

Taking Offense

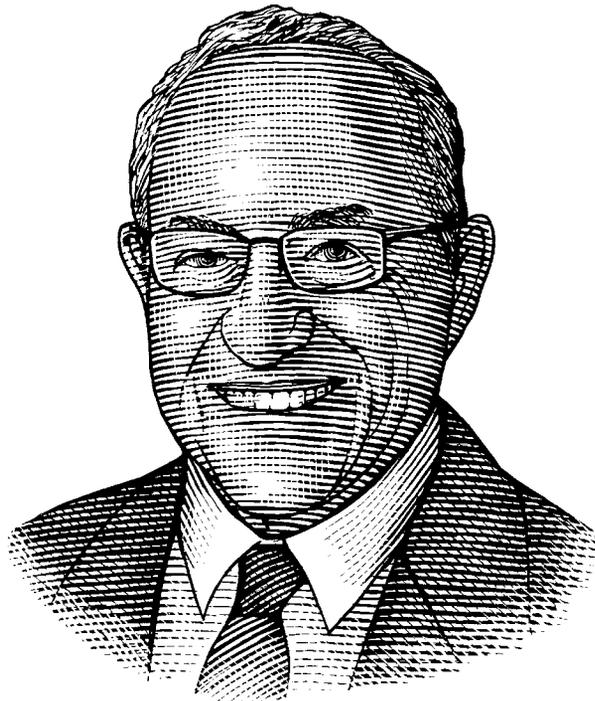
An Interview with

Alan Dershowitz

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“May you live in interesting times,” says an ancient Chinese curse that masquerades as a blessing. Alan Dershowitz has indeed lived an interesting, if often controversial, life. A professor at Harvard Law School since the age of 28, he has represented movers and shakers of Hollywood, politics, law, sports, and business, including Bill Clinton, Julian Assange, O.J. Simpson, Claus von Bulow, Marlon Brando, Mia Farrow, and Mike Tyson. But it wouldn’t be fair or accurate to label him just as a “celebrity lawyer.” While his client list is indeed chockablock with ritzy personalities, he has also played a key role in some of the most interesting litigation involving people who were not well known but whose cases nonetheless raised riveting legal issues, such as whether a husband can be prosecuted on charges of slavery for not doing anything about his wife’s alleged abuse of domestic employees.



See United States v. Sabhnani, 599 F.3d 215 (2d Cir. 2010).

Acclaimed as “the best known criminal lawyer in the world”—having litigated or consulted on cases throughout the world, including the Ukraine, the Soviet Union, the Russian Federation, Israel, China, New Zealand, Australia, the Vatican, Libya, The Hague, Pakistan, and several European countries—Dershowitz has never shied away from controversy or unpopular causes. Nor does he hide behind what he calls a “shield of feigned humility.” Having played a role in many of America’s precedent-setting legal cases of the past 50 years,

Dershowitz’s fire continues to burn bright. The man who wrote a book on chutzpah has strong beliefs and opinions. And he will let them be known. What’s more, he’s not one to shy away from taking a provocative stance or conform his opinions to notions of political correctness.

Illustration by Steven Noble

I interviewed Professor Dershowitz at his Manhattan apartment—an elegant *pied-à-terre* full of art and books. The time was late October 2016, shortly before the presidential election. As we talked, a television on the kitchen wall was tuned to a news channel that was playing out the last days of the bitter, divisive, controversial, and intense, no-holds-barred presidential campaign.

ASJ: It's interesting. America, in a way, is getting more diverse day by day, with the influx of immigrants, trade . . .

AD: It's a great thing! We are a country of immigrants. We are a country of diversity. And the more diverse we are, the better a country we will be.

ASJ: . . . but at the same time, do you feel that intolerance and bigotry appear to be on the rise?

AD: No. No, no, not even close! It's way on the decrease. Organizations like Black Lives Matter misinform the American public. They take a snapshot rather than a video. If you look at what's happened to the relationship between young black men and the police between 1995—I picked that date because of O.J. Simpson and because of the Rodney King case—and today, there has been a dramatic, dramatic, dramatic improvement. If you did a video of the last 20 years, you'd see dramatic improvements. It's not as good as it should be, but it's much, much better. The situation has improved dramatically, but if you have somebody who has come to adulthood today, and he sees videotapes of African American young men being shot—and because everybody has video cameras now on their phones—it looks like it's happening every day. So there's a misperception of real improvement, and what is improvement looks like it's actually a decline. But that's not the reality. I challenge Black Lives Matter to prove that things have actually gotten worse. They can't do it. They can argue that they're very bad and they should get much better, but they can't persuasively argue that things have gotten worse because they haven't. They've gotten much, much better.

ASJ: As you reflect back on your life in the law, what do you see?

AD: Well, I have to divide my life into three periods. First, I was a professor, and I didn't know, really, how the legal system operated in practice. Then I became a practicing lawyer along with being a professor. For 50 years, I litigated and also taught, and I would bring the trial experience into the classroom and bring the classroom into the courtroom. I thought it made me a better teacher and a better litigator to have had that joint experience.

