

Who Took the Awe Out of Law?

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Perhaps if more of us were devoted country music fans we would understand better. All those bad things that happen when you least expect them. Then—to make it right—we could play the song backwards, thereby regaining car, dog, job, and lost true love.¹

A cloud of melancholy has descended upon the legal profession. Lawyers say they are not having much fun any more. This is in stark contrast to what they remember or have heard about the lives led by lawyers merely a few years ago. Judges complain about being unappreciated but also targeted for unfair media scrutiny; because of the multitude of constraints and efficiency pressures now imposed on them, many judges report that their work has begun to resemble that of low-level bureaucrats, except that a judge cannot hide. These complaints, and a floodtide of others, arise from the lives of many lawyers, judges, and even jurors. By now, it is a cliché to note that lawyers seem to be miserable. Increased competition, diminished civility, rampant bureaucratization, overspecialization, and grievous overwork combine to form a familiar, unpalatable portrait. In the eyes of the public, the legal profession is in great disrepute; lawyer jokes proliferate like poison ivy. To add injury to insult, leading lights within the Bar and in legal academia now have joined the chorus. We have a plethora of articles and books that bemoan the failed ideals of lost lawyers and the undue influence that lawyers purportedly have throughout the United States. Moreover, study after study tells us of the growing malaise—not to say panic—that seems to flood over more and more lawyers, no matter how apparently successful they may be.

So there are, to be sure, numerous “objective” explanations for the misery so widely felt and so frequently described among contemporary lawyers and judges. But there are other, more subtle issues at stake as well. Lawyers surely cannot be isolated from the society surrounding us, and much of the angst deeply felt by lawyers reflects some of our deepest societal problems today. Nevertheless, widespread lawyer misery also reflects subtle but powerful shortcomings in understanding some of the essentials of the lawyer’s art and craft.

Mystic Chords of Memory

We are awash in grief over the passing of a golden age of lawyer-statesmen with practical judgment. We hear repeated regret about the demise of old-fashioned common law lawyers, experts in understanding context and gradually trying to adjust to change.² Taken together with countless speeches, bar journal articles, and flourishing new national media that now focus on lawyers, these books tend to exaggerate the influence of lawyers, while downplaying the obverse impact that societal changes have had on the practice of law. Moreover, mournful celebrations of a lost golden age—an abstract time that never really existed—help produce what David Wilkins aptly has called “a debilitating nostalgia that is likely to reinforce, rather than to counteract, the cynicism and abdication of moral responsibility by contemporary practitioners.”³

Also lost in all the surveys and studies of malaise is the considerable progress made over the past three decades on several crucial fronts. The poor and oppressed, for example, now have much better access to the legal system, though much of this progress currently is at grave risk. The legal community also has much greater concern about, and has achieved much greater success in allowing diversity in our jury rooms, the bar, and the bench. Our present success, though still limited, tends to help us forget, for example, that the ABA did not admit African-Americans until the 1960s and that women, with a tiny set of noteworthy exceptions, were basically not seen or heard within mainstream legal institutions until the late 1960s.

No one can deny, however, that the life of any young associate in any Howey, Billum, & Singh big law firm, with a home office looking down from high above Downtown, U.S.A., actually is overloaded with too much tedious work and too little time to develop and enjoy the craft of lawyering. Nor does that associate even have time to enjoy the considerable monetary rewards that often follow when so many produce such extraordinary billable hours for so few. The fact that the number of lawyers in our nation has more than doubled since 1960 has only increased the competitive atmosphere. Moreover, partnership is no longer assured even for dedicated and extremely hard-working associates, as it generally once was “in the normal course of things.” Those who wish to work on behalf of a cause find only a handful of low-paying jobs for which they must vigorously compete.

Lawyers love threes. It may have something to do with residual trinitarian faith or with ancient Roman roots, but lawyers thrive on three-part tests and on three considerations in each case. We also like to talk about on the one hand, and then on the other, particularly as we question simple binary choices in law schools. On the one hand, however, by inducing so many of our students to run up monumental debts to pay for their legal educations, law schools themselves are directly implicated in today’s malaise. Increasingly, law schools have begun to look like they are largely in the business of selling dreams. In fact, today many lawyers **are** making much more money than ever before. Those earnings, once closely guarded secrets, are now proudly trumpeted and widely disseminated. Even good publicity about the bottom line adds to competitive pressures and reinforces feelings of inadequacy, jealousy, and rage both from within and from outside the legal profession.

