

# THE CASE FOR AMERICAN HISTORY IN THE LAW-SCHOOL CURRICULUM

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## I. THE SHOCK OF RECOGNITION

Karl Llewellyn once said that there are always two or more “technically correct” answers to any serious legal question, mutually contradictory and pointing in opposite directions in a given case.<sup>1</sup> He meant that a court can almost always find a technically acceptable way of rationalizing whatever result it wishes to reach. A lot of time is spent in law school in gaining an appreciation of this so-called logical process. Law students learn hundreds of general rules, each with its exceptions; they learn the canons of statutory construction, each with an equal and opposite canon; they learn to manipulate precedent—to analogize cases when favorable, to distinguish them when not, often by invoking factual distinctions that might strike anyone but a lawyer as irrelevant. It soon becomes apparent that there are no right answers—just an array of arguments on either side of a given issue. Bewildered students are confidently assured that they are learning to “think like a lawyer,” whatever that odious expression means.

The reality that Llewellyn describes is apt to come as a shock, but it is only the starting point. For once students have grasped the fact that almost any result can be rationalized in a “technically correct” way, they are in a position to ask the first important question. Why does a court decide a particular case in a particular way when it could just as easily have decided it differently? Many years ago Oliver Wendell Holmes gave a profound answer to this question:

The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed.<sup>2</sup>

Elsewhere, he made the point still more explicit:

The language of judicial decision is mainly the language of logic. And the logical method and form flatter that longing for certainty and for repose which is in every human mind. But certainty generally is illusion, and repose is not the destiny of man. Behind the logical form lies a judgment as to the relative worth and importance of competing legislative grounds, often an inarticulate and unconscious judgment, it is true, and yet the very root and nerve of the whole proceeding. You can give any conclusion a logical form. You can

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<sup>1</sup> See Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are To Be Construed*, 3 VAND L. REV. 395, 396 (1950).

<sup>2</sup> OLIVER WENDELL HOLMES, *THE COMMON LAW* 1 (1881).

always imply a condition in a contract. But why do you imply it? It is because of some belief as to the practice of the community or of a class, or because of some opinion as to policy, or, in short, because of some attitude of yours upon a matter not capable of exact quantitative measurement, and therefore not capable of founding exact logical conclusions.<sup>3</sup>

In these famous passages, Holmes was warning that the “why” of judicial decisions is more likely to be a function of conscious or unconscious value judgments—opinions, beliefs, attitudes, even prejudices—than of the vraisemblance of logical reasoning that will appear in the opinions in explanation of the result.

Holmes did not mean that rules, precedent, and logic are unimportant—that they exert no real pressure on a court. A particular judge’s conception of how a case ought to come out if “justice” is to be done may clash with other values that are always at play in the judicial system. Among these are a concern for uniformity of result—for deciding the same kinds of cases in the same way; for certainty and predictability, so that lawyers, litigants, and others can plan intelligently, order their behavior, and conserve time and money; for ease of administration and simplification of the judicial task, in recognition of the reality that courts are usually hopelessly backlogged and overworked; and for the proper scope of the exercise of judicial power consistently with separation-of-powers values. All of these concerns are furthered by the consistent construction and application of rules of law and by a healthy respect for precedent.

Nor should one discount the pressure of professionalism and craftsmanship that makes a judge want to write an opinion that makes sense to her and to her constituency—fellow judges, lawyers, litigants, the public. To write an opinion, in short, that is persuasive. “The appropriate and commonly accepted means of persuading others,” Samuel Mermin said in a thoughtful and valuable article, are “the standards of observation and experience, experiment, and logical reasoning. They are central in scientific method. They are, theoretically, the accepted standards in practical affairs, including the operations of law.”<sup>4</sup> Opinions aren’t written just to decide a case but to persuade the reader that the result being reached is better than some other. Rules are sometimes bent, but there are limits. If a conscientious judge can’t find the words that give the appearance of rationality to the result she wants to reach, she may not feel free to reach it.<sup>5</sup>

All of these constraints on unfettered decision making are important, and Holmes, a master of legal argumentation, would have been the last to minimize them. But his central point remains: cases of any importance aren’t likely to be decided by logic alone. They are likely to be decided by value judgments—by a

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<sup>3</sup> Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 465-66 (1897).

<sup>4</sup> Samuel Mermin, *The Study of Jurisprudence—A Letter to a Hostile Student*, 49 MICH. L. REV. 44, 46-47 (1950).

<sup>5</sup> Framing a persuasive argument is the essence of a lawyer’s skill, and it isn’t an easy one to acquire. There is perhaps no better way than reading with a critical eye hundreds of good and bad illustrations of the technique. Students soon learn that the many judicial opinions they must read aren’t dispassionate demonstrations of known and accepted rules of law applied with rigorous logic to a set of facts, leading inexorably to some one-and-only possible conclusion. They are arguments—advocates’ statements. The ability to frame persuasive arguments cannot be acquired by memorizing a lot of black-letter rules.

judge's conception of what ought to be. Swamped with cases, students sometimes fail to appreciate the importance of this point. It should be obvious that value judgments are at the heart of a discipline whose concern is nothing less than the human condition. When students read a case, they know at once how a particular judge thought the case "ought" to come out. All they have to do is look at the result. The danger here is that students may fail to appreciate that what they are digesting at this level is, in a very real sense, descriptive only—a statement of the way things are and why other people have said they ought to be that way. Either from time pressure or from lack of confidence, it is easy for them to conflate the two—to make one "is" out of an "is" and an "ought." They fail to pause and ask themselves how they believe the case should have been decided, nor do they spend much time in struggling to discover and articulate why they believe as they do. Why should they, given the teaching methodologies of most law schools? Yet this is the third and most critical level on which legal education proceeds, and the most complex.

The chasm between what "is" and what "ought to be" has never been bridged in the history of philosophical thought. An "ought" conclusion cannot logically be deduced from an "is" premise. Knowing that a tree "is" cannot tell you that you "shouldn't" run into one at high speed in your car. The "should not" in this simple example is a value judgment, and it cannot be deduced from the fact that a tree "is"—that it exists. Every "ought" (or "should") statement should be tested by immediately asking why. Why shouldn't I run into a tree with my car? Well, I shouldn't if I want to live. Why should I want to live? Well . . . . And rather quickly in this instance one reaches what philosophers call an "ultimate ought"—here, that it is better to live than to die. This ultimate value judgment cannot be defended or argued about very fruitfully. One either accepts it or doesn't. It is a value held for its own sake, not subject to proof by the standards of the scientific method. Most people would accept this particular value judgment, but someone who has decided that life is no longer worth living might see it differently.<sup>6</sup>

Value judgments are always made in reference to some standard, some ultimate ought. In law, the most frequently invoked ones are "justice" and "fairness." Everyone agrees that cases should be resolved in such a way that "justice" is done and a result reached that is "fair." Rather than putting an end to the matter, the invocation of these vague and undefined abstractions only underscores the fact that here there is a controversy, a difference of opinion. "Justice" is the label placed on a result after it has been reached. A thinking person doesn't ask what

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<sup>6</sup> See Mermin, *supra* note 4, at 47-49. An ultimate ought should be distinguished from the chain of ought statements leading up to it. These are called "instrumental oughts." Suppose I tell a student that she ought to come to class. She asks why. If you want to master the material. Why should I master the material? So that you will get a good grade in the course. Why should I get a good grade—and so on until finally some belief of mine about what makes for success and satisfaction in the practice of law comes to light. Note that my assertion that coming to class will better enable her to master the material is an instrumental ought which is at least in a form subject to testing and verification. A statistical study, for example, might show that students who don't come to class do as well or better on examinations as those who do. The distinction between instrumental and ultimate oughts is important because, with ultimate oughts, further argument is fruitless.

the label is, but rather *what is it* that is being labeled.<sup>7</sup> As Pareto said, water could be called “Lavoisier,” and all of chemistry would stand the same.<sup>8</sup>

Most of us know at once how a case ought to come out if our notions of “justice” and “fairness” are to be served. This deep-seated, intuitive kind of reaction defines us individually and is a unique product of who we are and all that we have lived through. Dissecting this reaction usually reveals that it is made up of the kinds of considerations Holmes talked about—moral and political theories; intuitions of public policy, avowed or unconscious; beliefs, opinions, attitudes, even prejudices. Understanding this makes it possible to understand why one person’s idea of “justice” may not be the same as another’s. Everyone comes to law school with an array of value judgments, some definite, some fuzzy, others operating powerfully but subliminally at intuitive or subconscious levels. Inevitably some of these will change. One of the virtues of a legal education is that it gives students, at least in theory, the opportunity to bring their values into the light and measure them against those of other people—the judges who write the opinions, their friends, classmates, and teachers. They find it is not enough to “feel” that a certain result in a case would be the most fair and just under the circumstances. They also have to be able to put that feeling into words, into a form suitable for examination and testing by themselves and by others. Only in this way can they evolve consciously held and defensible value judgments—ones that they, at least, are comfortable with. Students should be assured that they have a right to have value judgments other than those they find reflected in legal materials or hear espoused by their instructors. Indeed, they have an obligation to have them because in a very short time they will have the awesome responsibility of making decisions critical to their clients without an all-knowing professor looking over their shoulders and grading their performance. In this light, having their beliefs challenged on a daily basis so that they can better know what they believe and why should be seen as healthy and stimulating, not intimidating.

But in practice it doesn’t exactly work out that way. In preparation for one of the most active of professions—one in which lawyers are always doing something, writing, arguing, negotiating on behalf of clients—law students spend most of their time sitting passively, trying to absorb how and why others have said legal problems ought to be resolved. Very little active participation is required beyond cramming for and taking finals at the end of the semester. The meritocracy of class ranking leaves eighty percent or more of students demoralized, forced to deal with the reality that they just don’t have “it,” whatever “it” is. There are several reasons for structuring legal education in this way. There is first the sheer volume of material. Law school aims, probably rightly, at exposing students to a great many different areas, teaching them a little bit about a lot of things and not very much about anything. They aren’t expected to leave with a specialist’s knowledge in any area, or even with all they need to know to be a competent law-

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<sup>7</sup> See IRVING J. LEE, LANGUAGE HABITS IN HUMAN AFFAIRS 172 (1941) (“To respond to words as if they were more than symbols of something other is to revert to the primitive and the infantile. The basic question: not, What was it called, but *What* was being so called.”)

<sup>8</sup> See 1 VILFREDO PARETO, THE MIND AND SOCIETY: A TREATISE ON GENERAL SOCIOLOGY 63 (Andrew Bongiorno & Arthur Livingston trans., 1935) (1923).

yer. What they hoped for and perhaps expected was that law school would magically transform them in three years into a person capable of handling anybody's legal problem in competent fashion, preferably without having to think about it very much. The reality is that only years of trial and error beyond law school can give them that ability, and they will never reach the never-never land where they don't have to think. But the effect of this broad-brush approach is to leave little time for thinking about how things *ought* to be.

This shades into a second point, which is a little more subtle. It is that many students are reasonably satisfied with the value judgments they find expressed in legal materials and hence feel no pressure to go further than learning as much as they can about the way things are and why other people have said they ought to be that way. There is certainly an element of self-interest in this: they sense, even at an early stage, which side their bread is buttered on. They seldom pause to think that it's just luck that they're in law school instead of somewhere else. Consider this striking passage written some years ago by a student in one of my classes:

If we admitted to ourselves that we are where we are and the poor, handicapped, weak, and sick are where they are because of *the luck of the draw*, life wouldn't be so easy. We might then have to feel guilty. We might then actually think in terms of giving something up so that another human being, equally deserving, might have a little more. We might then have to accept and live with other people's misfortunes because they are also ours. For most of us this is too high a price to pay.<sup>9</sup>

Forty years ago, when I sat where today's law students sit, I would have dismissed this passage as just another bit of bleeding-heart drivel. It pleased me then to believe that natural ability and hard work had brought me to the verge of what promised to be a successful career. I never paused to consider the implications of the luck of the draw—what it meant, for example, to have been born white, male, Anglo-Saxon, and Protestant; to have been raised in a comfortable home; and to have been given a good education. It never occurred to me to wonder why I was in law school while the blacks I'd grown up with in South Carolina were collecting garbage or out in the fields picking cotton or putting in tobacco under a hot summer sun. It never occurred to me to ask what responsibility I might bear for those less fortunate than I. As far as I was concerned, I had earned everything I had, and luck had nothing to do with it. I had no reason to question the underlying values of the legal system because it seemed that it was precisely that system that would give me everything I wanted out of life. Mercifully, I couldn't foresee the ruts that lay in the road ahead. Suffice it to say that my view of the world is far different today than it was forty years ago.<sup>10</sup>

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<sup>9</sup> (Emphasis added.).

<sup>10</sup> There are some things that can't be taught; they can only be learned the hard way—by making mistakes and then, if one is lucky enough to survive, picking up the pieces and trying a different way. Among the things I've come to appreciate over time is what the existentialists meant in saying that

we do not begin to discover what it means to be human until we are brought up short against the great limiting realities of suffering and guilt, or sorrow and disappointment and death. For it is only when we know what it means to be "shipwrecked," it is only when we have felt the sting of some radical failure, of blighted hopes and foundered purposes, of some misfortune that is sheer, unmitigated woe—it is only then that we begin,

Many people come to law school in hopes of “making a difference.” I’ve read that phrase in thousands of personal statements over the years. Of course “making a difference” means different things to different applicants, and some of it is doubtless hype. But there are a significant number of students who can still believe in the possibility of the “humane order which we call law.”<sup>11</sup> They come from a world which by their lights is neither fair nor just—one in which the only order is the disorder of a frenzied scramble for money and power and the things of the world and which could hardly be dignified with the word “humane.” They know, often from bitter personal experience, about discrimination in its many forms; about raped and battered women and abused children; about people locked away in mental hospitals, nursing homes, and overcrowded prisons; about poor people and the vast disparities of wealth that exist in our society; about exploited migrant workers and aliens struggling with immigration problems. Some fear for the environment and what they see happening to it—its destruction here and around the world so that this nation can enjoy comfort and convenience inconceivable to most of the world’s population. Some are troubled by the casual assumption that human beings stand atop life’s biological ladder and are entitled to do whatever they please to the so-called lower forms of life—animals and other creatures—that share this planet with us. Some worry about what the science of genetic engineering, nanotechnology, robotics, and information technology may soon make possible. Some cannot comprehend this nation’s commitment to capital punishment, abortion on demand, the ready availability of firearms, the costly and ineffective war on drugs, or the exclusion from public life of anything that smacks of the religious or spiritual. Some cannot understand our turning a blind eye to genocide in some countries while waging wars of “stabilization” in others, much less a politics that has plainly become what George Orwell once called it, “a mass of lies, evasions, folly, hatred, and schizophrenia.”<sup>12</sup>

Yet what do these students find in the typical law-school curriculum that responds to these concerns? The answer in practice is not much. Any good school offers a variety of seminars and other intriguing small-enrollment courses that deal with such provocative subjects; but these courses may be difficult to fit in. The first-year curriculum is prescribed; in the second and third years there are

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in any deep way, to appreciate our human finitude, how frail and unsheltered and vulnerable we are before the vicissitudes of life. And to be without any experience of extremity is to lack a certain necessary equipment (of wisdom and maturity) apart from which no really authentic life can be achieved.