Then, in the past two years of my life, my life changed quite dramatically because after 50 years of representing people—some innocent, many not so innocent—I was falsely accused

of a serious crime and had to use all of my own legal talents to disprove this false accusation. A woman simply made up a false charge against me. Her lawyers ultimately withdrew the charge and acknowledged that it was a mistake. But for almost two years I had to use all of my legal skills to defend myself. It was the first time in my history I ever defended a client who I knew for absolute certainty was innocent. So I broke all the rules that I taught my students about how to litigate cases when you don't know whether your client's guilty or innocent.

ASJ: You've always gone to the mat in defending people accused of crimes. How did it feel when *you* were the defendant?

AD: Well, very, very different. First of all, it made me really sympathize with other people who have been falsely charged. It turned, for me, from an intellectual pursuit to a very emotional one, and it made me feel that the people who made these false charges should never be allowed to get away with it.

ASJ: In *Taking the Stand: My Life in the Law*, you have written about a flaw in our legal system where lawyers or pro se litigants can get away with defaming someone in a court filing.

AD: Right.

ASJ: Well, how do we strike a balance between not chilling lawsuits against powerful people and, at the same time, allowing people who have been defamed in a lawsuit to have recourse?

AD: When lawyers use the litigation privilege and hide behind it to make false charges for financial gain, the bar associations ought to vigorously go after them. That's one way to strike the appropriate balance.

The other tragedy is that criminal prosecutors don't go after people who lie in depositions. And lying in depositions is *ram-pant*. I know lawyers who advise their clients: "It's OK to lie in a deposition. Don't worry, nobody ever indicts anybody for lying in a deposition."

My accuser lied repeatedly, over and over again, under oath. Yet, there was no criminal investigation. People lie and hide behind the litigation privilege with impunity. And I'm going to see that that changes.

ASJ: You've been an outspoken critic of the problem with criminal defense lawyers: It's not that they are overzealous; rather, it's "under-zealousness" that's the real problem. Does that continue to be the case?

AD: It's worse than ever.

ASJ: How so?

AD: Criminal defense lawyers, many of them, just want to suck up to prosecutors and to judges because they're the continuing source of their business. The last person that the criminal

defense lawyer thinks about—not the good ones, but the mediocre ones—is the client, because the client is today’s client and tomorrow not at all. But prosecutors are a continuing source of relationship, as well as the judge, and there are a lot of defense attorneys who really are prosecutors in defense attorneys’ clothing. All they want to do is plea bargain, cooperate with the government, be on the good side of the government. We need more zealous advocacy on behalf of both innocent and even guilty defendants.

ASJ: And how would we make that happen?

AD: First of all, I would raise the standards. I would change the standards for what constitutes ineffective assistance of counsel. They’re much too difficult to achieve today. I had a case—a death case—where my client’s trial lawyer fell asleep. Fell asleep in the middle of the trial! And the court held that that was *not* ineffective assistance of counsel. I have to tell you, that hour he was asleep, that was his best time in the trial.

ASJ: Do you think the *Strickland* standard is too high of a bar?

AD: Much too high of a bar, much too unrealistic. The United States Supreme Court has very few justices who have any experience in the criminal law. There are a few who were prosecutors, but nobody who really served as a defense attorney, and certainly none who served as a defense attorney for any lengthy period. The naïveté and lack of experience of the Supreme Court justices show up in their opinions.

ASJ: How so?

AD: They’re extremely naïve. You have Justice Ginsburg saying that it’s OK for a criminal defense lawyer, without his client’s consent, to tell the jury that his client is guilty. You have the harmless error rule, which doesn’t understand the dynamics of how real trials operate. How dare nine elitist, ivory-tower justices sit in judgment about whether a conviction would have been the same had certain dynamics been different—had a confession not been admitted, for example? They don’t know what they’re talking about when it comes to harmless error. They weren’t there, they don’t have the experience, and they don’t have the feel.

I’ll give you an example: In the O.J. Simpson case, if he had lost and we had persuaded the court on appeal that the search and seizure was unlawful, that there were other violations, the conviction would have been affirmed on harmless error. And the quote would have said, “Look, there was a mountain of evidence. Any jury would’ve convicted based on this mountain of evidence.” Any jury *except* the jury who actually sat on the case—because there are many dynamics in a trial, which you can’t really see on the paper, that affect the outcome of a case. So judges ought to be much more deferential when they decide that an error was harmless error.

ASJ: Deferential to whom?

AD: To reality. To the fact that they should be humble—that they don’t know. They don’t have the experience to make that kind of judgment.

ASJ: You have written about how the authority of the Supreme Court will diminish over time in the United States. Why do you believe that?