Amid all the gnashing of teeth and pointing of fingers today (on the other hand, as it were), we pay too little attention to vital, direct threats to the qualities of good lawyering that set our profession apart. Taking time to ask why may help explain the clear trend away from viewing law as a profession and towards seeing it, with clear-eyed realism, as a legal business. Make no mistake: our nation’s legal practice has never been far removed from business and power. But our times **are** different, the media **is** more scathing, and the bottom line **has** become much more dominant in a culture seemingly ever more emphatic about winner-take-all. Amid the clamor over failed ideals and lost glory, however, we are missing some quite basic elements that still define and separate legal craftsmanship from other profit-making ventures. Perhaps we cannot resist the race to the short-term, bottom-line measures of success that are such a fixation of our times. Amid the staccato of fragmentation and excess, however, finding time to take our time has become even more precious than billable hours.

Chords for Three Hands

It is with sensitivity to the third hand—such third-hand awareness is the point where many lawyers make their livings—that we can perceive a fundamental and revealing tension. The tension directly involves the art and craft of lawyering. It centers around time. Key aspects can be counted on three fingers (at which point one may have struck out, and be on the way back to the dugout). This essay suggests that three crucial significant locations for the development of angst are: the attachment/detachment dilemma, transactions within a transitional world, and desperately seeking justice. Much of today’s angst among lawyers, judges, and jurors emanates from sources beneath or beyond the “objective” explanations. By better understanding three key factors, we may be able to reduce time spent worrying, and being pushed too quickly down towards the bottom line. Then together we could concentrate on matters more relevant to the craft of lawyering. To address the basic problem will require less efficiency and more careful conversation. In contrast to the current vogue that focuses on narrative and story-telling, I want to underscore listening, and listening well.⁴ Everyone has many stories. And we should all know that there are stories—and then there are stories. It takes a skilled listener to supply the context, and to add the discernment, necessary to distinguish among myriad stories. That kind of listener is likely to be a particularly effective lawyer.

1. The Attachment/Detachment Tension

In his great poem “September 1, 1939” W. H. Auden wrote of a universal hunger and

linked it to hope, even though the poem's title marked the Nazi invasion of Poland and the start of World War II. Auden described a common feature of humanity:

For the error bred in the bone
Of each woman and each man
Craves what it cannot have,
Not universal love
But to be loved alone.⁵

Auden soon scrapped the stanza, and he later refused to reprint the entire poem. His mood turned even gloomier than this poem's description of a world "defenceless under the night." In the context of "international wrong," it had become necessary again for "Faces along the bar" to "cling to their average day." Otherwise:

we should see where we are,
Lost in a haunted wood,
Children afraid of the night
Who have never been happy or good.

Each of us does seem to crave being loved alone. All claim to be unique individuals, thereby somehow finding shelter and connection. Yet such love always turns out to require someone else. Anyone who has been a parent—or a child, for that matter—has had to struggle not so much with the issue of whether to be attached and detached but rather with the appropriate degrees of separation and connection at any particular time. Relationships are built and often founder on how attached and detached people should be both in a specific context and over time.

The tensions of attachment and detachment permeate all our lives. Yet the struggle is heightened for lawyers. The dilemma of balancing attachment and detachment is inherent in the task of representing others. To represent another always means to suppress part of one's own individuality. As Clyde Spillinger pointed out in his recent essay delving into the complexity of Louis Brandeis's famous stance as the "lawyer to the situation," representation always entails relatedness.⁶ Jurors and judges must also grapple with the dilemma of representation—though this fact might not be obvious at first. Jury representation is key in recent decisions about peremptory challenges, for example—to say nothing of the scrutiny we now afford the "representativeness" of the venire. We also allow attorneys to try to convince jurors to use their decision to encompass a principle, to represent others by "sending a message." The jury's role long has been understood to include, at least in part, the application and expression of the views, and even the consciences, of the myriad communities from which the jurors are drawn.

During our founding era, in fact, jury service was considered a basic component of representative government, essential to guarantee the liberty and security of the people.⁷ In the period leading up to the drafting and ratification of the federal constitution, juries actually performed most of what we would today call the administrative functions of town government. White male freeholders *circa* 1775 expected to serve on juries at least dozens, and even hundreds of times, during their adult lives. Moreover, no one seriously doubted until well into the next century that jurors were to decide both facts and law.

Even if this somewhat unfamiliar perspective on jurors is acknowledged, it might seem peculiar to extend the concept of representation—and the relatedness it entails—to judges. Judges, after all, are supposed to be experts in discerning relatedness, but they are not themselves generally considered related to or representative of anyone. Yet judges, above most others, need the time and the inclination to listen to others actively and well. It is no accident that we declare that a basic component of a judge's job is to "hear" cases. Judges are expected to be impartial, of course, yet we should be wary of all those judges who strive to forget where they came from in their pursuit of impartiality. Judges only fool themselves if they think they can float above human attachments.⁸ Paradoxically, we want them to be anchored that way. More acutely than the rest of us, however, judges find themselves pressed from behind by the past and blocked and driven back by the future.⁹ The very essence of their task involves the strain of trying to treat like cases alike.