NATHAN A. SCOTT, JR., *Existentialism and the Tragic Sense of Reality*, in *MIRRORS OF MAN IN EXISTENTIALISM* 1, 22 (William Collins ed., 1969). There are generalizations about students scattered throughout this article. I want to emphasize that there are exceptions to all of them. I have known students of all ages who have already lived a lifetime.

<sup>11</sup> See GEORGE STEINER, *The Hollow Miracle*, in *LANGUAGE AND SILENCE* 99, 101 (1967). Steiner, an eminent literary critic, was making the point, in relation to the Holocaust, that when language is used to dehumanize human beings, “[s]omething of the lies and sadism will settle in [its] marrow . . . . It will no longer perform, quite as well as it used to, its two principal functions: the conveyance of the humane order which we call law, and the communication of the quick of the human spirit which we call grace.” *Id.*

<sup>12</sup> GEORGE ORWELL, *Politics and the English Language*, in *THE ORWELL READER* 355, 364 (1946).

scheduling conflicts, or the courses are over-subscribed, or they may offer only pass-fail credit where graded hours are needed. And with only so many hours in a semester, most students feel pressured to take the so-called core courses that almost everyone deems essential either for the practice of law or for the bar examination. What the idealistic students wind up with is mostly the law that is—a legal system already suspect in their view because it has either created injustice or else failed to remedy it. In these heavily subscribed, supposedly indispensable courses—corporations, bankruptcy, real estate transactions, wills and trusts, evidence, family law, taxation, administrative law, intellectual property, estate and gift taxation, and suchlike—the underlying values that might profit most from critical reexamination are largely taken for granted. The bar examiners and the profession itself are concerned with the law that is, not the law that ought to be.<sup>13</sup> Legal education reflects this reality in the heavy emphasis it places on the teaching of doctrine. None of this is to say that doctrine is unimportant. A law school is a professional school, after all, and aims at preparing students for the practice of a profession. The reality is that the practice of law requires both an extensive set of skills and a working knowledge of current doctrine. Holding hands is not a substitute for the acquisition of knowledge. My point is only that the current emphasis is disproportionate.

## II. THE VALUES DEFICIT: “NO ONE REMEMBERS THE PAST”<sup>14</sup>

The values deficit that I see in legal education cannot conveniently be fobbed off on the existing legal system. Trashing that system and the profession itself as self-serving and duplicitous has become something of a national pastime. But those who make lawyers the butt of endless jokes should perhaps reflect a bit on the role which law has played in the history of the United States. Law most often did what people asked of it, what seemed needful and proper given the perceived necessities of the time. Law functioned as a tool—one bent and twisted by men to shape the conditions of life in this nation to their will.<sup>15</sup> Indeed, the instrumental

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<sup>13</sup> One should not underestimate the importance to many law schools of bar-passage rates. This statistic is among those used by *U.S. News & World Report* in its annual “ranking” of schools—an ironical twist, given that no first-rate law school has ever geared its curriculum or teaching methods to this consideration.

<sup>14</sup> JOAN DIDION, *Some Dreamers of the Golden Dream*, in *SLOUCHING TOWARDS BETHLEHEM* 3, 4 (1964). “Life always looks good in the golden land because no one remembers the past,” Didion wrote, referring to California in the 1960s.

<sup>15</sup> See JAMES WILLARD HURST, *LAW AND SOCIAL PROCESS IN UNITED STATES HISTORY* 1-17 (Da Capo Press ed., 1972) (1960) [hereinafter *LAW AND SOCIAL PROCESS*]:

There may be some ideas of law which meaningfully abstract it from relation to other than legal ideas. There are societies—usually very simple ones—in which law has little relation to general living, or scarcely exists as a distinct focus of interest. But these things have not been significantly true of our experience; at least since our more developed and colonial years and certainly since we became a nation, we have woven law into a wide range of living. Indeed, this has been itself one of the striking features of our experience. Ready use of law expressed a deep-seated instrumental attitude toward institutions that came naturally to our peculiar situation on the North American continent; we found legal organization not only a handy but a specially necessary tool in our circumstances. Few in

use of law may be the single most striking feature of American legal history. Ours has always been a government of men, not laws, notwithstanding the persistent cant of those who insist on reading the Constitution in consonance with what they may suppose to have been in the minds of the framers of that instrument.<sup>16</sup> History vitiates this argument, for it is simply not possible to deny the ever-present human element in the equation of governance—an element often idiosyncratic, sometimes perverse in nature, stubborn in defying reason, frequently unpredictable, and yet the very quality that moved Holmes so many years ago to declare that “the felt necessities of the time” had more to do with “the rules by which men should be governed”<sup>17</sup> than the other way around.

Willard Hurst wrote that “law should supply rich and . . . unique portions of the history of ideas and attitudes that have given character to life in the United States.”<sup>18</sup> Yet this history plays a minor role in legal education, relegated to a

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numbers, scarce of working capital on an immense, rich and unsettled continent, we needed every workable device we could contrive to muster men, money, and tangible movable resources for realizing our opportunities.

. . . .  
. . . [B]ecause we valued law as a means to ends of life, and not as itself representing end values, we should expect to find insistent pressure of lay demands upon law, and so it was. Moreover, principle gained drive from the varying strains of pragmatism that made up our working philosophy. Preoccupied with settling and developing the continent and achieving status in a busy, mobile society, people found it natural to demand that law be useful.

*Id.* at 6, 9. See also JAMES WILLARD HURST, *LAW AND SOCIAL ORDER IN THE UNITED STATES* 23-81 (1977); JAMES WILLARD HURST, *LAW AND ECONOMIC GROWTH: THE LEGAL HISTORY OF THE LUMBER INDUSTRY IN WISCONSIN, 1836-1915* (1964). American legal history owes a profound debt to Willard Hurst. Of his work, the eminent legal historian Lawrence Friedman has written:

Modern scholarship on American legal history was, to a remarkable degree, the creation of a single individual, J. Willard Hurst (1910-1997). . . . In the dark ages before [Hurst’s] books were written, American legal history was highly formalist; it treated law as a narrow, self-contained little island. . . . Hurst threw open the doors and brought law back into society . . . . He broke down the barriers between legal history, and general social and economic history.

LAWRENCE M. FRIEDMAN, *AMERICAN LAW IN THE 20TH CENTURY* 501 (2002) [hereinafter FRIEDMAN].

<sup>16</sup> The preëminent example, of course, is Justice Antonin Scalia, who recently said that anyone who regards the Constitution as a living instrument whose meaning changes with changes in societal conditions “‘ would have to be an idiot to believe that.’” Associated Press, *Scalia Dismisses ‘Living Constitution,’* N.Y. TIMES, Feb. 14, 2006 (online ed.). See Lynette Clemetson, *Meese’s Influence Looms in Today’s Judicial Wars,* N.Y. TIMES, August 17, 2005 (online ed.). She reports that in 1985, newly confirmed attorney general Edwin Meese “gave what many say was the speech of his career. Helping lay the foundation for the judicial wars that continue today, he advocated a ‘jurisprudence of original intention.’ The philosophy he promoted, one of strict adherence to what proponents say were the intentions of the writers of the Constitution, inspired a generation of conservatives—including, some say, a young lawyer named John G. Roberts Jr., now a Supreme Court nominee.”

<sup>17</sup> See *supra* note 2.

<sup>18</sup> HURST, *LAW AND SOCIAL PROCESS*, *supra* note XX, at 11. He said:

Law offers special insights into the growth of this North American society because so many forces for stability and change came into focus at points of legal action. The

course or seminar here and there, even though in its vast wealth of documented activity law has much to tell of who we are as a society—of what we value in this life and what we are willing to do to get it.<sup>19</sup> These ideas and attitudes demand a far more systematic and critical examination, for they have everything to do with the shape of the legal system and, at but slight remove, of legal education.

I go perhaps a step further, however, in believing that legal history cannot meaningfully be separated from the history of the society at large. In our instrumental use of law, most things of significance that have happened in this nation have involved the legal system in one way or another. Law has usually been the preferred method for formalizing, institutionalizing, or legitimating whatever it was that people thought needful at particular times. But law in our society has also been significant for what it didn't do. A narrow focus on legal history as such is to risk missing how often law was significant by inaction—by failing to act when action was arguably called for. The role of law in American society can best be understood from a history of that society. From a pedagogical standpoint, students cannot fully understand, much less evaluate, the content of substantive courses without a knowledge of envioning context. Hence the need in law school for a course in American history—not an elective seminar or upper-class offering, but a required course spanning the entire first year.

In my mind there is a still more urgent reason for such a course, but here bias enters the picture, and it is just as well to make mine clear at this point. Legal education focuses primarily on doctrine; in striving for a sterile and detached learning environment, it deliberately leaves students to make their own individual decisions about what they will do with their professional lives. In this, law schools are a little like gun dealers, just selling guns without worrying overmuch about the uses to which those guns will be put. I believe our aim should be a little higher. In choosing career paths, our students will find, sooner or later, that they face a fundamental choice. I think a major goal of legal education should lie in creating an awareness of this choice and of its implications.

For simplicity's sake, let me sketch what I mean in very black-and-white terms. Lawyers can devote themselves to serving those who can afford to pay the going rate, typically clients whose goal is either to keep what they have or to get more of it. In this calculus, law is a business like any other and must be run as such. The bottom line is profit and loss. Time is all lawyers have to sell, and time is money. The pressure to get the result the client wants is intense, and a great

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character of law in this society—its monopoly of legitimate violence and scrutiny of other forms of compulsion, its constitutionalism, its procedural emphasis, its functions in allocating resources—gave it a large role in supporting and investigating other institutions of social order.

*Id.* at 17.

<sup>19</sup> As Hurst noted,

For all its frailties and fictions, law operated with force not matched by any other major institution of social order to press men to define ends and means. Hence its product of constitutions, statutes, judicial opinions—and, later, administrative rules and orders—yielded the largest single body of articulated values and value-oriented contrivances in society.

*Id.* at 12.

deal of arduous work, translating into billable hours, is the norm. The rationale is simple and understandable. Without money coming in, a firm cannot afford to open its doors. It can serve nobody. The upside of this paradigm is that young lawyers earn a handsome salary, steadily increasing from year to year with down the line the prospect of partnership or shareholder status and an even greater share of the wealth. With money, these lawyers can afford the good life: a nice home, expensive cars, the best schools for their children, and suchlike. Not the least of the pluses is the ability to pay off the staggering debt with which so many of today's students are saddled. But there is a downside to this conventional career path—one reflected in a growing recognition that many lawyers are unhappy with their lives, both at the professional and the personal level.<sup>20</sup> Despite good salaries, they seem to find no sense of satisfaction and fulfillment in their work, and the instances of divorce, substance abuse, even suicide, are much higher among lawyers than in the population generally.<sup>21</sup> Something seems to be missing. This evidence should be of concern to those who teach in law schools, but for the most part it is not. A law school, you are apt to hear, is neither a seminary nor a psychiatrist's couch.

The alternative lies in a vision of law as a noble profession—one dedicated to helping those who cannot help themselves, without regard to ability to pay. The American Bar Association captures this aspiration in one of its ethical canons: “The basic responsibility for providing legal services for those unable to pay ultimately rests upon the individual lawyer, and personal involvement in the problems of the disadvantaged can be one of the most rewarding experiences in the life of a lawyer.”<sup>22</sup> This certainly proved true in my own experience. I found satisfaction in doing competent work for paying clients, but one soon came to resemble another. What sticks in my mind today from so many years ago are those whom I was able to help who couldn't afford to help themselves. This approach is

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<sup>20</sup> See, e.g., Timothy L. O'Brien, *Up the Down Staircase*, N.Y. TIMES, March 19, 2006 (“Over the last two decades, as law firms have devoted themselves keenly to the bottom line, depression and dissatisfaction rates among both female and male lawyers has grown, analysts say; many lawyers of both genders have found their schedules and the nature of their work to be dispiriting.”); Lawrence S. Krieger, *Institutional Denial About the Dark Side of Law School, and Fresh Empirical Guidance for Constructively Breaking the Silence*, 52 J. LEGAL EDUC. 112 (March–June 2002); JEAN STEFANCIC & RICHARD DELGADO, *HOW LAWYERS LOSE THEIR WAY* (2005).

<sup>21</sup> See Krieger, *supra* note XX, at 114-15; STEFANCIC & DELGADO, *supra* note XX, at 47-71.