AD: I think, first of all, that the impact of the Supreme Court on the daily life of most Americans is way exaggerated. I’ll give you a perfect example. I argued a leading case in the Supreme Court—I think it was in maybe 1969—on obscenity. I argued on behalf of a film called *I Am Curious (Yellow)*. It had some nudity in it. It was banned in many parts of the country, and the Supreme Court, in a decision by then chief justice Warren Burger, set out rules, and under those rules today, adult pornography

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can be banned. Now, just look at anybody’s iPhone—press three buttons and you have pornography. It’s pervasive. It’s all over—in hotels, on everybody’s television set. The Supreme Court has had no influence, none whatsoever, on the issue of pornography.

The Supreme Court has had very little influence on issues of prayer in the schools, for example. The Supreme Court has said categorically that you can’t have prayer in the schools. Go to southern schools, you’ll see prayers all over the place. Go to southern public school athletic events; there are prayers all over the place.

Even desegregation. While the Court obviously had influence on this matter, segregation persisted for many, many, many years in the guise of de facto segregation.

So don’t think that the Supreme Court is going to solve all our problems; they won’t. We’re a democracy, and a democracy in which people rule and not nine justices.

ASJ: But what about the respect for the Court from a common man’s perspective?

AD: I think it has diminished and that it was a self-inflicted wound. I think with decisions like *Bush v. Gore* and *Citizens*

United—suddenly creating a constitutional right of corporations—the Supreme Court has wounded itself. It has become too political. The process by which justices are nominated is becoming even more political, as we see some people saying we won't confirm any justices to the Supreme Court no matter what. So I think we see far less respect for the Supreme Court today than when I was a young person. But I have to tell you, the respect that you get is often the respect you deserve, so a large part of it results from a self-inflicted wound inflicted by the justices themselves.

ASJ: Is it also because of the general increase in partisanship politics these days?

AD: Sure, but it shouldn't apply to the Supreme Court. Justice Harlan, when he was appointed to the Supreme Court, said he would never vote again. Justice Ginsburg, on the other hand, gives an interview—I like Justice Ginsburg; she's a very good justice—insulting a presidential candidate. That shouldn't be what Supreme Court justices do. Justice O'Connor, when she was a justice, arranged campaign events for the Republican Party, wrote a letter to the Republican Party of Arizona helping them secure more people to join the Republican Party. Justices shouldn't be doing that.

ASJ: Justice Holmes viewed the role of the lawyer as a predictor of future legal decisions and trends. Is that still true in this day and age of the Internet and its global influence?

AD: It's not only truer than ever, but more difficult than ever. Lawyers have to be making predictions all the time because we have to advise our clients. It's like a football pass. You don't throw a football pass to where the player is; you throw it to where he's going to be four seconds after you've thrown the ball in the air. The same thing with legal advice. I give my clients legal advice, not based on the past, not based on the present, but based on the future. About what it's going to look like six months, eight months, a year, two years, five years down the line. So we all have to be predictors. We have to be predictors about how the government will respond to actions. We have to be predictors about how the courts help, how juries help. Every institution—you have to make predictions, and it's harder and harder to do, even though we have more and more information.

ASJ: In this age of vanishing trials, what would you tell a young lawyer who wants to be a trial lawyer?

AD: Become a criminal lawyer because we have to have more criminal trials and fewer civil trials. There's almost no civil dispute that can't be mediated and arbitrated. The courts spend too much time on money and too little time on liberty. So we have too many civil trials and too few criminal trials. Right now, it's very hard to go to trial if you're an accused criminal because

you'll get 10 times—*10 times*—the amount of punishment if you plead not guilty, and are found guilty, than if you plead guilty. And that inclines lots of people, some of whom are innocent, some of whom are in gray areas, to plead guilty because they can't afford the risk of being found guilty and getting 10 times the punishment.

ASJ: What are you most proud of as you look back on your life?

AD: I'm most proud of bringing up three wonderful children, having a wonderful marriage, having two fantastic grandchildren. Pride, often, is very personal. I say I'm proud of this, though I didn't contribute much to it: My children, my grandchildren have made their own lives—they've made fantastic and good lives for themselves—and, most important, they're good people. They're people with good values, and I'm very, very proud of that.

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Professionally, I think the case I'm most proud of is having represented Natan Sharansky, the Soviet Jewish dissident who was going to spend the rest of his life in prison for a crime he didn't commit. He was probably going to die in prison, and his wife asked me to try to get him out in time so she could try to have babies. She was about thirty-something at the time, and we did get him out in time for him to come to Israel, serve in the government, have two wonderful daughters, and now grandchildren. So that's the case I'm most proud of because, there but for the grace of God go I, if my parents had turned in one direction and his parents had turned in the opposite direction, I might have been the Soviet Jewish dissident and he might have been the American lawyer, and he would've helped me much the way I helped him.

ASJ: Any regrets?

AD: Sure. I regret having defended Jeffrey Epstein, because that's the case that caused me to be falsely accused, and it took two years out of my life. But I don't sit and bemoan regrets. I want to make sure that what happened to me serves as a lesson for the criminal and civil justice systems to change their ways. I also want to make sure that those who brought about this injustice are held to account for it. ■