Early in our lives within families or other social units, however, we discern that sometimes to treat everyone the same way is to be unfair in an essential way. Different children have different needs and abilities. It is a basic part of the American belief system that each individual is unique and that individual differences should be considered in reaching judgments. We cherish our individualism, yet we want to live within “a government of laws, and not of men.” On a basic level we also know, however, that “One law for the Lion and Ox is Oppression.”¹⁰ To take the time to understand context and complexity is to be extremely countercultural today. We live in an era of sound-bites and instantaneous thumbs up or thumbs down judgments. Toting up wins and losses with an eye out for the bottom line has become all-important, with attention scarcely paid to how you play the game. (Red Sox fans are the exception: we keep watching, though well aware that disaster is to be expected on all fronts.) Because many lawyers and judges insist still that time be taken—and that those without ready access to the media still find a place through law where they can be listened to somewhat—it is hardly surprising that the legal system and those who work within it are now absorbing more than a fair share of criticism and public outcry.

An examined life that wrestles seriously with the paradoxical nature of attachment and detachment takes concentration, empathy, courage—and developing the ability to listen before judging. It also takes time: time that is not devoted to the bottom line; time that is spent learning to be comfortable without resolving—but instead living within—the attachment/detachment dilemma. To develop this facet of the legal craft always remains an ongoing struggle. This may help explain why it is said in the Talmud that, “The judge should feel as though a sword were suspended above his head throughout the time he sits in judgment.”¹¹ Yet the Talmud—which may be considered a kind of written clearinghouse for an ongoing dialogue across generations—also states that “Every judge who judges a case with complete fairness even for a single hour is credited by the Torah as though he had become a partner to the Holy One, blessed be he, in the work of creation.”¹²

2. Transactions within a Transitional World

Americans are notoriously ahistorical. More than 150 years ago, Tocqueville made the point with characteristic verve when he proclaimed, “The only historical remains in the United States are the newspapers; if a number be wanting, the chain of time is broken and the present is severed from the past.”¹³ Today in an era of virtually instantaneous information, it often seems that to seek the past within a newspaper is quite old-fashioned, if not quaint. It is hardly a new insight to note that American law is no exception to our propensity for presentism, and that our law generally has always been unusually kinetic. More than in most legal systems, our law has been in relatively rapid transition for hundreds of years. Indeed, this sense of law as kinetic was one of the touchstones of the founding era. The crucial running battles surrounding the growth of both public power and private rights helps to explain the extraordinary importance attributed to lawyers and the judiciary in the development of the United States.¹⁴

American law in transition always has involved a great deal of transactional law. Consideration of the legal career of the great antebellum lawyer, orator, and politician Daniel Webster provides a useful illustration and a cautionary tale. Webster’s early rural practice in New Hampshire revolved around constantly mediating an integral local network of credit and debt. After he moved to Boston and Washington, Webster achieved legendary status for his 180 appearances before the United States Supreme Court and his famous speeches. Yet he made a very good living through his more subterranean representation of the interests of an intertwined Boston elite. Constantly short of cash because of his extravagant spending, Webster’s successful legal practice depended on his role in many of the major corporate transactions of his time. He and his corporate clients both affected and were affected by the rapid changes in American law. “It is one of the ironies of American history,” however, “that the rise in status of Webster and other lawyers was built upon the foundation of their increased dependency.”¹⁵

Most people and even most lawyers were not much aware of the extremely malleable nature of law either during or after Webster’s time on the national stage. (We will return to another aspect of Webster’s career shortly.) Particularly in the era of legal formalism, there was

an impulse, almost a hunger, to consider law to be almost mechanical. A and B would have a dispute over Blackacre. The judge, having heard the lawyers, would go look up the answer and settle the dispute conclusively. We now know better, however, that “whoever wins it won’t be for good and it won’t be for long”—as Faulkner may have said (though I have never been able to find the citation again). While lawyers and businessmen long have been closely allied, in the old days they had the time to talk, which led to mutual understanding and advice that was valued for more than a temporary blip in the international flow of capital. Understanding and loyalty often flowed from repeated opportunities to converse. The lawyer was conversant with the banker’s problems and ambitions, and vice versa. As former Dean Michael J. Kelly recently pointed out, “Money and prestige cannot be extricated from the history of the American legal profession.”¹⁶

Most of us who work in the legal system now work within organizations. These organizations make major claims on our limited time and on our increasingly short attention spans. As the world around us seems to grow more fragmented every day, the organizations that surround lawyers and the separate legal cultures they embody are sources of authority over us, but they are also needed sources for much of the authority we enjoy. There are in fact separate legal cultures embodied in the quite diverse organizations in which we work.¹⁷ To understand the differences takes time and care. Such an understanding of the importance of discrete institutional customs and usages makes the world look more kaleidoscopic, more densely populated by diverse, particularistic anthropological units. It also helps us understand that good lawyers never were—and cannot be—isolated individualists.