<sup>22</sup> AMERICAN BAR ASSOCIATION, MODEL CODE OF PROFESSIONAL RESPONSIBILITY, Canon 2, EC 2-25, *reprinted in* THOMAS D. MORGAN & RONALD D. ROTUNDA, MODEL CODE OF PROFESSIONAL RESPONSIBILITY, MODEL RULES OF PROFESSIONAL CONDUCT, AND OTHER SELECTED STANDARDS ON PROFESSIONAL RESPONSIBILITY 181 (Foundation Press 2002). The Georgia Justice Project, privately funded, is a good example of what can be done in the area of criminal law. See Greg Bluestein, *Attorneys take their jobs beyond courtroom*, TALLAHASSEE DEMOCRAT, Sept. 11, 2005, at 8A. Bluestein writes that “[l]awyers across the country are rethinking the profit-oriented goals learned in law school and adopting more holistic approaches to work out the social circumstances that lead to criminal activity.” Similar projects are underway in other cities, the article reports. The article quotes David Hall, a professor at Northeastern University School of Law: “Despite the fact that they are successful with earning salaries, lawyers are not seeming satisfied with what they have to do. They are looking for alternative ways to continue practicing law but in a way where they can sleep more comfortably at night.”

unlikely to change the world in any profound way. But in small, often unnoticed ways lawyers can make a difference by taking the side of the weak, the poor, the helpless, or the unpopular. In this way they can keep the ideal of equality and justice alive. This is all they can do, but in the process they may find that they are living a meaningful life—one that comes as close as possible to that elusive, hard-to-define quality we call happiness, at least to a sense of fulfillment and peace of mind.

No one can generalize meaningfully about the motives that draw people to the law in the first place, or later to the various forums in which law is practiced. A legal education can go only so far in influencing the choice that graduates make about what to do with their lives. But it should at least seek to impart an awareness of choice. And it is certainly not amiss to explore the obligations that come with the privilege of practicing law. For these purposes there is nothing more revelatory than a long and searching look at the history of this country. The United States today is the richest and most powerful nation on earth. But the full story of how it got that way is in many respects an ugly one. The history being made today sadly is of a piece as we continue to repeat the mistakes of the past. Domestically, the country is deeply fractured and the world around us even more so, in no small part because of our self-serving attempts to influence events. All one has to do is read the newspapers for confirmation of this gloomy assertion. The principles upon which America was founded are deeply moving to me. But on far too many occasions we have failed to live up to those principles. In those failures of the past is much food for thought—for today, and for the future.

Radical proposals for curricular change, especially in the first year, are usually looked at askance; and there are bound to be objections to this one.<sup>23</sup> One is that “history” is already an integral part of most substantive courses and will necessarily permeate the minds of students, as if by osmosis, during the course of a semester. This may be true to some extent, but history acquired in this way is apt to be piecemeal and hence incoherent, and I doubt that the arid casebook summaries of doctrinal developments over time are what Willard Hurst had in mind when he spoke of the “ideas and attitudes” that have shaped our character as a nation. A standard torts course, for example, will dutifully trace the bumpy road from “no liability without fault” to workers compensation and beyond to the modern conception of strict liability. But there is unlikely to be any mention of the 1930–32 driving of a tunnel through Gauley Mountain in West Virginia by the Rinehart & Dennis Co. of Charlottesville, Virginia.<sup>24</sup> This was an engineering feat in which the calculated decision was made to speed the work by using dry drilling methods rather than wet as recommended by the Bureau of Mines, even though the mountain was composed of sandstone containing over 99 percent pure silica. Two thousand men worked on the project for 25 cents an hour, and three-fourths of them happened to be black. Many of the workers soon developed acute silicosis from exposure to the dust; 476 died, and a further 1500 deaths were predicted. The

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<sup>23</sup> There are a variety of strategies for overcoming the difficulties which the structuring and staffing of such a non-traditional course might pose. I leave the details to the imaginations of those who find the idea itself an appealing one.

<sup>24</sup> This account is drawn from PAUL BRODEUR, *OUTRAGEOUS MISCONDUCT* 18-22 (1985).

company shrugged off the tragedy, saying that “‘if they killed off those men there were plenty of other men to be had’”<sup>25</sup>—an eminently pragmatic response considering that most of the workers were black and that the country was caught in the throes of the Great Depression. In the ensuing litigation, the *plaintiffs’* attorneys were paid by the defendant to settle 300 damage claims for a total of \$130,000. In a torts course, this occurrence wouldn’t register as a blip on the screen. But what does it tell us about the character of life in this country?

Another objection rests on the assumption that those who come to law school are reasonably well educated, already have a working knowledge of the nation’s history, and, having lived in this society, are amply familiar with the broad social contexts with which law, at so many critical points, has interacted. This belief, however, is as chimerical as the one that holds that law students learned to write before coming to law school. The distinguished Middle East historian Bernard Lewis put it bluntly: “In current American usage, the phrase ‘that’s history’ is commonly used to dismiss something as unimportant, of no relevance to current concerns, and, despite an immense investment in the teaching and writing of history, the general level of historical knowledge in our society is abysmally low.”<sup>26</sup> Most law students are in their early twenties, and their view of life has largely been shaped by television—a medium which prides itself on delivering images of a world that has no history and whose only real purpose is entertainment.<sup>27</sup> Many see no point in spending time with the nation’s past. The world they see around

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<sup>25</sup> *Id.* at 21 (quoting Vito Marcantonio, a Republican Congressman).

<sup>26</sup> Bernard Lewis, *The Revolt of Islam*, THE NEW YORKER, Nov. 19, 2001, at 50, 51. See also Suzanne Fields, *We Need Some Answers to Dangerous Questions in Dangerous Times*, TALLAHASSEE DEMOCRAT, Jan. 9, 2006, at A7 (“When seniors at the top 55 American colleges were tested for their knowledge of history, only 19 percent scored a grade of C or higher.”). As to the writing abilities of law students, see H.P. Southerland, *English as a Second Language—or Why Lawyers Can’t Write*, 18 ST. THOMAS L. REV. 53 (2005).

<sup>27</sup> See generally NEIL POSTMAN, *AMUSING OURSELVES TO DEATH* (Penguin Books, 1986) (1985). In this remarkable book, Postman demonstrates persuasively how the radically new technology that is television has come to dominate our lives. Television, he argues, “gave the epistemological biases of the telegraph and the photograph their most potent expression, raising the interplay of image and instancy to an exquisite and dangerous perfection. . . . [T]here is no subject of public interest—politics, news, education, religion, science, sports—that does not find its way to television. Which means that all public understanding of these subjects is shaped by the biases of television.” *Id.* at 78. He reminds us along the way that young people will have watched 16,000 hours of television by the time they graduate from high school. *Id.* at 153. What Postman finds profoundly disturbing is not the obvious—that television is entertaining. It is that television “has made entertainment itself the natural format for the representation of all experience. . . . The problem is not that television presents us with entertaining subject matter but that all subject matter is presented as entertaining, which is another issue altogether.” *Id.* at 87. He illustrates how television makes entertainment out of news, religion, politics, and education. *Id.* at 99-154. Television presents a world of images and fragments, a world without a history. It “is a speed-of-light medium, a present-centered medium. Its grammar, so to say, permits no access to the past. Everything is presented in moving pictures is experienced as happening ‘now’ . . . . With television, we vault ourselves into a continuous, incoherent present.” *Id.* at 136, 137. As one writer said of Postman, he “dissected the ways in which virtually every aspect of American life [has been] turned into entertainment—the ways in which the lines between private experience and public diversion [have become] not just blurred, but erased.” Bob Greene, *Was It Real for You, Too?*, N.Y. TIMES, July 23, 2005 (online ed.).

them looks normal, and they are naïvely confident that most of the truly egregious wrongs have long since been righted. They are mainly concerned with where we go from here. As Joan Didion once remarked of California, “The future always looks good in the golden land, because no one remembers the past.”<sup>28</sup> Today her comment seems apropos of the nation as a whole. For many students the past simply doesn’t exist.

Still another objection cuts deeper. It stems from the recognition that the values expressed in our history don’t paint a very flattering picture. And because those values haven’t changed that much, the past is seen as something of an embarrassment. It’s more comfortable for those of us who teach in law schools to dwell in the present and take refuge in the niceties and fine distinctions of doctrine, as if the law were a thing apart from the social context that produced it. This black-box, or law-in-a-vacuum theory of legal education owes much to Christopher Columbus Langdell and the Harvard school of the late nineteenth century.<sup>29</sup> Amazingly, this theory still predominates in law schools. Its persistence can be explained in part because it is helpful in masking the fact that the central concern of law ought to be the human condition and not the memorization of a lot of rules.<sup>30</sup> It is also supremely congenial, at once cost-effective in allowing individual faculty members to teach large-enrollment classes while leaving ample time for the writing of the books and law review articles which have become the measure of all things—for schools, their reputation and prestige, and for individual faculty members, their reputation, rank, and pay. The truth is that the current curricular methodology is geared more to the convenience of those who administer and teach in law schools than to the needs of students. Where are our priorities? Without students, law schools would not exist.

And meanwhile, what of the students? They are consigned to three years of the same mind-numbing thing, a discipline which they endure only because they must to reach the light at the end of the tunnel—the place they call the “real world,” a never-never land where they can at least believe things will be different, and hopefully better. They live in a vacuum, hardly unchanged from that of over a hundred years ago, a world of very expensive, thousand-page casebooks and their neatly organized recitals of doctrinal developments, materials virtually guaranteed to rob the law of its inherent fascination, its human dimension and its enviroing context. It is hard to believe that the study of law could be boring, but the current curricular methodology makes it so.

Most law students as yet have nothing but an imperfect and second-hand sense of what motivates those whom they will represent. They have no real appreciation

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<sup>28</sup> JOAN DIDION, *Some Dreamers of the Golden Dream*, *supra* note XX.

<sup>29</sup> See FRIEDMAN, *supra* note XX, at 33-36.

<sup>30</sup> See *id.* at 489-504. Friedman sums it up in this way:

Only in the law schools does the old scholarly order hang on. It is a bit battered and frayed around the edges, but the core of it is still intact. Students still feel, as John Schlegel put it, “that law is about rules.” The professors still give them “a pile of appellate cases to chew on.” In the law schools, the “notion of law as rule is as overwhelming as the smell of limburger cheese.” Not everybody finds this the most attractive of smells.

*Id.* at 504 (footnote omitted).

of the infinite ways in which clients can contrive to foul up their lives and the lives of those around them. Nor have most of them had to confront the fact that they are human, too, and not immune from the same temptations to which their clients will have succumbed. Where in the standard curriculum are they invited to ponder the nature and administration of the world; to reflect on what place a human being endowed with reason has in it; to consider in what their good and evil consists? Matters of this sort, one hears, more properly belong to the realm of personal philosophy, or perhaps to the soft subjects of psychology, sociology, literature, or religion, with all of which a detached, disinterested, and rigorous discipline like law should have nothing to do.

Obviously, I disagree; and I think that it is here that a study of our history can make a difference. But it bears remembering that history is an art form—an effort to paint a picture of a past that can never be fully known. Like any picture, it can be colored in different ways, and it is usually the winners who get to choose the colors.<sup>31</sup> A history of the United States can depict courageous men and women fighting for their freedom and then struggling to make a life for themselves on an “unsettled” continent. It can tell of the wisdom of the founding fathers—their belief that all men were created equal with the right to life, liberty, and the pursuit of happiness—and their genius in devising a government instituted among a free people to secure these ends.<sup>32</sup> History can dwell on the bloody Civil War fought to save the Union so that, in the closing words of Abraham Lincoln’s eloquent Gettysburg Address, “government of the people, by the people, and for the people shall not perish from the earth.”<sup>33</sup> It can boast of the melting pot, our wonderful tradition of welcoming the tired, poor, and huddled masses yearning to breathe free.<sup>34</sup> It can tell of our bravery and courage in fighting two world wars to make the world safe for democracy. It can dwell on the wisdom of great leaders and

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<sup>31</sup> A significant part of history, for example, is contained in government documents that are unavailable to historians. These documents have been classified as secret, usually on the ground that their revelation would compromise some vaguely defined interest of the state such as “national security.” Even nominally free societies like Great Britain and the United States routinely engage in this practice, which amounts to nothing less than the editing of the past. An interesting variant recently came to light in the United States. In 2001 and 2002, respectively, the CIA and the Air Force entered into secret agreements with the National Archives that permitted these agencies to inspect and reclassify previously declassified material. It is estimated that 55,000 pages of material have been removed from the shelves and are now unavailable to researchers. The agreements have since been repudiated. See Scott Shane, *National Archives Pact Let C.I.A. Withdraw Public Documents*, N.Y. TIMES, April 18, 2006 (online ed.); Editorial, *Putting the Cat Back in the Bag*, N.Y. TIMES, April 19, 2006 (online ed.) (“This not only violates the mission of the National Archives; it is also antithetical to the natural flow of information in an open society. . . . It’s worth remembering, after all, that the contents of the National Archives represent the raw materials of history.”).

<sup>32</sup> The point is usually not stressed that the founders evidently meant “men” literally, and only some men at that. Women, Native Americans, slaves, indentured servants, and those without property were not included.

<sup>33</sup> Abraham Lincoln Online, *The Gettysburg Address*, <http://showcase.netins.net/web/creative/Lincoln/speeches/gettysburg.htm>.

<sup>34</sup> A paraphrase of the best-known lines of Emma Lazarus’s stirring sonnet “The New Colossus,” written in 1883 to help raise money for the pedestal of the Statue of Liberty. The complete poem is inscribed on a plaque at the entrance to the pedestal.

their role in determining the course of momentous events, and it can recount the vision, ingenuity, and determination of those who made this nation the richest and most powerful on earth. It can extol the glories of capitalism—the only possible bedrock on which a republic like America could be built, a true meritocracy in which ability and hard work are, ineluctably, amply rewarded.

