Robert had a minimal role in the strike, merely giving advice after Pullman had made the major decisions. Still, Emerson does not deny that Robert Lincoln, like most post-Civil War Republicans, was a wealthy conservative with a pro-business philosophy.

The validity of the charge of racism is also unclear, according to Emerson. On the one hand, Robert, as a member of the Lincoln family, was revered by the African-American community. Although he rarely gave public addresses, those he delivered totally supported his father's principles. For example, in 1896, he delivered a speech at Knox College in Galesburg, Ill., commemorating the 38th anniversary of the Lincoln-Douglas debate that had occurred in that town. He noted his father's struggles to support right over wrong and endorsed his battle on behalf of all classes in society. On the other hand, Robert never opposed segregation in railroad travel or actively supported civil rights. For most of his term at the Pullman Company, he blocked the efforts of black porters to improve their working conditions. One former porter published a tract in 1904 called "Freemen, Yet Slaves Under 'Abe' Lincoln's Son, or Service and Wages of Pullman Porters," which

accused Robert of having abandoned his father's legacy.

The strongest criticisms of Robert flow from his having his mother committed to a mental asylum in 1875. In an article published in *The New Yorker* on Feb. 28, 1994, Michael Beschloss reported that "recent scholars believe that the problem was less the widow's mental health (she was, it seems, highly eccentric but capable of caring for herself) than the son's designs on his mother's money and his wish to get her out of public view."

Emerson completely rejects this position. He describes the deep bond that existed between Mary and Robert. As a lawyer, when Abraham Lincoln left his family in Springfield to travel through Illinois' Eighth Judicial Circuit, Mary found emotional support in her young son. When she was the first lady, she visited Robert at Harvard, where they shopped and traveled together. Having lost two sons, she was so anxious for him that she would not let him serve in the Army until 1865, just as the Civil War was ending. After Abraham Lincoln's death, Mary's closeness with Robert continued as Robert provided for her housing and counseled her on Tad's welfare. They shared in delight as Robert's first child, named Mary, was born in 1869.

Although Robert borrowed money from his mother as he commenced his career in real estate investing, he rapidly became successful and wealthy on his own and did not covet his mother's small estate. Moreover, Mary Lincoln was not just "eccentric." When Robert and his legal advisers decided that he had to take action, she was the target of spiritualists and frauds who were planning to steal her money. According to the respected medical community of Chicago, she was showing signs of paranoia. She was carrying all her assets—her bonds—in a pocket of her dress.

Robert was emotionally drained by the need to proceed against his mother. He was so embarrassed that he wrote an unsigned explanation of his actions that was published in the *New York Times*. In May 1875, Mary was placed in an excellent facility, and less than four months later she gained her freedom through the help of the

first woman admitted to the Illinois bar, Myra Bradwell. Mary left for Springfield and then went to Europe. Five years later, Robert and Mary reconciled.

Those taking sides in the debate over whether Robert was right or wrong in committing his mother are passionate, drawing support from varied readings of a collection of documents discovered at Hildene in the last 20 years. In this highly charged academic atmosphere, it is unlikely that historians following either Beschloss or Emerson will moderate their views.

Emerson discusses aspects of the relationship between Abraham Lincoln and Robert Lincoln, such as that Abraham let Robert play a major part in his trip from Springfield to Washington in February 1861 for his first inauguration. Robert was instructed to keep in his custody Lincoln's intended remarks at the inauguration, but, at one train stop, Robert misplaced the valise carrying the speech, and Lincoln, to his annoyance, had to locate it. Robert also was a sounding board for his father at the White House. Lincoln solicited Robert's views as he wrote strident letters to Union Gen. George Meade demanding that he block Robert E. Lee's retreat from Gettysburg in 1863, and as he planned for the Hampton Roads peace conference in 1865.

Emerson writes poignantly of the morning of Lincoln's assassination: "After breakfast, Robert spent a few hours talking alone with his father, recounting to him the final days of the [military] campaign. The president was so eager to spend time with his oldest son, in fact, he postponed his morning cabinet meeting—a meeting in which General Grant was to attend and the group was to discuss the important subject of reconstruction—for two hours in order to 'see something of [Robert] before I go to work.'"