We should also recognize that expressions of despair at the generalized decline of civility and professionalism in the practice of law are hardly new. In 1869, for example, the scion of a leading Philadelphia family wrote the following familiar-sounding words about an acquaintance who decided to give up law to study divinity:

It by no means follows that a successful lawyer is a gentleman, that he is a man of honor, or that he has received a liberal education, and indeed those who are now most successful in *making money*, the great object of all, are notoriously deficient in these qualities, which were once regarded as requisites. The bar & bench, too, have fallen very far below the dignified & respectable position it held when I knew it thirty years ago. I saw & knew the last of the old set who gave it so much influence & reputation . . . all of them distinguished for learning & ability, . . . all of them, too, with scarcely an exception, worthy of all confidence & respect for integrity, professional honor, and moral worth. . . . All is now changed—culture, elegance, refinement, courtesy, eloquence, wit, scholarship have vanished.¹⁸

Sydney George Fisher exaggerated, of course, but he was basically correct about the reduced influence within the Philadelphia bar of those who were “gentlemen by culture, birth, and manners.”¹⁹ Yet in other places, in other times, and in different kinds of law practice, the legal profession has provided crucial opportunities. Law practice has been the key to respectability for members of downtrodden groups—often in the face of great resistance from the professional elite.²⁰

Awareness about our nation’s diverse legal cultures—and the ability to negotiate within and among them—is a basic part of the expertise American lawyers provide for our clients. Yet we often forget how this very diversity of legal cultures underscores the kinetic quality of law. This problem is exaggerated because we live in a society that seems to grow ever more frustrated with any time-frame of more than fifteen minutes, and any result that is not clear and final. We have a national hunger for half-baked anecdotes. Through headlines, talk shows, and quickly controlled spins on the news, anecdotes become the basis for snap decision-making. We also seem to hunger today for definitive decisions at almost any cost. At their best, however, lawyers tend to slow things down and to add complexity that makes snap judgments more difficult.

Over forty years ago, David Riesman noted that lawyers are indeed feared and disliked, but lawyers are also needed “because of their matter-of-factness, their sense of relevance, their refusal to be impressed by magical ‘solutions’ to people’s problems.”²¹ One popular critique bemoans the overrepresentation of lawyers in our political system.²² Another retransmits and

inflates the relative number of lawyers in our society compared to other cultures. As with other exaggerated stories about damages for apparently frivolous lawsuits or hand wringing about what a litigious society we have become, the facts about such matters do not catch up with the sweeping allegations that seem to seize the public imagination.²³

Though Marc Galanter may have understated the time-frame, he put his finger on a crucial modern tendency when he observed that the sense of decline from a noble legal profession suffused with civic virtue to commercialism “has been a recurrent theme for at least a hundred years.”²⁴ Moreover, the period when virtue last prevailed generally seems to have been “just over the receding horizon of personal experience.” This declension story seems to permeate our public life, but it is particularly noticeable in discussions of our legal system. As Cicero once proclaimed, however, “Not to know history means to remain forever a child.”²⁵ Our nation tends to be quite childish in this regard, and to celebrate a mystical, sanitized past when we heed history at all. Still, it remains a shock when judges and leading legal scholars simply proclaim an ideal and then assign it some place in the past.

Daniel Webster, for example, is frequently mentioned as an exemplary lawyer-statesman, celebrated as a representative figure for moral virtues, character, and practical wisdom.²⁶ Like dreams, however, we should be careful in choosing our ideals. The facts of Webster’s life, such as we can discern them, should be relevant. For instance, even his sympathetic recent biographer summarized Webster’s career as replete with questions about his integrity. As Maurice Baxter put it, “The distinction between [Webster’s] personal transactions and public business was a very fine one.” Baxter finally had to conclude that Webster “was culpable of serious impropriety”(502). In his magisterial biography of Justice Joseph Story, distinguished historian Kent Newmyer noted that Story and Webster had a direct, collaborative relationship that was “one of the most extraordinary in American law and politics”—a working alliance of great mutual benefit that also was surely of “questionable propriety.”²⁷ Additionally, Webster was secretly on the payroll of several groups of New England capitalists, from whom he received very large sums (389, 448 n. 25).