Or a history can be told from a different perspective. It can paint the grim picture of just how we went about exterminating Native Americans and of their sorrow and misery at the loss of a way of life. It can trace the rise of laissez-faire capitalism—free markets and near-unfettered freedom to exploit them—and the enrichment beyond belief of a handful of people at the expense of millions forced to toil for them for pitiful wages in conditions that exacted a dreadful toll in life, limb, and health. It can tell of government’s complicity in this enterprise—the crushing of labor unions and brutal strike-breaking—its alliance with powerful business interests to suppress all economic systems other than capitalism. It can recount the inhumane history of racial discrimination that has disgraced this nation from 1619 to the present. Conventional teaching in law schools spends a little time on *Dred Scott v. Sandford*,<sup>35</sup> *Plessy v. Ferguson*<sup>36</sup> and *Brown v. Board of Education*,<sup>37</sup> and over night we have become a color-blind society. Almost 400 years of outright slavery and its aftermath of second-class citizenship have magically been made to disappear. Law schools, supposedly concerned with equal justice under law, spend precious little time on what it has meant to be black in America or on how many policies have been shaped under the dark shadow of racism.<sup>38</sup> One of the public-service commercials used to say that a mind is a terrible thing to waste.<sup>39</sup> Could anyone begin to calculate what this nation’s policies have cost over so many generations in wasted intelligence and ability? And if hatred and prejudice directed relentlessly at one group for almost four centuries can add up to a sort of death in life—existence without hope or future—would the numbers not far exceed the six million Jews whom the Germans exterminated in the killing centers?<sup>40</sup> The treatment of blacks throughout most of our history may not have been genocide in a strict definitional sense, but functionally it has come to much the same thing.<sup>41</sup>

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<sup>35</sup> 60 U.S. (19 How.) 393 (1857).

<sup>36</sup> 165 U.S. 537 (1896).

<sup>37</sup> 347 U.S. 483 (1954).

<sup>38</sup> See, e.g., Shaila Dewan, *100 Years Later, A Painful Episode Is Observed at Last*, WASH. POST, Sept. 24, 2006 (online ed.) (recounting Atlanta race riot of 1906 which has been “erased from the city’s consciousness, left out of timelines and textbooks”).

<sup>39</sup> This apothegm is attributed to William H. Gray, III, a Philadelphia preacher and former congressman who for years headed the United Negro College Fund.

<sup>40</sup> See Harold P. Southerland, *Law, Literature, and History*, 28 VERMONT L. REV. 1, 32 (2003).

<sup>41</sup> The core provision of the United Nations Convention on the Prevention and Punishment of the Crime of Genocide is article 2, which defines “genocide” as

any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

(a) Killing members of the group;

(b) Causing serious bodily or mental harm to members of the group;

History can tell, too, of how women were relegated throughout most of our past to a similar sort of second-class citizenship with the concomitant wasting of their talents and abilities; and it can trace their struggle to throw off the shackles of motherhood and homemaker to achieve something like equality with men.<sup>42</sup> It can tell of our willingness to suppress free speech,<sup>43</sup> freedom of the press,<sup>44</sup> and freedom of religion<sup>45</sup> when it seemed expedient. It can tell of the overt enthusiasm with which we rounded up and incarcerated native-born citizens of Japanese ancestry—ostensibly because they were believed to pose a threat to national security but also because they looked different, were hated and feared by many, and because their businesses and assets were ripe for the plucking at a dime on the dollar.<sup>46</sup> In recounting the witch hunts, purges, and the ruination of innocent lives during the McCarthy era, it can cast in sharp relief our own capacity for evil when hysteria is loosed in the land.<sup>47</sup> And it can trace the lies, deceit, and arrogance of

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- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
  - (d) Imposing measures intended to prevent births within the group;
  - (e) Forcibly transferring children of the group to another group.

SAMANTHA POWER, “A PROBLEM FROM HELL: AMERICA AND THE AGE OF GENOCIDE 42 (2002).

<sup>42</sup> See, e.g., ALICE KESSLER-HARRIS, *OUT TO WORK* (1982).

<sup>43</sup> See *Schenk v. United States*, 249 U.S. 47 (1919) (Holmes, J.) (affirming conviction of defendants who published circulars urging people to resist and obstruct the draft); *Abrams v. United States*, 250 U.S. 616 (1919) (affirming convictions of defendants for publishing circulars with intent to encourage resistance to the war and to incite curtailment of war production) (Holmes & Brandeis, JJ., dissenting); *Dennis v. United States*, 341 U.S. 494 (1951) (affirming the constitutionality of defendants’ convictions under the Smith Act for conspiring to organize the Communist Party of the United States, which advocated overthrow of the U.S. government by force or violence).

<sup>44</sup> See GEOFFREY R. STONE, *supra* note XX, at 33-78 (prosecutions under the Sedition Act of 1798), 126-32 (attempts to restrict the press during the Civil War), 500-16 (unsuccessful attempt by government to enjoin publication of the Pentagon Papers). More recently President Bush and other government officials have severely criticized the publication in the *New York Times* of details of the government’s program that attempts to track terrorists by mining data relating to worldwide banking transactions. Rep. Peter King (R. N.Y.), chair of the House Homeland Security Committee, has asked the attorney general to investigate whether the publication violated the Espionage Act of 1917. See Sheryl Gay Stolberg, *Bush Says Report on Bank Data Was Disgraceful*, N.Y. TIMES, June 27, 2006 (online ed.). See also *Branzburg v. Hayes*, 408 U.S. 665 (1972) (declining to recognize a first-amendment privilege for journalists who refuse to reveal the identity of their sources).

<sup>45</sup> See *Reynolds v. United States*, 98 U.S. 145 (1878) (upholding conviction for polygamy against defendant’s free exercise claim that his conduct was religiously motivated); *Davis v. Beason*, 133 U.S. 333 (1890) (upholding statute making membership in the Mormon Church, without more, a crime). See also THOMAS F. O’DEA, *THE MORMONS* 41-69, 110-11 (1957) (recounting history of Mormons’ persecution); Lawrence Wright, *Lives of the Saints*, THE NEW YORKER, Jan 21, 2002, at 40 (noting that Mormonism “entered the twentieth century as the most persecuted creed in America”).

<sup>46</sup> See *Hirabayashi v. United States*, 320 U.S. 81 (1943) (upholding constitutionality of curfew imposed on all persons of Japanese ancestry); *Korematsu v. United States*, 323 U.S. 214 (1944) (holding exclusion of those of Japanese ancestry from West Coast constitutional). Justices Roberts, Murphy, and Jackson dissented, contending that the order constituted unjustified discrimination on the basis of race. See *id.* at XX.

<sup>47</sup> See GEOFFREY R. STONE, *supra* note XX, at 312-426.

power which led America to betray herself in Vietnam.<sup>48</sup> Surely those who know this history must be moved to ask whence comes our moral authority today to impose our version of freedom and democracy on the rest of the world—perhaps even to question just how free and democratic this society really is.<sup>49</sup>

History can also tell of how this nation essentially did nothing while millions of people around the world were slaughtered in genocides. It was this nation that took the lead in forming the United Nations after World War II. It was this nation that took the lead in bringing the surviving Nazi leaders to justice for their perpetration of crimes against humanity. Robert Jackson, a sitting Justice of the United States Supreme Court, served as chief prosecutor at the Nuremberg trials. If any nation could be expected to speak out against and try to stop wanton and insensate killing on a massive scale, it should have been this one. But like most of the rest of the world, we did nothing.<sup>50</sup>

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<sup>48</sup> See BARBARA W. TUCHMAN, *THE MARCH OF FOLLY* 234-377 (Ballantine Books, 1985) (1984).

<sup>49</sup> As the author Jim Holt points out, “[O]ur form of government bears scant resemblance to what the ancients called *demokratia*. . . . Our own government, to the Athenians, would look like an elective oligarchy. In fact, it was deliberately set up to ensure, as James Madison wrote in the *Federalist Papers*, ‘the total exclusion of the people in their collective capacity, from any share’ in it.” Jim Holt, *Export This?*, N.Y. TIMES, April 23, 2006 (Magazine) (online ed.). George Orwell put it succinctly: “In the case of a word like *democracy*, not only is there no agreed definition, but the attempt to make one is resisted from all sides. It is almost universally felt that when we call a country democratic we are praising it: consequently the defenders of every kind of regime claim that it is a democracy, and fear that they might have to stop using the word if it were tied down to any one meaning.” GEORGE ORWELL, *supra* note XX, at 359-60. It bears remembering that the “free” people of this country enslaved blacks, then relegated them to second-class citizenship; disenfranchised women; incarcerated American citizens of Japanese ancestry; and periodically engaged in the ruthless suppression of dissent in the name of national security. See, e.g., GEOFREY R. STONE, *supra* note XX, at 136-233 (World War I), 312-426 (the McCarthy Era).

<sup>50</sup> The history of the involvement of the United States with genocide is recounted in excruciatingly painful detail in SAMANTHA POWER, *supra* note XX. In every case throughout the twentieth century and into this one, our highest officials have had reliable information that genocides were either being planned or were actually in progress. Though the word “genocide” did not exist in 1915, we knew that the Turks were exterminating an estimated two million Armenians. We did nothing. See *id.* at 1-16. During World War II we knew of Hitler’s “final solution” and did nothing. See *id.* at 31-45. In 1975, in the aftermath of Vietnam, we turned a blind eye to genocide in Cambodia, even continuing to recognize Pol Pot and the Khmer Rouge as the “legitimate” government of that nation. It was left, ironically, to a united Vietnam to put a stop to the regime’s insensate killing of over one million Cambodians and to expose to the world the magnitude of the slaughter. See *id.* at 87-154. We knew of Saddam Hussein’s 1987-1988 attempt to resolve his Kurdish “problem” and took no action, continuing to supply him with billions in financial aid. See *id.* at 171-245. In 1991, the crisis in the Balkans began. The Serbs set out to cleanse the former Yugoslavia of its Muslim population, and again we did nothing. See *id.* at 247-327. In Rwanda, in 1994, the Hutus slaughtered an estimated 800,000 Tutsis while we stood idly by. See *id.* at 329-89. Srebrenica and Kosovo—the Serbs again—were equally deadly and only ended with belated NATO intervention. See *id.* at 391-473. Today it’s Sudan and Dafur. At one point President Bush acknowledged that genocide was occurring there, but his response, in the eyes of most observers, has been feckless. See, e.g., Nicholas D. Kristof, *A Wimp on Genocide*, N.Y. TIMES, Sept. 18, 2005 (online ed.); Elizabeth Rubin, *If Not Peace, Then Justice*, N.Y. TIMES, April 2, 2006 (Magazine) (online ed.). If there is ever any justification for military intervention in other countries, genocide would seem to be it.

It is this side of our history, I think, that needs to be told. The controversial historian Howard Zinn takes this point of view in his *A People's History of the United States*.<sup>51</sup> Zinn makes his bias very clear:

“History is the memory of states,” wrote Henry Kissinger in his first book, *A World Restored*, in which he proceeded to tell the history of nineteenth-century Europe from the viewpoint of the leaders of Austria and England, ignoring the millions who suffered from those statesmen’s policies. . . . But for factory workers in England, farmers in France, colored people in Asia and Africa, women and children everywhere except in the upper classes, it was a world of conquest, violence, hunger, exploitation—a world not restored but disintegrated.

My viewpoint, in telling the history of the United States, is different: that we must not accept the memory of states as our own. Nations are not communities and never have been. The history of any country, presented as the history of a family, conceals fierce conflicts of interest (sometimes exploding, more often repressed) between conquerors and conquered, masters and slaves, capitalists and workers, dominators and dominated in race and sex. And in such a world of conflict, a world of victims and executioners, it is the job of thinking people, as Albert Camus suggested, not to be on the side of the executioners.<sup>52</sup>

He writes from the perspective of those who might be called the losers, and while remaining faithful to the known record, allows us to see, as few historians do, the price exacted for America’s rise to world prominence. He explores the dark side of the American experience—a side often cursorily mentioned in the more conventional treatments with their emphasis on great men and their deeds and the happening of momentous events. After recounting the ruthless genocide of the many millions who were already here when Columbus “discovered” the Americas—a genocide perpetrated by Columbus himself, the Spaniards who followed, and the Puritans<sup>53</sup>—Zinn puts two critical questions: “[w]as all this bloodshed and

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There is a pathetic and cynical footnote to this long history of inaction. The word “genocide” itself was coined during the 1940s by a Jewish survivor of the Holocaust, a lawyer named Raphael Lemkin, whose tireless efforts were instrumental in the drafting and eventual adoption by the UN General Assembly of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide. By 1950, the requisite twenty nations had ratified the treaty, making genocide an international crime. See SAMANTHA POWER, *supra*, at 17-78. But despite President Truman’s urging, the treaty stalled in the Senate and languished there until 1986. Almost alone, Senator William Proxmire spoke out against the shame of inaction, delivering daily speeches that would eventually total 3,211 over 19 years, from 1967 to 1986. Only when President Reagan was caught in an unexpected and embarrassing outcry at his projected stop at a German cemetery where SS soldiers were buried among the German war dead did he seek to bolster his credibility by urging the Senate to act. With Reagan’s support, the treaty was finally ratified, but with one crucial reservation. Before the United States could be prosecuted in the International Court of Justice, the president would have to consent to jurisdiction. This opt-out clause of course gave other nations a perfect excuse for refusing to submit to ICJ jurisdiction. There was the usual fear of ceding any part of our sovereignty to other nations, and Southern senators argued that the United States might be hauled before the ICJ for its treatment of Native Americans and blacks—a patently absurd argument since the treaty, which became effective in 1951, was not retroactive. See *id.* at 61-85; 155-69. This sorry story of dithering captures in exquisite microcosm our history of arrogance, self-interest, and hypocrisy.

<sup>51</sup> See HOWARD ZINN, *A PEOPLE’S HISTORY OF THE UNITED STATES* (2004).

<sup>52</sup> *Id.* at 9-10.

<sup>53</sup> See *id.* at 1-22.

deceit . . . a necessity for the human race to progress from savagery to civilization? . . . [H]ow can the judgment be made if the benefits and losses cannot be balanced because the losses are either unmentioned or mentioned quickly?”<sup>54</sup>

How, indeed? Students cannot begin to think about how they ought to live and to what uses they ought to put the law without a knowledge of the nation’s past. Oliver Wendell Holmes said that the life of the law has been experience.<sup>55</sup> What is experience but an account of the felt necessities of particular times—a history, in other words? In a history fully told, students will find much that is shocking and dismaying. They will find a tale of almost unbroken suffering, misery, pain, violence, and death—ongoing, regrettably, to this day. They may well find a guide for how *not* to live their lives; for it is a truism that those who cannot learn from the past are doomed to repeat it.