And who can top this story that Emerson relates from 1860? "Robert [at Harvard], standing in his nightshirt, surrounded by bullying sophomores most likely in masks, was interrogated: 'Are you the son of the Mr. Lincoln who is named by the Republicans for the presidency?' Robert admitted that

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he was. It was then demanded: ‘What manner of man is this father of yours?’ Robert, very coolly and honestly, said, ‘Father is the queerest old cuss you ever saw.’” TFL

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Gunfight: The Battle Over the Right to Bear Arms in America

By Adam Winkler

W.W. Norton & Company, New York, NY, 2011. 361 pages, \$27.95.

REVIEWED BY ARAM A. GAVOOR

Gunfight weaves a compelling tale of the historical, political, and procedural background of the Supreme Court’s landmark Second Amendment decision in *District of Columbia v. Heller*, 554 U.S. 570 (2008), and of the decision itself. The book’s author, Adam Winkler, is a professor of constitutional law at University of California, Los Angeles, School of Law. Although the Second Amendment jurisprudence that Winkler discusses is complex, he presents it in an inviting, storytelling style, which should be accessible to non-lawyers.

Winkler’s thesis in *Gunfight* is that guns are the beating heart of America’s cultural divide. Such a grandiose statement gives the reader quite a lot to chew on. Winkler has little trouble establishing that guns are “lightning rods of American culture, and in such a charged atmosphere, common ground is hard to find.” Even if he fails to convince some readers that guns are *the* divider of the American psyche, he certainly succeeds in establishing that they are a larger contributor to it than we generally recognize. Winkler seeks to move the gun policy conversation forward by demonstrating the legitimacy of both sides in the gun debate, although he heavily criticizes the extremists on both sides, whom he refers to as “gun grabbers” and “gun nuts.” According to Winkler, “[t]he two ideas—the right to bear arms and

gun control—are not mutually exclusive propositions. In fact, America has always had both.” He equally opposes advocates of disarming Americans and proponents of universal gun rights. He views the former as foolish because disarmament is politically impossible, and he challenges the latter because reasonable regulation is consistent with America’s historical practice and is good public policy.

Gunfight opens by describing the near-pandemonium that took place among the masses of gun rights and gun control activists outside the Supreme Court on the morning of the oral argument in *Heller*. Winkler notes that, when the oral arguments were held, “security at the Court mandated that no actual guns be brought into the building.” Winkler then introduces the main characters, focusing on Alan Gura, the Virginia attorney who served as lead counsel for the plaintiff, Dick Heller, challenging the District of Columbia’s ban on handguns. Winkler emphasizes the National Rifle Association’s opposition to the lawsuit, which was based on its fear that an adverse decision from the Supreme Court would undermine its national gun rights strategy. In fact, the National Rifle Association tried to control the litigation by filing a lawsuit of its own and by pushing for a legislative fix to render Heller’s case moot. At the oral argument, Gura faced Walter Dellinger and Solicitor General Paul Clement—both outstanding Supreme Court litigators.

The book then moves back to 1975, and explains that the District of Columbia handgun ban was enacted as an idealistic measure that was largely ineffective and that the lawsuit challenging it was a vehicle to promote the individual rights theory of the Second Amendment. Touching on a variety of topics, Winkler addresses the relative dearth of Second Amendment scholarship until the second half of the 20th century, showing that gun rights were previously not so contentious.

Winkler dispels many historical myths. In the Revolutionary era, gun laws were strict, but not in the sense we understand that concept today.

Rather, gun ownership was *mandatory*. Winkler notes, “When national defense became too important to leave to individual choice or the free market, the founders implemented laws that required all free men between the ages of eighteen and forty-five to outfit themselves with a musket, rifle, or other firearm suitable for military service.” In the 19th century, gun control was alive and well in the American frontier. Even though many people owned guns, it was common practice for frontier towns to enforce stringent gun control measures to spur public confidence and promote business growth. Winkler also reveals that racism was a basis for gun control in American history. He describes how the Ku Klux Klan took an active role in disarming freed African-Americans in the South after the Civil War. In addition, in a chapter titled, “Gangsters, Guns and G-Men,” Winkler shows how, during the Prohibition era, national gun legislation was enacted in response to the widespread availability and criminal use of automatic and semi-automatic weapons.