There are also crucial aspects of Webster’s public role that apparently were not known, or were not considered relevant, in painting his portrait as an ideal lawyer-statesman. Webster was a hidebound conservative who adamantly opposed the separation of church and state; he played a key role in opposing what he saw as too much democratization and in vehemently seeking to protect major property holdings. In his last years, Webster was widely vilified throughout the antislavery north, and particularly bitterly excoriated in his beloved New England, for the key role he played in the passage of the Fugitive Slave Act of 1850, a draconian statute that forced the return of slaves without even minimal due process.²⁸ We are well-advised to seek heroes. Yet even if it makes that search more frustrating, we ought to find out what we can about them, too.

At the moment, the United States Supreme Court seems bent on leading us down the ahistorical path. In the Court’s fervor for clear answers about such fundamental issues as race, sovereignty, and the treatment of Native Americans, history is ignored or distorted beyond recognition.²⁹ Nuance and context are simply irrelevant. The quest instead is for a clear, readily recyclable ideal of an original constitutional moment, flash-frozen and thereby rendered timeless. Nonetheless, it remains the task of lawyers to try to understand the past and to look to the future, fully aware of contingency and context—and the complexity rooted in human frailty.

3. Desperately Seeking Justice.

It is well known that the Justice Oliver Wendell Holmes, Jr. once wrote: “I have said to my brethren many times that I hate justice, which means that I know if a man begins to talk about that, for one reason or another he is shirking thinking in legal terms.”³⁰ Generally we seem to have become devotees of astringent Holmesian thinking that either denigrates or entirely rejects considerations of justice within law. In many law schools, justice is whispered about at best; in some, talk of justice is mocked during first-year boot camp and virtually banned from the classroom. Yet for all Holmes’s emphasis in his famous “Path of the Law” speech on the bad

man as properly the exclusive focus in law, and on the role of history and economics rather than morality, Holmes himself relied on what could be intuited “in justice” as the criterion for an answer to the prescription hypothetical he posed in that speech a century ago. Once he got past the desired shock value of completely decoupling law and morality, Holmes resorted to deeply rooted morality and “the deepest instincts of man” to decide in favor of the active entrepreneur and against the inactive property holder within his hypothetical legal conundrum.³¹

The point is not that Holmes was inconsistent within “The Path of the Law.” That he certainly was. Rather it is to notice that the search for justice keeps popping up as something lawyers seemingly cannot avoid, whether we like it or not. Yet we should recognize that the search for justice is inevitably frustrating. Seeking justice is like going east. You can go east and go east as much as you would like—but you never get east. This helps explain why it often seems so appealing to avoid worrying about justice and to hide instead behind the professional role of zealous advocate. This role becomes sufficient both as end and means. For many lawyers and judges, however, such professionalization comes at the cost of the reasons they went to law school in the first place—perhaps inspired somewhat naively by “Perry Mason” or *To Kill a Mockingbird*. It turns out, of course, that life is not so full of happy endings, or indeed full of endings at all. Technique and role then become appealing insulation to cover the disappointment of such hard-nosed discoveries. Forgotten in that mix is the great legal realist Karl Llewellyn’s important point: “Compassion without technique is a mess; technique without compassion is a menace.”³²

At some law schools, and in many lawyers’ offices, homes, and hang-outs, justice is still much discussed. The lawyers who share such concerns tend to be the kinds of people who approach what Ralph Waldo Emerson called “sphericity.” They do not rigidly try to separate work and home, private and public, law and justice. At the same time, however, they know that the mixture is always unstable, and that flux and tension are inevitable. Grant Gilmore has sometimes been condemned as a nihilist, which he surely was not. He was profoundly skeptical, to be sure, but he tied his skeptic’s stance directly to the importance of lawyering done well. Gilmore once described what he had learned from Wesley Sturgis, himself often called a nihilist. Sturgis was “a lonely, great, and tragic figure” who refused to play child’s games because he had the courage of his bleak convictions. Nonetheless, in the fall of 1941, at the request of his students, Sturgis taught an extra course on the common law forms of action, though he already was teaching a full load and volunteering his time in government service for the defense effort on the eve of Pearl Harbor. Sturgis’s students—through taking extra time, by plunging into the process of wrestling with complexity and by seeking justice in the details—learned “about the use and the uses of words.”³³ Much could follow from learning about words this way. Gilmore summarized with characteristic aplomb: “I can think of few things that are more central to the lawyer’s craft and art. He taught us to be forever on our guard against the slippery generality, the received principle, the authoritative proposition. He taught us to trust no one’s judgment except our own—and not to be too sure of that. He taught us to live by our wits. He taught us, in a word, how to be lawyers” (139 n. 31).