### III. THE IDEAS AND ATTITUDES SHAPING THE CHARACTER OF LIFE IN THE UNITED STATES

The “ideas and attitudes that have given character to life in the United States”<sup>56</sup> can be summed up in two words— physical dominance. The philosopher Gary Zukav writes that human beings have evolved until now by “exploring physical reality with . . . [their] five senses.”<sup>57</sup> In this way of experiencing the world, he says, “physical survival appears to be the fundamental criterion of evolution because no other kind of evolution is detectable. It is from this point of view that ‘survival of the fittest’ appears to be synonymous with evolution, and physical dominance appears to characterize advanced evolution.”<sup>58</sup> What Zukav describes is the law of the jungle. Throughout history the vast majority of human beings have chosen to live by the seemingly ineluctable first principle of survival.

Physical dominance requires power—the ability by wit, strength, or hard work to control the surrounding environment and all others, human and non-human, who inhabit it. Zukav calls this kind of power “external power” because it “is power over what can be felt, smelled, tasted, heard or seen.”<sup>59</sup> External power, he writes,

can be acquired or lost, as in the stock market or an election. It can be bought or stolen, transferred or inherited. It is thought of as something that can be gotten from someone else, or somewhere else. One person’s gain of external power is perceived as another person’s loss. The result of seeing power as external is violence and destruction. . . .

. . . .

Money is a symbol of external power. Those who have the most money have the most ability to control their environment and those within it . . . . Money is acquired, lost, stolen, inherited and fought for. Education, social status, fame, and things that are owned, if we derive a sense of increased security from them, are symbols of external power. Anything we fear to lose—a home, a car, an attractive body, an agile mind, a deep belief—is a symbol of external power. What we fear is an increase in our vulnerability. This

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<sup>54</sup> *Id.* at 17.

<sup>55</sup> HOLMES, *supra* note XX.

<sup>56</sup> HURST, LAW AND SOCIAL PROCESS, *supra* note XX.

<sup>57</sup> GARY ZUKAV, THE SEAT OF THE SOUL 21 (Fireside ed., 1990) (1989).

<sup>58</sup> *Id.* at 22.

<sup>59</sup> *Id.* at 23.

results from seeing power as external.

When power is seen as external, the hierarchies of our social, economic and political structures, as well as the hierarchies of the Universe, appear as indicators of who has power and who does not. Those at the top appear to have the most power and, therefore, to be the most valuable and the least vulnerable. . . . All perceptions of lesser and greater personal value result from the perception of power as external.

Competition for external power lies at the heart of all violence. . . .

The perception of power as external splinters the psyche, whether it is the psyche of the individual, the community, the nation, or the world. There is no difference between acute schizophrenia and a world at war. There is no difference between the agony of a splintered soul and the agony of a splintered nation. When a husband and a wife compete for power, they engage the same dynamic that humans of one race do when they fear humans of another race.

From these dynamics, we formed our present understanding of evolution as a process of ever-increasing ability to dominate the environment and each other.<sup>60</sup>

The United States today is the richest and most powerful nation on earth. We got that way by carrying what Zukav mordantly calls the *appearance* of advanced evolution to a new level. In the primordial drive to survive, we are hardly unique; but we may be unique in the extent to which we have succeeded. The rise to the top was extraordinarily rapid—a mere two hundred years. Perhaps no other nation ever devoted itself so single-mindedly to achieving physical dominance over the material world, and no other has acquired so much external power. Most of us see this as natural enough. Yet the point Zukav seeks to drive home is that the cost of living this way is pain, suffering, misery, violence, and death.

All of recorded history bears witness to his assertions, but one need look no further than the twentieth century for eloquent confirmation. In this period alone the nation-states of the world inflicted more unnecessary death than in the whole prior history of the human race. More than two hundred million human beings died before their time as the result of “state action”—wars, internecine strife, deliberate starvation, ethnic cleansing, genocide.<sup>61</sup> And no one could begin to reckon the sum total of pain, misery, and suffering that went along with all this calculated death. This is the central reality of our time. It is a reality, I believe, that must be relived again and again in all its excruciatingly painful detail until the enormity of all the slaughter and suffering sinks in and someone finally cries out, “Enough.” There is a choice here, too—perhaps the most fundamental of choices. For as Zinn warns, “[I]n a world of victims and executioners, it is the job of thinking people . . . not to be on the side of the executioners.”<sup>62</sup>

Zinn’s point ricochets off many students. They are young. Unthreatened, sequestered and secure in their artificial house of words, they see no reason to summon the imagination necessary to let the reality of so much slaughter and suf-

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<sup>60</sup> *Id.* at 23, 24-26.

<sup>61</sup> As of 1983, Richard Rubenstein put the count of the unnaturally dead from state action at 150 million. See RICHARD RUBENSTEIN, *THE AGE OF TRIAGE* 160-61 (1983). Since 1983, there have been a number of genocides, wars, sectarian strife, and deliberate starvations. Recent scholarship discloses that Chairman Mao may have killed 70 million of his countrymen in peacetime. See Michiko Kakutani, *China’s Monster, Second to None*, N.Y. TIMES, Oct. 21, 2005 (online ed.) (reviewing JUNG CHANG & JON HALLIDAY, *MAO: THE UNKNOWN STORY* (2005)). Even 200 million may be a conservative estimate.

<sup>62</sup> ZINN, *supra* note XX.

fering sink into the marrow of their bones. They have been nurtured, after all, in a society which markets violence, bloodshed, and death as entertainment—so pervasively, so relentlessly, that the line between the real and the virtual hardly exists anymore. The Great War—“The *Flanders* mud, the slime of putrefying bodies. The accusing sunken eyesockets trodden in the trench floor. The gargled pink froth, and an all-pervading smell.”<sup>63</sup> The firebombing of Hamburg by British and American bombers on the night of July 28, 1943, causing a cyclonic firestorm which destroyed the city and much of its civilian population. In the aftermath, the dead could be reached “only with flamethrowers, so densely did the flies swarm around them, and so thick were the floors and steps of the cellars with slippery finger-length maggots.”<sup>64</sup> The dreaded selection process on the railroad platform at Auschwitz, the casual life-or-death gesture of the SS doctors, *nach links* or *nach rechts*.<sup>65</sup> The fetid jungles of Vietnam, in which American soldiers fought and died for nothing.<sup>66</sup> The killing fields of Cambodia, the rape and murder in Rwanda.<sup>67</sup> Talk about such things is apt to evoke yawns. They’ve seen it all before, usually in glorious color. No one really gets killed or shattered in wars on the big screen and television, which is all most of them know about it. Wars are terrible in a way that words or images can never fully convey.<sup>68</sup> Talk to those who have been there.<sup>69</sup> Talk to Cindy Sheehan, whom the president wouldn’t talk to.<sup>70</sup> Wars are started by politicians but never fought by them.<sup>71</sup> This in itself should

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<sup>63</sup> RICHARD HUGHES, *THE FOX IN THE ATTIC* 108 (1961).

<sup>64</sup> W.G. Sebald, *A Natural History of Destruction*, *THE NEW YORKER*, Nov. 4, 2002, at 66, 73.

<sup>65</sup> See WILLIAM STYRON, *SOPHIE’S CHOICE* 552-63 (Modern Library 1998) (1979).

<sup>66</sup> See BARBARA W. TUCHMAN, *THE MARCH OF FOLLY* 234-377 (Ballantine Books 1984).

<sup>67</sup> See SAMANTHA POWER, *supra* note XX, at 87-154, 329-89.

<sup>68</sup> Wilfred Owen, a British line officer killed in action during the last week of the Great War, left behind perhaps the most moving collection of poetry ever written about the horror of that war and of all war. See, for example, “Anthem for Doomed Youth” and “Strange Meeting.” WILFRED OWEN, *THE COLLECTED POEMS OF WILFRED OWEN* 44, 35-36 (C. Day Lewis ed.) (New Directions ed., 1963). In the preface to his war poetry, Owen writes: “All a poet can do today is warn.” *Id.* at 31.

<sup>69</sup> In the 1950s, I served in the 82nd Airborne Division with a number of officers and enlisted men who had fought in World War II and Korea. Some had made all four of the Division’s combat jumps; some had gone ashore at Normandy in the 2nd Ranger Battalion; some had fought in the South Pacific; some had made the two combat jumps in Korea with the elite 187th Regimental Combat Team. Sometimes they shared bits and pieces of their stories.

<sup>70</sup> See, e.g., Maureen Dowd, *Why No Tea and Sympathy?*, *N.Y. TIMES*, August 10, 2005 (online ed.) (“It’s amazing that the White House does not have the elementary shrewdness to have Mr. Bush simply walk down the driveway and hear the woman out, or invite her for a cup of tea.”). See also Frank Rich, *The Vietnamization of Bush’s Vacation*, *N.Y. TIMES*, August 28, 2005 (online ed.) (noting that “the original, stubborn fact of her grief brought back the dead the administration had tried for so long to lock out of sight”).

<sup>71</sup> Lt. Gen. Greg Newbold, one of the retired generals who spoke out in criticism of the war in Iraq and its mismanagement by Secretary of Defense Donald Rumsfeld, summed it up in a single poignant sentence: “‘My sincere view is that the commitment of our forces to this fight was done with a casualness and swagger that are the special province of those who have never had to execute these missions—or bury the results.’” Maureen Dowd, *The Rummy Mutiny*, *N.Y. TIMES*, April 15, 2006 (online ed.). See also Bob Herbert, *Someone Else’s Child*, *N.Y. TIMES*, June 20, 2005 (online ed.).

tell us something.

In her last essay for *The New Yorker*, Susan Sontag meditated at length on the inadequacy of photographs to convey the horror of war. She ended with these lines:

These dead are supremely uninterested in the living: in those who took their lives, in witnesses—or in us. Why should they seek our gaze? What would they have to say to us? “We”—this “we” is everyone who has never experienced anything like what they went through—don’t understand. We don’t get it. We truly can’t imagine what it was like. We can’t imagine how dreadful, how terrifying war is—and how normal it becomes. Can’t understand, can’t imagine. That’s what every soldier, and every journalist and aid worker and independent observer who has put in time under fire and had the luck to elude the death that struck down others nearby, stubbornly feels. And they are right.<sup>72</sup>

Perhaps there is no substitute for the actual experience of war. But a stimulated imagination is a powerful thing; I don’t think Sontag would disparage the effort to try to imagine—and perhaps to conclude that war is just not worth the cost. That, after all, is the point of her essay.

The United States today is the world’s only superpower. To most law students, it seems natural that we should use this overwhelming power to exact revenge for the horror of September 11th—one historical event, at least, that is cemented in their minds. It seems natural to some that we should use it to shape the behavior of other nations to our liking. Law school, after all, is all about learning how to exert power over others. And it is all the easier for them to think this way since someone else—a pathetically small sliver of Americans, our all-volunteer military—will have to do the fighting while they sit safely at home, following the action, if at all, on Fox News or CNN.<sup>73</sup> Perhaps only the reinstatement of the draft—compulsory military service, without deferments—could bring home to them what the novelist E.L. Doctorow meant in his eloquent condemnation of George Bush and his war of choice in Iraq: “He wanted to go to war,” Doctorow writes, “and he did. He had not the mind to perceive the costs of war, or to listen to those who knew those costs. He did not understand that you do not go to war when it is one of the options but when it is the only option; you go not because you want to but because you have to.”<sup>74</sup> Doctorow’s indictment of Bush is scathing:

But this president does not know what death is. He hasn’t the mind for it. You see him joking with the press, peering under the table for the weapons of mass destruction he can’t seem to find, you see him at rallies strutting up to the stage in shirt sleeves to the roar of the carefully screened crowd, smiling and waving, triumphant, a he-man.

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<sup>72</sup> Susan Sontag, *Looking at War*, THE NEW YORKER, Dec. 9, 2002, at 82, 98.

<sup>73</sup> See David M. Kennedy, *The Best Army We Can Buy*, N.Y. TIMES, July 25, 2005 (online ed.). Of the significance of an all-volunteer military, Kennedy says: “The implications are deeply unsettling: history’s most potent military force can now be put into the field by a society that scarcely breaks a sweat when it does so. We can now wage war while putting at risk very few of our sons and daughters, none of whom is obliged to serve. Modern warfare lays no significant burdens on the larger body of citizens in whose name war is being waged.” *Id.* What is perforce lacking, he thinks, is “civilian society’s deep and durable consent to the resort to arms.” *Id.*

<sup>74</sup> E.L. Doctorow, *The Unfeeling President*, THE EAST HAMPTON STAR, Sept. 9, 2004.

He does not mourn. He doesn't understand why he should mourn. He is satisfied during the course of a speech written for him to look solemn for a moment and speak of the brave young Americans who made the ultimate sacrifice for their country.

But you study him, you look into his eyes and know he dissembles an emotion which he does not feel in the depths of his being because he has no capacity for it. He does not feel a personal responsibility for the 1,000 dead young men and women who wanted to be what they could be.<sup>75</sup>

To attempt to make real the magnitude of so much bloodshed and suffering may be a feckless endeavor. Yet I think the effort has to be made. Confronting this history and the part we have played in it casts in sharp relief our seemingly innate need to control the material world and inevitably forces the question whether all the pain, suffering, and death has been worth it. And it is a useful point of departure for looking at how America has chosen to define itself by physical dominance.

Some dismiss war as too aberrational to serve as a guide to the American character. Perhaps they have in mind a well-defined event like World War II, which began for us in 1941 and ended decisively in 1945, a war we had no choice but to fight. They overlook the fact that America is almost always at "war"—that the word itself is a metaphor for the way we understand life: the War on Alcohol, the Cold War, the War on Crime, the War on Poverty, the War on Drugs, and now the War on Terror. If there's no "real" war ready to hand, we invent one. We need war. We need an enemy—someone we can call the "other," a "they." The most obvious thing about the obvious, Willard Hurst used to say, is that it's likely to be overlooked. And that is how deeply embedded in our psyches the we-they dichotomy is: nobody notices it. In the depths of our being we need somebody or something to fight against. It is how we define and experience ourselves.