Winkler succeeds in establishing that “[g]un rights and gun control are not only compatible; they have lived together since the birth of America.” He believes that the Supreme Court’s decision in *Heller* exemplifies this fact. Although he does not choose sides as to whether the majority or the dissent had the better originalist understanding of the Second Amendment, he believes that, in a sense, both sides in the gun debate won. The Court held that there is a Second Amendment individual right to bear arms, but that such a right is not absolute, and that reasonable gun control is permissible. In essence, the District of Columbia’s absolute handgun ban was unconstitutional not because it was a regulation of the right to bear arms, but because it was so extreme.

Gunfight’s discussion of the history and policy behind gun rights and gun control is so rich that the reader may grow impatient with the digressions from the *Heller* story. We do not learn what happens in the case—although we all *know* what happens—until past

page 200. The end is worth the wait, however. Winkler's discussion of the Court's deliberations in *Heller*, its decision, and the effect of the decision, are thoughtful, entertaining, and fair. **TFL**

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Steve Jobs

By Walter Isaacson

Simon & Schuster, New York, NY, 2011. 630 pages, \$35.00.

REVIEWED BY CHRISTOPHER FAILLE

Walter Isaacson's biography of Steve Jobs is now regarded in some corners as a how-to manual for business success. This can take harmless forms; for example, some managers have adopted Jobs' catchphrase—"one more thing"—as their own. But it might take more dangerous forms too, because Jobs' dictatorial streak could encourage his admirers to let their own inner tyrant loose. A recent story in the *Wall Street Journal* quotes Isaacson himself complaining that managers boast to him: "I'm like Steve Jobs, I drive people to perfection," to which Isaacson replies "Make sure that you have his talents as well."

Jobs' idiosyncrasies are, of course, subject to replication, but without the rare combination of talents, drives, and circumstances that this book chronicles in detail, the personal traits are just that—idiosyncrasies. And anyone with the same combination of talents and drives will make his or her way in the world without trying to imitate someone else anyway.

Furthermore, it may help scotch the whole rather jejune idea of management-as-imitation to recall that Jobs' life includes far-from-admirable incidents. Isaacson, who, at some level, admires his subject, is nonetheless candid about these incidents. Perhaps the best example involves

the birth of a baby girl in May 1978. Lisa Nicole was Jobs' daughter by his significant other at that time, Chrisann Brennan, but Jobs denied paternity and cut off relations with Brennan (who didn't "feel up to" suing for child support). Brennan raised Lisa for the first years of her life on welfare, just as Apple was taking off commercially. This conjunction of facts makes Jobs appear loathsome, although it must be said that he eventually did acknowledge paternity, and that Lisa Nicole Brennan-Jobs lived with him for a period when she was a teenager.

What is especially odd about the denial of paternity is that, in 1981, Jobs actually named a computer after the daughter he was still claiming wasn't his. After the Apple III flopped in mid-1980, Jobs decided to start from scratch, without the assistance of his longtime collaborator Steve Wozniak, and with a team of newly hired engineers. This was the project he named "Lisa," in a move that, as Isaacson says, "would have caused even the most jaded psychiatrist to do a double-take."

The Rise of the Mouse Click

Apple introduced its Lisa to the public in January 1983. In hindsight the computer looks transitional—part of the development of what we think of as the Macintosh design—and was only the second personal computer sold by anyone to include the graphical user interface (GUI, pronounced "gooey"), which is a feature of personal computing that has long since come to be taken for granted. GUI is the feature that allows users to click a mouse when the cursor coincides with a given image on the screen, rather than having to type a textual command.

Of course, neither Jobs nor the company openly acknowledged the source of the new computer's name. The cover story was that "Lisa" was an acronym. The public relations gurus came up with "local integrated systems architecture," as a jumble of words that would sound like plausibly geeky jargon. Engineers on the project joked about "Lisa: invented stupid acronym." Isaacson tells us that, during one of his talks with Jobs in researching this book,

Jobs did finally admit, "Obviously, it was named for my daughter."