Conclusion

The world seems to speed up and fall apart all around us. The factors are obvious: the information explosion, the internationalization of markets and capital, the exquisitely complicated personal demands within overworked families. We experience much time and motion, with little time for emotion. What we can get instantaneously through computers and television makes us increasingly desperate for, but less adept at, human connections. We have direct access to more information than anyone could want, often in unmediated form. We speed up and splinter simultaneously. Again we have become “dense commuters,” who now move more rapidly “From the conservative dark / Into the ethical life,” but now we grow more inured to “habit-forming pain / Mismanagement and grief.”³⁴

Such times demand interpreters, soothsayers, wise men and women of the tribe. Such times particularly require good lawyers. Good lawyers will not solve the attachment/detachment dilemmas that drive so many people to embrace simplistic binary choices between “either” and

“or.” We will not convince most people that change cannot be avoided, not even through law. Nor can we do much to slow down the race to the bottom line. There is no stopping the widespread passion to acquire the biggest heap, no matter what its content. There are shards everywhere, and everybody has his or her reasons for further breakage. Yet good lawyers still may take the time to listen, to listen skeptically, and to listen well. The best lawyers remain adept at hearing the faint echoes of the past—and the hope of the future—in the small voices of those who continue to seek justice after all these years. Even within “a world in stupor,” Auden wrote, “Ironic points of light / Flash out wherever the Just / Exchange their messages” (58-9).

Notes

- ¹ This image is loosely based on a talk by my friend, historian David Hall. Kurt Vonnegut employs a similar image in *Slaughterhouse Five* (1969). He describes film of a bombing mission run backwards, so that bombs rise from the ground, fly into the bellies of planes, etc., until the material is harmlessly placed back in the earth.
- ² The best recent examples include Anthony Kronman, *The Lost Lawyer: Failing Ideals of the Legal Profession* (Cambridge: Harvard University Press, 1993) and Mary Ann Glendon, *A Nation Under Lawyers: How the Crisis in the Legal Profession is Transforming American Society* (New York: Farrar, Straus, and Giroux, 1994).
- ³ David Wilkins, “Practical Wisdom for Practicing Lawyers: Separating Ideals from Ideology in Legal Ethics,” book review of Anthony Kronman, *The Lost Lawyer*, *Harvard Law Review* 108 (1994), 458, 459.
- ⁴ For more than a decade the discourse of legal scholars has been filled with scholarly discussions of narrative and story-telling, and debates about the importance of such concepts in reaching appropriate judgments. A good recent example, including a survey and a careful analysis of some of the inherent complications in the genre, is Susan Bandes, “Empathy, Narrative, and Victim Impact Statements,” *University of Chicago Law Review* 63 (1996), 361. At times, this scholarly outburst has seemed a little like the old story about the man who is thrilled to discover that he is speaking prose. On the other hand, the “narrative turn” has been among the most illuminating developments in the law reviews in many years. I have contributed minimally to this flood, but I did try to probe the importance of listening to and for the dispossessed in an early symposium examining law and race in southern literature, Aviam Soifer, “Listening and the Voiceless,” *Miss. College Law Review* 4 (1984), 319.
- ⁵ W. H. Auden, *The Collected Poetry* (New York: Random House, 1945), 58-9. Auden’s later dismay at this poem, and his tendency to renounce his optimism and to blame it on the influence of Yeats on his work, is described in Humphrey Carpenter, *W. H. Auden: A Biography* (Boston: Houghton Mifflin, paperback ed. 1982), 330-1; 416, 418.
- ⁶ Clyde Spillinger, “Elusive Advocate: Reconsidering Brandeis as People’s Lawyer,” *Yale Law Journal* 105 (1996), 1445, 1492.
- ⁷ Jack Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* (New York: Knopf, 1996), 288-338.
- ⁸ Over a century ago, Leo Tolstoy provided a chilling portrait of a new kind of judge who “mastered the technique of dispensing with all considerations that did not pertain to his job as examining magistrate, and of writing up even the most complicated cases in a style that reduced them to their externals, bore no trace of his personal opinion, and, most importantly, adhered to all the prescribed formalities.” Leo Tolstoy, *The Death of Ivan Ilyich* (New York: Bantam Books, 1981), 54. Ilyich becomes so adept at separating his official duties from his private life that “occasionally, like a virtuoso, he allowed himself to mix human and official relations, as if for fun” (69). Cf. Kazuo Ishiguro, *The Remains of the Day* (New York: Vintage, 1990), 169: “A butler of any quality must be seen to *inhabit* his role, utterly and fully; he cannot be seen casting it aside one moment simply to don it again the next as though it were nothing but a pantomime costume.”
- ⁹ This parable may be found in Franz Kafka, *The Great Wall of China*, trans. Willa and Edwin Muir (New York: Schocken Books, 1946), and it became the starting point for Hannah Arendt’s *Between Past and Future* (New York: Penguin, 1977), 7.
- ¹⁰ William Blake, “The Marriage of Heaven and Hell,” *The Collected Poetry and Prose of William Blake*, ed. David V. Erdman (Berkeley: University of California Press, 1982), 33, 44.
- ¹¹ Quoted in *The Pentateuch and Haftorahs*, 2nd ed., ed. J. H. Hertz (London: Soncino Press, 1960), 500.
- ¹² Babylonian Talmud, Tractate Shabbat 10a, quoted in Emanuel B. Quint and Neil S. Hecht, *Jewish*