Look at our mania for sports. It is competition where all that matters is winning. Look at the national frenzy to devise a system that will produce a "true" national champion in college football, and at the lengths to which athletes are willing to go to win—blood doping, the pervasive use of steroids and other performance-enhancing drugs. Even our children aren't exempt: parents tell their little leaguers that it's only a game, to just have fun, but the first thing they want to know at the end of the day is who won.<sup>76</sup> Look at our politics, where the stakes are unabashedly dominance and control, and where governance in the public interest, to the extent it exists, seems like an afterthought to campaign financing and the fight for reelection. Look at America's vast corporate empire, where competi-

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<sup>75</sup> *Id.* Since Doctorow wrote, the death toll has risen to over 2600, increasing daily. He is not alone in his sense of this president. An author and funeral director writing an op-ed column in the *New York Times* said: "And maybe this is the part I find most distancing about my president, not his fanatic heart—the unassailable sense he projects that God is on his side—we all have that. But that he seems to lack anything like real remorse . . ." Thomas Lynch, *Left Behind*, N.Y. TIMES, August 17, 2005 (online ed.).

<sup>76</sup> See Harvey Araton, *The Burden of Failure Puts Athletes at Risk*, N.Y. TIMES, Aug. 7, 2006 (online ed.). In today's climate, of course, parents are more likely to be in the stands, shrieking curses at the coaches, fighting among themselves, even killing on occasion. What lesson do children learn from this bizarre behavior? See, e.g., Glenn Collins, *Relationships; Forcing Children into Sports*, N.Y. TIMES, Jan. 32, 1983 (archives) (discussing the link between parental pressure to compete in little league and psychosomatic pain in children).

tion is the norm and winning is measured by the price of a company's stock, enhanced as necessary by downsizing, shutting or relocating plants; by outsourcing jobs and firing employees; and by the cynical use of deceptive accounting practices to misrepresent a company's financial condition. And look at our adversarial legal system, which has not progressed much beyond the trial-by-combat mentality of the middle ages. Lawyer-surrogates come into court with their swords drawn and fight to the death. It isn't a game. It's real life in deadly earnest. We are taught to revere drive and ambition—the impulse to be the best, to get ahead, to win. School is supposed to be about learning, but all anyone really cares about are grades and scores, and the intensity of the competition rivals that of corporate board rooms.<sup>77</sup> Look at law schools. Everyone knows that class standing determines the jobs that graduates can realistically compete for, and so legal education transmogrifies from a learning experience into a foot race. Only those in the top ten percent think this is how it should be.

Seldom asked is why this way of living seems so intuitively right. Why do we seek power over the environment that surrounds us and those who inhabit it? We all have a basic instinct for the society and companionship of others; we want and need other people and could hardly imagine life without them. But those upon whom we rely or with whom we interact in our daily lives don't always behave as we think they should. Think of all those who at some time or other have disappointed you: parents, siblings, children, spouses, lovers, roommates, friends, classmates, teachers, bosses, co-workers, agencies and institutions. The common reaction to their shortcomings is anger, a powerful emotion that makes us shout, argue, or protest vehemently. Anger fills us with righteous indignation. Frequently, and crucially, it gives rise to the powerful urge to retaliate, to strike back, often with violence.<sup>78</sup> Acting on anger is the polar opposite of Christ's injunction to turn the other cheek.

Most of us understand anger on the large stage—the almost universal reaction to the attacks of September 11th, for example. What we are prone to overlook in the glare of headlines, however, is how the same impulse infects our daily lives. Children are physically abused by angry parents. Spousal disagreements end in violence. Pro-lifers bomb abortion clinics and murder doctors. On the street the slightest disrespect is answered with gunfire. More and more people carry guns, and state laws are increasingly liberalizing their use: a neighbor settles a petty dispute over garbage bags with a gun. Commonplace road rage ends in gun battles. Children bring guns to school and sometimes use them. Our prison system, with the largest population in the world, is a paradigm of revenge: we vent out anger at those who have broken our rules with draconian mandatory minimum sentences,

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<sup>77</sup> See, e.g., Eugenie Allen, *Harvard or Bust*, N.Y. TIMES, Aug. 6, 2006 (online ed.) (reviewing ALEXANDRA ROBBINS, *THE OVERACHIEVERS: THE SECRET LIVES OF DRIVEN KIDS* (2006)) (high school students buckling under pressure to be perfect); Margaret Talbot, *Best in Class*, THE NEW YORKER, June 6, 2005, at 38 (vicious competition among high-school students for valedictorian).

<sup>78</sup> Franz Kafka captures the universality of this impulse in his cryptic short story "A Fratricide." See FRANZ KAFKA, *A Fratricide*, in *SELECTED SHORT STORIES OF FRANZ KAFKA* 165-67 (Willa Muir & Edwin Muir trans., Modern Library ed. 1952) ("The bliss of murder! The relief, the soaring ecstasy from the shedding of another's blood!"). *Id.* at 167.

and in extreme cases we execute. Children turn to drugs or other dysfunctional behavior to strike back at a world that in some way has disappointed them.

If argument gains nothing, if retaliation is either impossible, impractical, or impolitic, then we internalize anger in the form of resentments. Resentments are a bitter, festering, and corrosive emotion we carry within us like so much stomach acid. We lie awake at night, tossing and turning and running scenarios of revenge and vindication through our heads. We punish ourselves because we can't punish somebody else. Resentments are not only the more common form of anger but in a way the more pernicious. Acting on anger may bring momentary relief—a catharsis of sorts, a vindication. But resentments, in their nature, can't be satisfied. They become the proverbial chip on the shoulder, coloring not only the way we see the object of our ire but the rest of the world too. They predispose us to look for the things that are wrong with that world, to fixate on and criticize the faults, foibles, and shortcomings of others, to perceive slights where none were intended. Consumed with resentments, we find it easy to overlook our own shortcomings—an introspection that if honestly undertaken might reveal that those who hurt us have done so because we, ourselves, did something to them. You can see, for example, the resentments in students whom the system hasn't labeled the best and the brightest. They've been indelibly marked as mediocre or worse, and they react in the only way they can—by becoming indifferent to learning. Whatever enthusiasm they came with is gone, killed by the pernicious power of grades.

Power is so intuitively compelling because it enables us to deal with the unpleasant emotions of anger and resentment. With enough power we can arrange life to suit ourselves. We can compel others to behave as we think they should. Power, like a drug, is addictive. A little sets up the craving for more, and there is no such thing as enough. Power is also the way we deal with fear—the sick, sinking feeling, the ache in the gut, that comes when our physical or emotional security is threatened, when we think we're going to lose something we have or not get something we want. In America, the most conspicuous form of power is money. Money holds out the illusion that we can buy physical and emotional security. With money we can separate ourselves from those who annoy or offend or would take what we have. With money we can live in a gated community or in a penthouse condominium, sealed off and safe from the rabble. We can afford the finer things of life—prestigious cars, a luxurious home, the best schools for our children, travel abroad, the best restaurants, the finest wines, all the amusements and diversionary toys and gadgets our hearts desire. With money we can hire the best attorneys as surrogates in our battle with life. We can command the respect, obedience, and adulation of others. We can buy substances that artificially soften the world and make it seem for a time like a less threatening place. With enough money we can create the illusion of immortality and allay the ultimate fear—the fear of death. Pursuing the things of the world can distract us from thinking about death; cosmetic surgery and personal trainers can restructure our bodies to simulate eternal youth; expensive, state-of-the-art medical care can prolong life itself. Money gives a certain substance to the illusion of security. And in American society, money has long been the common denominator, the outward indicator of status and worth, of who has power and who does not.

For the past several hundred years Western civilization has devoted itself at an accelerating pace to the twin principles of maximizing pleasure and minimizing pain, relying chiefly on science and technology to achieve these goals.<sup>79</sup> Somewhere along the line—conventionally dated to Nietzsche in the late nineteenth century—God died.<sup>80</sup> For many in the Western world he became an irrelevancy: no longer an all-loving, all-knowing, felt presence, but someone who, if he exists at all, is very far away and not overly concerned with us and our frantic scramble to wrest happiness and satisfaction out of life. We are left alone to create meaning and purpose from sheer activity: to prove that we matter simply because we exist. That God’s “death” should have occurred during the full flowering of the industrial revolution in the late 1800s was hardly coincidence.

Americans, for the most part, reject the notion that God is dead. And yet in the quest for physical dominance, in the fierce competition for power and money, in the pursuit of pleasure and the avoidance of pain, our experience stands as the paradigm. But the fruits of all this activity—the stunning scientific and technological achievements, the material prosperity—seem to have brought not happiness and satisfaction so much as an uneasy sense of how dependent we have become on forces we no longer understand and cannot control. The British economist-philosopher E. F. Schumacher put it succinctly: “Every increase of needs tends to increase one’s dependence on outside forces over which one cannot have control, and therefore increases existential fear.”<sup>81</sup> Our “needs” have increased exponentially. We need things today that humanity somehow did without for most of its history. We cannot imagine life without electric power, cars, television, computers, cellphones, air travel, air conditioning, and myriad other so-called modern conveniences. Yet when anything malfunctions, none of us has the slight-

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<sup>79</sup> See, e.g., ANTHONY O’HEAR, *AFTER PROGRESS* 247 (1999). O’Hear, a British philosopher, writes:

Since the eighteenth century we have all shared the same beliefs about science, about humanity and about the past: we have our salvation in our own hands; science and reason hold the key to progress (we believe that even when, as with so much environmentalism, we use science to attack science); human fulfillment consists in the production of pleasure and the avoidance of pain; the way forward (itself a telling, unconscious metaphor) is forgetfulness of the past, of ancient prejudice and outdated repression.

<sup>80</sup> See Claudia Roth Pierpont, *After God*, *THE NEW YORKER*, April 8, 2002, at 82, 82-83 (Nietzsche proclaimed the death of God in *The Gay Science*, published in 1882). Neil Postman says that “Francis Bacon, born in 1561, was the first man of the technocratic age. . . . [I]t was Bacon who first saw, pure and serene, the connection between science and the improvement of the human condition.” NEIL POSTMAN, *TECHNOPOLY* 35 (Vintage Books 1993) (1992). Bacon died in 1626, Postman continues, but

it took another 150 years for European culture to pass to the mentality of the modern world—that is, to technocracy. In doing so, people came to believe that knowledge is power, that humanity is capable of progressing, that poverty is a great evil, and the life of the average person is as meaningful as any other. It is untrue to say that along the way God died. But any conception of God’s design certainly lost much of its power and meaning, and with that loss went the satisfactions of a culture in which moral and intellectual value were integrated.

*Id.* at 38.

<sup>81</sup> E. F. SCHUMACHER, *SMALL IS BEAUTIFUL* 31 (1973).

est idea what to do about it: we are helpless when the power fails, when cars won't start, when cellphones die, when computers crash. It's not just a matter anymore of going to the woodshed for a fresh supply of kerosene.<sup>82</sup> Existential fear is undifferentiated fear: a deep-seated, persistent sensation of anxiety and insecurity. The uneasy sense that we are living precariously, in houses built on sand, is what Schumacher is talking about. He is drawing attention to a paradox: that the more we look for security in things, the less of it we have.

These are hardly novel observations. The world's great religious and spiritual leaders have long warned of the emptiness and futility of living lives dedicated to the pursuit of power. But if this is wisdom, it is wisdom that the United States, preëminently, has chosen not to heed. Instead, as a nation, we have devoted ourselves to the path of physical dominance, apparently in the belief that physical dominance characterizes advanced evolution. Yet what advance is there in this over the mentality of the cave and the jungle? What happened to the other side of the coin: to love, compassion, kindness, generosity, trust, forgiveness, and tolerance? To unselfishness, altruism, and self-sacrifice? Some number of the diverse people who populate this country actually believe in and try to practice these virtues in their daily lives. Their countless little acts of decency, kindness, and self-sacrifice rarely make the news. There are certainly many who still want to believe in the nation's founding principles—in freedom, equality, and justice—but their voices have been stifled or muted. For in the way this nation has chosen to structure itself, the kindness, generosity, decency, idealism, and courage of the American people have been lost—squandered or dissipated by two powerful forces: capitalism and the siren song of empire.

Capitalism is probably the only economic system imaginable for a nation dedicated to the proposition that all men are created equal and endowed by their creator with the right to life, liberty, and the pursuit of happiness.<sup>83</sup> In theory, capitalism frees the human spirit to create its own destiny. It rewards talent, vision, intelligence, hard work, risk-taking, and innovation.<sup>84</sup> As the *Washington Post* said in an editorial, this nation, “[l]acking a unifying religion, ethnicity or even language . . . is held together by an appealing faith: that anyone who works hard and plays by the rules can attain the American dream, sharing the fruits of economic progress.”<sup>85</sup> But the editorial is not a paean to capitalism; it is rather a sharp criticism of the way in which its practice has so sharply diverged from theory, particularly as reflected in the vast disparities of wealth it has created.<sup>86</sup> As-

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<sup>82</sup> For some timely examples of this kind of fear, see JOEL GARREAU, *RADICAL EVOLUTION* 61–62 (2005). A fried hard drive, he says, produces “the classic anxiety attack of our new century—a fight-or-flight reaction when you lose control of the machines that have become part of you. . . . We have bonded with these new machines. They have become part of us and we part of them.” *Id.* at 62. See generally NEIL POSTMAN, *TECHNOPOLY*, *supra* note XX.

<sup>83</sup> When Jefferson wrote these words, of course, he meant “men” literally, and only some men at that. Women were excluded, as were blacks, the very poor, and indentured servants.

<sup>84</sup> There is no better primer for grasping capitalism's aspirational essence than Ayn Rand's *Atlas Shrugged*, her well-known novel published in 1957.

<sup>85</sup> Editorial, *A Rising Tide?*, WASH. POST, March 12, 2006 (online ed.).