Psychoanalysis aside, some of the more fascinating takeaways from this book involve the continuing and always contentious issue of intellectual property in the United States. The aforementioned GUI, for example, had been first devised at XeroxPARC, which is Xerox's Palo Alto Research Center. (PARC really did begin as an acronym.) By coincidence, in summer 1979, at the high tide of Apple II's success, the venture capital division at Xerox wanted equity in Jobs' company. Jobs let them have it—in essence getting GUI in return for \$1 million of Apple stock.

Isaacson portrays this as a coup for Apple, as if the klutzes at Xerox didn't know what they were giving away. Indeed, Isaacson goes rather too far in portraying it that way, given the fact that the \$1 million worth of shares that Xerox received in the exchange for GUI would be worth \$17.6 million a year later. Not a bad return.

Our goey story doesn't end there, though. In 1985, when John Sculley was Apple's chief executive officer, Apple licensed GUI to Microsoft for Windows 1.0. This was the catalyst for years of conflict. In 1988, when Microsoft came out with Windows 2.0, Apple contended that the 1985 deal no longer applied and sued Microsoft.

Cutting a Deal

Through the following years, as the litigation wore on, there was a good deal of turnover in Apple's corporate suites. After a power struggle with Sculley that culminated in 1985, Jobs himself was effectively fired from the company he had started. Not long thereafter, Apple's board grew tired of Sculley and forced him out. Sculley was replaced by Michael Spindler, who in turn was replaced by Gil Amelio. Amelio invited Jobs back into Apple's executive suites again early in 1997.

Also by 1997, it had become clear that Apple wasn't getting very far in its efforts to recover the exclusivity of GUI. Isaacson tells us that Apple "had lost the case and various appeals but remnants of the litigation and threats

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of new suits lingered,” while Bill Gates at Microsoft also had to concern himself with the U.S. Justice Department and its antitrust division.

When Amelio and Jobs jointly sat down with Gates to discuss the GUI issue, Gates reportedly had a tough time figuring out which one of them was the boss—that is, with whom he should actually be negotiating. In-fighting at Apple continued, and Amelio resigned that July. With Jobs now firmly at the helm again, he called Gates and said, “I’m going to turn this thing around.”

Jobs then offered to settle Apple’s intellectual property claims against Microsoft in return for an infusion of cash (\$150 million) and an assurance that Microsoft’s engineers would continue to make software for the Macintosh.

Apple’s subsequent successes—especially after the seedy condition into which it had fallen during Jobs’ time in corporate Elba—speak for themselves. If one is looking for lessons from Jobs’ career, one might draw this one: a solid patent portfolio is a supplement to, but it is never a substitute for, a sound business plan. A related point is that the roles of courtroom adversary and marketplace collaborator are antithetical, and there will be times when the executives of a company will have to choose one or the other.

The spread of GUI from novelty to common coin—a story that includes Xerox’s deal with Apple and, later, Apple’s deal with Microsoft—that is business at its best. One hopes for the sake of the future of the high-tech industries in the United States that its practitioners will learn, as many alas have not, that it is often best to turn away from courtroom confrontations and turn toward the world of operations, productivity, and (where the law allows) cooperation. **TFL**

Christopher Faille is the co-author, with David O’Connor, of Basic Economic Principles (2000), and the sole author of a just-released book on the financial crisis of 2007-08, Gambling with Borrowed Chips.

American Tempest: How the Boston Tea Party Sparked a Revolution

By Harlow Giles Unger

Da Capo Press, Boston, MA, 2011. 290 pages, \$26.00 (cloth), \$16.00 (paper).

REVIEWED BY CHARLES S. DOSKOW

A new book about the genesis of the American Revolution with a title evoking the Boston Tea Party may suggest that the author will equate that historical event with a certain current movement, perhaps making a political statement. Fear not. Harlow Giles Unger draws no parallels, but he details the Colonies’ move to independence in a coherent and convincing narrative. True, we learn early on that Samuel Adams went bankrupt, and James Otis Jr. went insane, but these are only facts that help complete the portraits of the complex men who were driven to risk all in the cause of American freedom.