Jurisprudence (New York: Harwood Academic, 1980), 6. For a discussion of impartiality, and legal treatment of the connections people have to various communities, See Aviam Soifer, *Law and the Company We Keep* (Cambridge: Harvard University Press, 1995), 150-81.

- ¹³ Alexis de Tocqueville, *Democracy in America*, trans. Phillips Bradley, 2 vols. (New York: Vintage, 1945), 1: 219. Tocqueville went on to note, “The instability of administration has penetrated into the habits of the people; it even appears to suit the general taste, and no one cares for what occurred before his time.” Tocqueville also found Americans less concerned with posterity than any others because “the present moment alone engages and absorbs them” (2:261).
- ¹⁴ See e.g. Gordon Wood, *The Radicalism of the American Revolution* (New York: Knopf, 1992), 305-25. See generally J. Willard Hurst, *The Growth of American Law* (Boston: Little, Brown & Co., 1950).
- ¹⁵ Alfred Konefsky, Introduction, *The Papers of Daniel Webster: The New Hampshire Practice*, vol. 1 (Hanover: University Press of New England, 1982) xxxi, xxxvi, xxxix; Maurice G. Baxter, *One and Inseparable: Daniel Webster and the Union* (Cambridge: Harvard University Press, 1984), 19.
- ¹⁶ Michael J. Kelly, *Lives of Lawyers: Journeys in the Organizations of Practice* (Ann Arbor: University of Michigan Press, 1994), 200. For an outstanding study of the close legal-business connections in antebellum Boston, see Alfred Konefsky, “Law and Culture in Antebellum Boston,” *Stanford Law Review* 40 (1988), 1119. See generally Robert Gordon, “The Independence of Lawyers,” *Boston University Law Review* 68 (1988), 1.
- ¹⁷ As Michael Kelly puts it, “Law-practice organizations are the landscape or context of the practice of law in the United States. It is a landscape of small communities or villages, a metaphor that captures something of the closeness and interdependency, the character-defining role of the contemporary practice organization” (207). Kelly grounds this metaphor in Thomas Hardy’s statement in *Tess of the D’Urbervilles* that “every village has its idiosyncrasy, its constitution, often its own code of morality” (quoted 228).
- ¹⁸ E. Digby Baltzell, *Puritan Boston and Quaker Philadelphia* (Boston: Beacon Press, 1982), 337 n.*, quoting Sidney George Fisher’s diary entry for September 15, 1869.
- ¹⁹ Baltzell 337. Fisher himself practiced law only briefly, and tried to live off his inheritance as a scholar-farmer. In his intriguing study of the contrasts in patterns of leadership in Boston and Philadelphia, Baltzell calls Fisher’s diary “far and away the best source for an understanding of the Proper Philadelphia mind” (45).
- ²⁰ Jerold Auerbach, *Unequal Justice: Lawyers and Social Change in Modern America* (New York: Oxford University Press, 1976).
- ²¹ David Riesman, “Toward an Anthropological Science of Law and the Legal Profession,” *Individualism Reconsidered, and Other Essays* (Glencoe, Ill.: Free Press, 1954).
- ²² This is a strikingly ahistorical claim. One critic, for example, recently decried the fact that 61 percent of the United States Senators were lawyers. See Stephen P. Magee, “The Optimum Number of Lawyers: A Reply to Epp,” *Law & Social Inquiry* 17 (1992) 667, 675. The percentage of Senators who were lawyers was 95 percent in 1845; 77 percent in 1895; and 70 percent in 1945 (Baltzell 336 n. 18). Thus the recent percentage of lawyer membership, which is supposed to demonstrate the capture of government by lawyers, actually is lower than comparable percentages during what critics tend to consider the good old days before lawyer control.
- ²³ Marc Galanter is a leading scholar in pursuing facts scrupulously, and in demonstrating how they are cavalierly ignored or knowingly misrepresented within the critiques of litigiousness and alleged massive awards of damages for frivolous claims. See, e.g., Marc Galanter, “Predators and Parasites: Lawyer-Bashing and Civil Justice,” *Georgia Law Review* 28 (1994), 633; Marc Galanter, “News from Nowhere: The Debased Debate on Civil Justice,” *Denver Law Review* 71 (1993), 77. A fine study of the remarkable litigiousness of early Americans is Bruce Mann, *Neighbors and Strangers: Law and Community in Early Connecticut* (Chapel Hill: North Carolina Press, 1987).
- ²⁴ Marc Galanter, “Predators and Parasites,” 670.
- ²⁵ Quoted David Fishman “Embers Plucked From the Fire: The Rescue of Jewish Cultural Treasures in Vilna” (New York: YIVO Institute for Jewish Research, 1966), 1, quoting Simon Dubnow in 1891.
- ²⁶ Kronman, for example, suggested that Webster could anchor the “lawyer-statesman ideal” as viewed through the prism of the common law (21). Focusing on concrete disputes, this ideal placed “a high value on the character-virtue of practical wisdom that this task requires,” and looked to Webster’s speeches in particular. Just as Webster is a curious choice as a representative ideal from the nineteenth century, however, so is John McCloy dubious as a modern representative. John McCloy ought not be