<sup>86</sup> See *id.*

serting that “[t]he gap between the rich and everybody else in this country is fast becoming an unbridgeable chasm,”<sup>87</sup> Bob Herbert, an astute op-ed columnist for the *New York Times*, notes that “[f]or every additional dollar earned by the bottom 90 percent of the population between 1950 and 1970, those in the top 0.01 percent earned an additional \$162” while “[f]or every additional dollar earned by the bottom 90 percent between 1990 and 2002 . . . each taxpayer in that top bracket brought in an extra \$18,000.”<sup>88</sup> He adds perspective to these striking numbers:

A big problem, of course, is that American workers have been hurting badly for years. Revolutionary improvements in technology, increasingly globalized trade, the competition of low-wage workers overseas and increased immigration here at home, the decline of manufacturing, the weakening of the labor movement, outsourcing and numerous other factors have left American workers with very little leverage to use against employers.

Many in the middle class are mortgaged to the hilt, maxed out on credit cards and fearful to the point of trembling that all they’ve worked for might vanish in a downsized minute.

. . . .

The American dream was about expanding opportunities and widely shared prosperity. Now we have older people and college grads replacing people near the bottom in jobs that offer low pay, no pensions, no health insurance and no vacations.<sup>89</sup>

Nothing in capitalist theory speaks to how the fruits of economic progress should be shared; capitalism is an economic system, not a moral code. But in practice it has proved to be a compliant handmaiden to a privileged few whose aim is the acquisition of ever-increasing power and wealth. The American dream has been exposed as just that—a dream.

What does it signify to be the richest country on earth if the vast bulk of its wealth is concentrated in the hands of just a few people;<sup>90</sup> if 40 million Americans

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<sup>87</sup> See Bob Herbert, *The Mobility Myth*, N.Y. TIMES, June 6, 2005 (online ed.). In *The Rising Tide*, *supra* note XX, the *Washington Post* says that “Americans have tolerated divisions between rich and poor because they believed that anyone could get ahead, given enough talent and determination. But the truth is that rags-to-riches stories have never been the norm. One study of people reaching adulthood between 1968 and 1998 found that 42 percent of those born into the poorest fifth ended up there also. As the distance between the top and bottom grows wider, it becomes harder to traverse the gulf.” Making something of a mockery of the myth of equality as well as of mobility, these figures also suggest that the socioeconomic class from which one starts has a good to do with where one ends up. Elizabeth Kolbert notes, for example, that “only three per cent of students at the hundred and forty-six most competitive colleges come from families whose levels of education, jobs, and income put them in the bottom socioeconomic quarter. Seventy-four per cent come from the top quarter. More startling, recruitment of minority and low-income students actually fell in recent years.” Elizabeth Kolbert, *Top of the Class*, THE NEW YORKER, Oct. 2, 2006, at 35, 35.

<sup>88</sup> Bob Herbert, *The Mobility Myth*, *supra* note XX.

<sup>89</sup> *Id.*

<sup>90</sup> See The Rational Radical, *Wealth Distribution in U.S.*, Sept. 4, 2001, <http://www.the-rational-radical.com/dsep/wealth-distribution.htm>. Since these date were published, the divide has widened considerably. See Teresa Tritch, *The Rise of the Super-Rich*, N.Y. TIMES, July 19, 2006 (online ed.) (from 2003 to 2004, “real average income for the top 1 percent of households . . . grew by nearly 17 percent. For the remaining 99 percent, the average gain was less than 3 percent . . . .”); Paul Krugman, *Graduates Versus Oligarchs*, N.Y. TIMES, Feb. 27, 2006 (“income and wealth are becoming increasingly concentrated in the hands of a small, privileged elite”); David Cay Johnston, *Corporate Wealth Share Rises for Top-Income Americans*, N.Y. TIMES, Jan. 29, 2006 (“In

eke out an existence at or below the poverty level;<sup>91</sup> if the so-called middle class has seen only minuscule increases in real income while the very rich have grown obscenely richer;<sup>92</sup> if such a rich nation cannot bestir itself to provide national health insurance for its people;<sup>93</sup> if company after company is defaulting, in one way or another, on promises of health and retirement benefits for employees;<sup>94</sup> and if many of our great corporations are laying off workers, closing plants, outsourcing operations, or moving outright to other countries where labor is cheaper and environmental and safety regulations virtually non-existent?<sup>95</sup>

The answer to any of these questions is simple. This is how our version of capitalism works. Capitalism has obviously given us a standard of living inconceivable to most of the world's people. But the lifestyle we take for granted has come with a staggering price. With less than five per cent of the world's popula-

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2003, the top 1 percent of households owned 57.5 percent of corporate wealth, up by 53.4 percent the year before . . .”).

<sup>91</sup> See, e.g., Daniel Altman, *The Disaster Behind the Disaster: Poverty*, N.Y. TIMES, Sept. 18, 2005 (online ed.). Poverty is usually measured by annual income, approximately \$19,000

<sup>92</sup> See, e.g., Editorial, *Life in the Bottom 80 Percent*, N.Y. TIMES, Sept. 1, 2005 (online ed.)

<sup>93</sup> More than 46 million Americans are without health insurance. See, e.g., Associated Press, *U.S. Poverty Rate Unchanged Last Year*, N.Y. TIMES, Aug. 29, 2006 (online ed.) (according to the Census Bureau, the A.P. reports, “the number of people without health insurance increased to 46.6 million in 2005); Matt Bai, *Health Care Is Not an Issue to Tinker With*, N.Y. TIMES, Jan. 29, 2006 (online ed.); Paul Krugman, *Death By Insurance*, N.Y. TIMES, May 1, 2006 (online ed.); Bob Herbert, *Curing Health Costs: Let the Sick Suffer*, N. Y. TIMES, Sept. 1, 2005 (online ed.); David Blumenthal & James Morone, *Waiting for Another L.B.J.*, N.Y. TIMES, July 30, 2005 (online ed.); Malcolm Gladwell, *The Moral-Hazard Myth*, THE NEW YORKER, Aug. 29, 2005, at 44.

<sup>94</sup> For an insightful account of how pension plans and health-care benefits evaporated in American industry, see Malcolm Gladwell, *The Risk Pool*, THE NEW YORKER, Aug. 28, 2006. See also Mary Williams Walsh, *Major Changes Raise Concerns on Pension Bill*, N.Y. TIMES, March 19, 2006 (online ed.) (reporting on pending legislation designed to ensure that corporations meet their obligations on retirement benefits promised to employees).

<sup>95</sup> See, e.g., Micheline Maynard & Jeremy W. Peters, *G.M. to Offer Buyout Deal to More Than 125,000 Workers*, N.Y. TIMES, March 22, 2006 (online ed.) (reporting on an agreement between General Motors, the U.A.W., and Delphi Corp. “that would offer incentives of up to \$140,000 to more than 125,000 workers at the two companies if they agree to leave their jobs”). See also Katharine Weber, *The Factories of Lost Children*, N.Y. TIMES, March 25, 2006 (online ed.) (deaths of children in fires in overseas factories where U.S. has outsourced manufacturing jobs); Brad DeLong, *Americans Idle*, N.Y. TIMES, April 2, 2006 (online ed.) (reviewing *The Disposable American: Layoffs and Their Consequences* by Louis Uchitelle). The author says that Uchitelle’s “real wish is for managers to treat their workers as partners and fellow human beings, rather than as potentially obsolete and disposable parts in the corporate money-making machine. But when demand and industrial structure are shifting rapidly, there is a great deal of money to be made by treating workers as disposable parts rather than as partners.” Harold Meyerson, writing in the *Washington Post*, notes that American workers will soon be in competition with foreign workers for somewhere in the neighborhood of 50 million manufacturing jobs—jobs that potentially could move offshore. Citing the absence of any strategy to keep the most highly skilled jobs at home, he concludes dourly that “American capitalism, dominated by our financial sector, is uniquely wedded to disaggregating companies, thwarting unionization campaigns and offshoring work in a ceaseless campaign to impress investors that it has found the cheapest labor imaginable.” See Harold Meyerson, *Will Your Job Survive?*, WASH. POST, March 22, 2006, at A21 (predictions based on the work of the mainstream economist Alan Blinder).

tion, we consume nearly thirty per cent of the world's resources.<sup>96</sup> We have destroyed or polluted our own environment along with that of other nations whose resources we have exploited.<sup>97</sup> Economic self-interest has again and again dictated foreign-policy decisions that have returned to haunt us. We have supported tyrannical and despotic regimes, hated by their own peoples, if they are "friendly"—a neologism meaning useful to us, either as consumers of our products, suppliers of goods and raw materials, or allies of some sort in whatever war we happen to be waging at the moment.<sup>98</sup> The invasion of Iraq, some have openly said, was all about oil.<sup>99</sup> We are not only the chief producer of greenhouse gases, a major contributor to an unprecedented global warming, but the most feckless in doing anything about it.<sup>100</sup> Selfish behavior in preserving and enhancing our way of life has made us feared and hated around the world.

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<sup>96</sup> See, e.g., The Population Institute, *Population and Consumption*, [http://www. populationinstitute.org/teampublish/71\\_234\\_5215.cfm](http://www.populationinstitute.org/teampublish/71_234_5215.cfm) (last visited May 14, 2006)..

<sup>97</sup> The *New York Times* published a series of articles on gold mining, both here and abroad, and its devastating effects on the environment. See Jane Perlez & Raymond Bonner, *Below a Mountain of Wealth, a River of Waste*, N.Y. TIMES, Dec. 27, 2005 (archives) (Papua New Guinea); Kirk Johnson, *Drier and Tainted Nevada May Be Legacy of a Gold Rush*, N.Y. TIMES, Dec. 30, 2005 (archives) (Nevada). President Bush has pushed to open environmentally sensitive areas of Alaska to oil exploration. See John Cassidy, *Pump Dreams*, THE NEW YORKER, Oct. 11, 2004, at 42, 43. In other areas he has sought to change environmental policy to accommodate business interests. For a few examples of depredations countenanced by his administration, see Bobbie Ann Mason, *Kentucky's Underground Economy*, N.Y. TIMES, Feb. 5, 2006 (online ed.) (the well-known author's description of the kind of strip-mining for coal called "mountaintop removal" in Kentucky and its devastating environmental effects); Osha Gray Davidson, *The Alaska Chainsaw Massacre*, ROLLING STONE, Feb. 5, 2004, at 34 (clear-cutting the Tongass National Forest); Editorial, *Destroying the National Parks*, N.Y. TIMES, August 29, 2005 (online ed.) (opening national parks to off-road vehicles, snowmobiles, and jet skis); Editorial, *A Light in the Forests*, N.Y. TIMES, Sept. 9, 2005 (online ed.) (California, New Mexico, and Oregon file suit to block roll back of environmental protections for national forests). Nicholas Kristof bluntly accuses Bush of reversing a long-standing bi-partisan trend of adding to and protecting forests and wilderness areas, thus increasing "the private exploitation of federal lands even if that means losing their character forever." See Nicholas Kristof, *Staining the Land Forever*, N.Y. TIMES, Sept. 5, 2006 (online ed.).

<sup>98</sup> To assure friendliness—usually translated to mean the protection and promotion of American business interests—the United States has long intermeddled in the affairs of other countries. That history up to and including the Spanish-American War is traced in HOWARD ZINN, *supra* note XX, at 297-320. For an account of our involvement in Vietnam, see BARBARA W. TUCHMAN, *THE MARCH OF FOLLY*, *supra* note XX. In a significant number of cases, our involvement has taken the form of engineering regime changes. A typical example, particularly relevant today, is the 1953 CIA-engineered coup in Iran which overthrew the democratic government of Prime Minister Mohammed Mossadegh and effectively nullified his plan to nationalize the Iranian oil industry. See STEPHEN KINZER, *OVERTHROW* 111-28 (2006). The unforeseen consequences of what must have seemed like an economic triumph at the time are now becoming manifest in the current dispute over Iran's nuclear ambitions.

<sup>99</sup> See Ted Koppel, *Will Fight for Oil*, N.Y. TIMES, Feb. 24, 2006 (online ed.): "Perhaps the day will come when the United States is no longer addicted to oil; but that day is still many years off. For now, the reason for America's rapt attention to the security of the Persian Gulf is what it has always been. It's about the oil."

<sup>100</sup> See, e.g., Elizabeth Kolbert, *The Climate of Man*, THE NEW YORKER, April 25, 2005, at 56 (pt. I), May 2, 2005, at 64 (pt. II), May 9, 2005, at 52 (pt. III). In this survey of current scientific thinking on the phenomenon of global warming and its implications, the author castigates the Bush

This is today. But that we would come to such a pass is there to be read in our history. Standard accounts of America's rise tend to emphasize our considerable industrial and technological achievements and ever-improving material prosperity while minimizing the cost. They seldom dwell on the great alliance between government and powerful corporate interests that tolerated well into the twentieth century some of the most barbaric working conditions on earth. Consider again the early 1930s Gauley Mountain tragedy described above,<sup>101</sup> or read the shocking details of the 1911 Triangle Shirtwaist fire in New York City in which 146 workers, most of them young Jewish or Italian women, were killed because exit doors were locked to prevent theft.<sup>102</sup> Yet in 1918, the Supreme Court could deny Congress the power under the commerce clause to fix the minimum age for employing children in factories.<sup>103</sup> The harbinger of a binge of decisions in this vein, extending roughly from 1900 to 1937 and openly friendly to employers and thus to large and powerful business interests, was the 1897 decision in *Allgeyer v. Louisiana*.<sup>104</sup> There the Court said that the right to make contracts was part of the "liberty" protected by the due process clause.<sup>105</sup> This concept soon resurfaced in the Court's 1905 decision in *Lochner v. New York*,<sup>106</sup> which declared unconstitutional on freedom-of-contract grounds a state statute limiting hours of work.<sup>107</sup>

These decisions legitimized the freedom of employers to fix wages, hours, and working conditions on their own terms. In the richest country on earth,

[a]s late as 1900, 70 per cent of the industrial workers in the country worked ten hours or more each day, and ten years later only 8 per cent were on an eight-hour day. In many industries, the hours were shockingly long: the steel industry had a twelve-hour day and a seven-day week, a schedule maintained for many steel workers until 1923. Hours in the textile industry ranged from 60 to 84 a week, even for the women and little children who constituted a large part of the working force. The wage situation was not much better. From 1880 to 1910 the unskilled laborer commonly earned less than \$10 a week and the skilled worker rarely more than \$20 . . . . During the whole of this 30-year period [1880–1910] the average annual family income of industrial workers was never more than \$650, or of farm laborers more than \$400, figures considerably below that fixed as necessary for a decent standard of living.<sup>108</sup>

At the same time, the decreasing need for skilled workers in the new mass-production industrial setting meant that just about any immigrant off the street

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administration's hostility to environmental measures and its head-in-the-sand posture in relation to the problem. She accuses this nation of retreating "into ever narrower and more destructive forms of self-interest" and concludes with a chilling observation: "It may seem impossible to imagine that a technologically advanced society could choose, in essence, to destroy itself, but that is what we are now in the process of doing." *Id.*, May 9, 2005, at 63 (pt. III).