American Tempest is mostly about Massachusetts, and even more about Boston. Its three principal characters are John Hancock, a wealthy merchant; Samuel Adams, a true revolutionary; and John Adams, a lawyer and politician. They were the leaders and manipulators of the movement for independence. The rest of the country was carried along, sometimes reluctantly, by the refusal of the patriots in the Bay State to give up the struggle, even in the face of unbroken British intransigence.

Taxation lay at the heart of Colonial objections to British rule. Beginning in 1733, the British imposed a series of imposts—the American Revenue Act, the Molasses Tax, the Stamp Acts, Tea Taxes, and Intolerable Taxes—on the Colonists in order to defray the costs of protecting them. The taxes were never a serious economic burden, but they always created resentment and unrest among the citizenry.

Sam Adams’ natural constituency was the workmen and others who hung around the Boston docks in one capacity or another. He was able

to enlist John Hancock in his cause because only Adams could assure the safety of Hancock’s property from the mob. Adams needed the financial support that could come only from the merchant class. It was said that “Adams soon dug so deeply into Hancock’s pocket that the merchant won the reputation of being Adams’s ‘milch cow.’” That alliance dated from 1765 and was decisive.

The Boston Tea Party itself occurred on Dec. 16, 1773. A boycott of English tea had been in place for some months when the *Dartmouth* landed with its cargo. The Boston branch of the secret society, the Sons of Liberty, had ordered the tea agents, who were charged with collecting the despised tax on tea, to resign their commissions, but they had not done so. While the *Dartmouth* and its companion ships stood at anchor in Boston Harbor, the Sons of Liberty stood guard in order to ascertain that no tea was unloaded.

Unger assures us that, although Boston Harbor became the recipient of a vast quantity of tea tossed overboard, the Tea Party remained an “orderly affair.” The culprits were reported to include “about fifty Mohawk Indians, with whom [Sam] Adams seems to be acquainted and speaks without interpreter.” “Depend upon it,” John Adams wrote later. “These were no ordinary Mohawks. The profound secrecy in which they have held their names, and the total abstinence of plunder, are proofs of the character of the men.” The Mohawks were not identified at the time. Appendix B to this book lists “The First Tea Party Patriots” and provides a second list of men who, according to claims made by their families and descendants, participated in the Tea Party. (The footnote to the list gives the source as an 1884 publication.)

The royal governor, Thomas Hutchinson, called the Boston Tea Party “the boldest stroke that had been struck against British rule in America.” But this was not the only Tea Party. A second followed in March 1774, and similar events occurred in New York,

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in Annapolis, and elsewhere.

Many other events took place on the road to American independence. The Boston Massacre was grist for the Sons of Liberty's mill. The Sons of Liberty was a true terrorist organization, regularly burning the homes of loyalists. Smuggling and molasses are also part of the story. The seizure of John Hancock's ship *Liberty* by the British was a business loss to Hancock, but an opportunity for rabble-rousing to Sam Adams. John Adams represented Hancock in the trial that followed the seizure of the ship.

The story goes on, with British intransigence and Colonial opportunism playing a role, along with Harvard

College and the Liberty Tree.

Was the Boston Tea Party central to the Colonists' march to independence? With all the actions and reactions that *American Tempest* describes, as well as the complexity of the Boston politics of rebellion that it explains, the first and most famous Tea Party may seem to be a footnote, blown up into a chapter, and then embellished into a book. In any event, the Tea Party is emblazoned in American folklore as the most dramatic adventure in the march to American freedom.

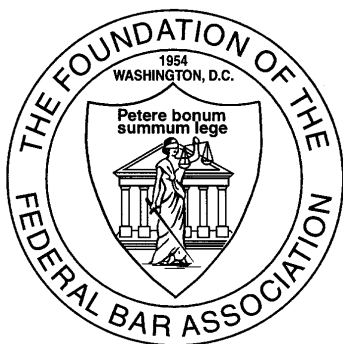
There are many other familiar names in the story, some from outside New England. George Washington and Patrick Henry (the subject of a biog-

raphy by Unger that I reviewed in the November/December 2010 issue of *The Federal Lawyer*) make cameo appearances. Unger takes us through the Continental Congresses of 1774 and 1775, which led to the drafting and signing of the Declaration of Independence.

There is a lot of history, and a lot of detail, in this relatively short volume, which remains exciting even though the outcome is not in doubt. **TFL**

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