someone who “come[s] immediately to mind” as “a great example of the type” (Kronman 11), at least not unless one wrestles with McCloy’s key role in the decision-making that yielded the refusal to bomb Nazi concentration camps, as well as his active role as a defender of the World War II internment of the Japanese-Americans during internal government battles over the matter (and his unrepentant position in later years). See David S. Wyman, *The Abandonment of the Jews: America and the Holocaust, 1941-1945* (New York: Pantheon, 1984), 210, 291-7, 323, and Peter Irons, *Justice At War* (New York: Oxford University Press, 1983), 268-77, 286-92.

²⁷ R. Kent Newmyer, *Supreme Court Justice Joseph Story: Statesman of the Old Republic* (Chapel Hill: University of North Carolina Press, 1985), 174-7, 313.

²⁸ See, e.g. David M. Potter, *The Impending Crisis: 1848–1861* (New York: Harper Torchbook, 1976), 97-120; Stanley W. Campbell, *The Slave Catchers: Enforcement of the Fugitive Slave Law, 1850–1860* (New York: W. W. Norton, 1970). Webster was widely castigated in poems and speeches for his role in the 1850 Compromise, but he had long been willing to underplay the “liberty” part of the famous peroration in his 1830 Reply to Haynes: “Liberty and Union, now and forever, one and inseparable.” As Secretary of State, for example, Webster was quick to condemn the rescue of an alleged fugitive slave in Massachusetts as “a case of treason,” and he forcefully but unnecessarily insisted that compensation be paid the American owners of slaves freed in a mutiny aboard *The Creole*. Leonard Levy, *The Law of the Commonwealth and Chief Justice Shaw* (Cambridge: Harvard University Press, 1957), 85-91.

²⁹ See e.g., *Bush v. Vera* 116 S. Ct. 1941 (1996); *Shaw v. Hunt* 116 S. Ct. 1894 (holding that equal protection requires the same strict scrutiny of efforts to aid African-Americans in voting context as in constitutional review of past official discrimination against them); *Seminole Tribe of Florida v. Florida* 116 S. Ct. 1114 (1996) (holding that the Eleventh Amendment bars federal government effort to allow Indian tribes to have standing to sue states). On the Court’s cavalier attitude—or worse—towards such history, see Aviam Soifer, *Law and the Company We Keep*, 81-8, 102-49.

³⁰ “Letter to Dr. John C. H. Wu, July 1, 1929,” reprinted in *Justice Holmes to Doctor Wu, An Intimate Correspondence, 1921-1932* (New York: Central Book, 1947), 53. There are numerous other legendary sources for Holmes’s insistence on the separation of law and justice. Some recently were tracked down and analyzed in intriguing fashion by Michael Herz, “‘Do Justice!’: Variations of a Thrice-Told Tale,” *Virginia Law Review* 82 (1996), 111.

³¹ Oliver Wendell Holmes, Jr., “The Path of the Law,” *Harvard Law Review* 10 (1897), 457, 477.

³² Quoted in Roger C. Cramton, “Beyond the Ordinary Religion,” *Journal of Legal Education* 37 (1987), 509, 510.

³³ Grant Gilmore, *The Ages of American Law* (New Haven: Yale University Press, 1977), 81.

³⁴ W. H. Auden, “September 1, 1939,” 58-9.