<sup>101</sup> See *supra* note XX & accompanying text.

<sup>102</sup> See HAROLD EVANS, *supra* note XX, at 120-21. The factory was on floors eight to ten, beyond the reach of the tallest fire ladders.

<sup>103</sup> See *Hammer v. Dagenhart*, 247 U.S. 251, 275-77 (1918).

<sup>104</sup> 165 U.S. 578 (1897).

<sup>105</sup> *Id.* at 589.

<sup>106</sup> 198 U.S. 45 (1905).

<sup>107</sup> For a concise summary of decisions during this period, see WILLIAM COHEN & JONATHAN D. VARAT, *CONSTITUTIONAL LAW* 514-31 (9th ed. 1993).

<sup>108</sup> 2 MORISON ET AL., *supra* note XX, at 93.

would do; wages reflected this reality, increasing the divide between the rich and the poor. Statistics from 1890 give some indication of the vast disparity in wealth which our version of capitalism produced. They show that 75 percent of the nation's wealth was concentrated in the hands of one percent of its families, 80 percent in the hands of slightly more than 10 percent.<sup>109</sup>

Conventional histories don't linger on the millions of workers—men, women, and pathetically children—who toiled for a pittance in the coal and iron mines, textile mills, foundries, steel mills, and sweat shops, often twelve hours a day, seven days a week. Nor is much said of the thousands who were either killed outright or maimed or ruined in health by unsafe working conditions, then callously discarded while the legal system looked the other way.<sup>110</sup> Law students learn little of the full extent to which a supposedly representative government, with its legitimate monopoly of force and a complicit legal system, threw its massive weight behind the interests of business. Every competing economic theory was ruthlessly suppressed. Communism, socialism, syndicalism, and anarchism—these were movements of class warfare, the protest and outrage of vast numbers of workers against inhumane working conditions and the grossly unequal distribution of the fruits of economic progress. These movements originated in Europe in the latter half of the 19th century.<sup>111</sup> The anarchist movement burned itself into

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<sup>109</sup> In 1989 dollars, the *wealthy classes*—those with annual incomes of \$692,000 or more—consisted of 125,000 families with an aggregate wealth of \$456,720,000,000 and an average wealth per family of \$3,653,760. The *well-to-do*—those with annual incomes of \$69,200 to \$692,000—comprised 1,375,000 families with an aggregate wealth of \$318,320,000,000 and an average family wealth of \$221,440. The *middle classes*—those with annual incomes of \$6,920 to \$69,200—consisted of 5,500,000 families with an aggregate wealth of \$113,488,000,000 and an average family income of \$20,760. The *poorer classes*—those with annual incomes of \$6,920 or less—consisted of 5,500,000 families with an aggregate wealth of \$11,072,000,000 and an average family income of \$2,076. See HAROLD EVANS, *supra* note XX, at 77.

<sup>110</sup> Throughout the 19th century and into the early 20th, the legal system clung to the common-law fellow-servant rule, which freed employers from the overhead costs of on-the-job injuries, those in which one employee was injured by the negligence of a fellow-employee. The rule was first announced in *Farwell v. Boston & Worcester RR. Corp.*, 45 Mass. (4 Met.) 49 (1842), and quickly adopted in every state even as the toll of death and injury mounted staggeringly. As Lawrence Friedman puts it, “Politically, the rage of the victims counted for very little in 1840, not much in 1860; [but] by 1890, it was a roaring force.” LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 417 (1973) In the single state of Wisconsin, for the period 1874 to 1890, 615 railroad employees were killed and 4,229 were injured. See ROBERT S. HUNT, *LAW AND LOCOMOTIVES* 155 (1958). By 1885, seven states had enacted statutes modifying the fellow-servant rule, recognizing that some of the costs of on-the-job injuries should be borne by the employer like any other cost of doing business. See WALTER F. DODD, *ADMINISTRATION OF WORKMEN'S COMPENSATION* 13-16 (1936). But it would be another three decades before workers compensation statutes began to proliferate and take some account of the overhead cost of job-related injuries. New York's attempt to enact a form of workers compensation legislation ran afoul of the freedom-of-contract principle and was declared unconstitutional. See *Ives v. South Buffalo Ry. Co.*, 94 N.E. 431 (N.Y. 1911). In 1915 the New York Court of Appeals finally approved a revised version, and in 1917, the Supreme Court upheld the statute, opening the door for other states gradually to follow. See *New York Central R. Co.*, 243 U.S. 188 (1917). Here at last was some recognition of the human costs in life and limb which industrialization exacted.

<sup>111</sup> For a concise overview of the socialist and anarchist movements, see BARBARA W. TUCHMAN, *THE PROUD TOWER* 407-62 (Ballantine Books 1966) (1962) (socialism); 63-113 (anarchism).

the American public mind with the assassination of President William McKinley in 1901 by a probably deranged Leon Czolgosz, who claimed to have been influenced by the speeches of the radical anarchist Emma Goldman. Czolgosz was promptly executed, and Goldman eventually deported. The socialist movement was emasculated at every turn: strikes were broken, unions crushed, and labor leaders imprisoned or deported. What does anyone know today of the great strike of 1877,<sup>112</sup> the Haymarket tragedy,<sup>113</sup> the strike at the Homestead works of the Carnegie Steel Corporation,<sup>114</sup> or the Pullman strike?<sup>115</sup> To understand this history

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<sup>112</sup> See 2 MORISON, ET AL, *supra* note XX, at 93-94: “The first great industrial conflict in our history came in 1877 when the four Eastern trunk railroads jauntily announced a wage-cut of 10 per cent, the second since the panic of 1873. . . . Only the most far-sighted realized that the country had reached a state of industrial evolution which meant that the ‘Great Strike’ of 1877 would be only the first of a long series of battles between labor and capital.”

<sup>113</sup> The Haymarket tragedy occurred in 1886 during a series of strikes by the Knights of Labor and other unions for the eight-hour day. A long strike at the McCormick Reaper Works in Chicago culminated in a riot on May 3 in which a number of workers were killed or injured. The next day several thousand workers gathered in protest at Haymarket Square. Though the demonstration was peaceful, someone—a person whose identity to this day is unknown—threw a bomb into a group of policeman; seven people were killed and more than sixty injured. Eight of the workers’ spokesmen and leaders were arrested and tried for inciting the actual killing. All eight were convicted; seven were sentenced to hang and one to imprisonment for 15 years. One of the eight committed suicide while awaiting execution; four were hanged. Six years later, convinced that the trial had been a farce, Governor John Peter Altgeld pardoned the three remaining “conspirators.” Haymarket became a worldwide symbol of protest for anarchists, socialists, and working men and women generally against the perceived injustices of the capitalist system. Haymarket is generally considered the first “red scare” in the United States and the trial itself one of the most unjust in American legal history.

<sup>114</sup> See, e.g., HAROLD EVANS, *supra* note XX, at 36 (“Carnegie Smashes the Union”).

<sup>115</sup> In 1894, workers of the Pullman Palace Car Co. struck in protest at George Pullman’s refusal to discuss grievances with his employees. Under the leadership of the charismatic Eugene V. Debs, the American Railway Union voted to boycott all Pullman cars. In the North, rail transportation came to a virtual halt. An injunction was obtained in federal court, and President Cleveland “declared that he would use every dollar in the Treasury and every soldier in the army if necessary to deliver a single postcard in Chicago.” 2 MORISON ET AL, *supra* note XX, at 95. On July 4th he ordered a regiment of regulars to the city although Governor Altgeld had the situation well in hand and protested against the presence of federal troops. Debs defied the injunction and was imprisoned for six months for contempt of court. His conviction was upheld by the Supreme Court in *In re Debs*, 158 U.S. 564 (1895), but with a curious result. During his imprisonment, Debs read widely in socialist literature and became what he had not been before—a socialist. In 1897 he organized the Social Democratic Party of America and was its candidate for president in five elections from 1900 to 1920. See, e.g., THE READER’S ENCYCLOPEDIA 281 (William Rose Benét ed., 1948). Ironically, many of the principles he stood for—among them hours of work, retirement benefits, safe working conditions—have become an accepted part of the American landscape. On July 7, a confrontation between the strikers and the police erupted in violence: “thirteen people were killed, fifty-three seriously wounded, seven hundred arrested. Before the strike was over, perhaps thirty-four were dead. With fourteen thousand police, militia, troops in Chicago, the strike was crushed.” HOWARD ZINN, *supra* note XX, at 281. As these instances make clear, the labor injunction, augmented by force if necessary, became the single greatest weapon of employers in breaking strikes. It was a tactic that would continue until the passage of the Wagner Act in 1935. See National Labor Relations (Wagner) Act of 1935, Pub. L. No. 198, 49 Stat. 449 (codified as amended at 29 U.S.C. §§ 151-169 (2000)). Other tactics included the use of “goon squads”—often

is to understand just how great the divide was between the few who owned the means of production and the many who had no choice but to toil for them. It is also to understand what our version of capitalism cost in human life and limb.

In the name of free enterprise and open markets, government presided benignly over the formation of great combinations of private capital. By the end of the nineteenth century, John D. Rockefeller had monopolized the oil industry, becoming in the process the richest man on earth; the E.C. Knight Company controlled 98 percent of the nation's sugar; the financier J.P. Morgan combined many of the railroad companies, then bought the Carnegie Steel Corporation and merged it with other companies to create United States Steel, the nation's largest corporation; Washington Duke's American Tobacco Company monopolized the manufacture and marketing of tobacco products; and Armour and Swift between them controlled meat production and distribution in the nation.<sup>116</sup> This was the fabled Golden Age of capitalism—an era in which the interests of government and the interests of big business were virtually indistinguishable. It was an era, too, that validated John Jay's famous maxim that "[t]he people who own the country ought to govern it."<sup>117</sup> In fact, they did. Those who ruled corporate empires were powerful enough to see to it that only like-minded men were elected to high office.<sup>118</sup>

Nothing, it seemed, could stand in the way of the progress and prosperity promised by the industrial and technological revolution that blossomed in this nation in the late nineteenth and early twentieth centuries. Concern for the human and environmental costs of such exponential growth was deferred to another day, and the few cases that students read from this era offer little more than rationalizations for all this activity. Judges, too, had an active stake in progress and prosperity. But then came the interregnum—a period spanning the years from roughly 1930 to 1970. The cause was the Great Depression, the worst in the nation's his-

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Pinkerton detectives—to break picket lines; the permanent replacement of striking workers with scabs; and the lockout.

<sup>116</sup> Congress was not entirely indifferent to the mounting protest of its constituents. In 1877 it created the Interstate Commerce Commission to regulate the railroad industry, with a particular eye to collusive and discriminatory rate fixing. In 1890 it enacted the Sherman Anti-trust Act, which, despite its sweeping language, was largely emasculated by the courts in its early years. The Pure Food and Drug Act of 1906 was a response to a public shocked and sickened by Upton Sinclair's depiction of conditions in the meat-packing industry in his novel *The Jungle*. Some of the great corporations, of course, were eventually forced to disaggregate.

<sup>117</sup> John Jay was one of the founding fathers, the author of several of the Federalist Papers, and the first Chief Justice of the Supreme Court. See WIKIPEDIA, *John Jay*, at <http://en.wikipedia.org/wiki/John>.

<sup>118</sup> For example, the Ohio industrialist Mark Hanna, who became a powerful and influential senator. Thomas Frank writes in a column for the *New York Times* that "[t]he figure who towers over this dialectic of graft as it roars to its consummation [today] is the greatest of the 19th-century political commanders, the industrialist Mark Hanna, who managed the 1896 presidential campaign of William McKinley. Hanna was famously quoted as saying openly what his contemporaries would say only privately: that we were ruled by 'a business state,' and that 'all questions of government in a democracy were questions of money.'" Thomas Frank, *A Distant Mirror*, N.Y. TIMES, Aug. 15, 2006 (online ed.). Hanna virtually extorted huge sums of money from corporations and spent lavishly to ensure McKinley's election in 1890 and again in 1896. He is credited with running the first modern political campaign.

tory, which began with the stock market crash in 1929. In 1932, the political house was swept clean: Franklin Roosevelt, a Democrat, became president and promptly set about implementing his New Deal.<sup>119</sup> Roosevelt was hardly anti-business, as his critics sometimes claim; but he believed that government did not exist solely for the benefit of America's corporate empire; he believed it also had an obligation to help those in need.<sup>120</sup> Out of this period grew the regulatory state that we know today—a vast federal bureaucracy with its myriad of administrative agencies charged with ensuring financial stability, public health and safety, the rights of workers, safe working conditions, equal employment opportunity, and environmental protection. Some of the worst abuses that an unregulated society had tolerated were curbed, but what was to have been the crowning achievement—Lyndon Johnson's vision, during the 1960s, of carrying the spirit of the New Deal further and creating a Great Society without racial discrimination or poverty—foundered on his commitment to the disastrous war in Vietnam.<sup>121</sup> The legacy of this era was Big Government, anathema to conservatives and the Republicans who speak for them, but so much a part of the landscape that it could not easily be dismantled. In 1980, with the election of Ronald Reagan as president, the pendulum began to swing the other way. After a forty-year diaspora, Republicans gradually regained power, capturing both houses of Congress in 1994 and electing George W. Bush as president in 2000. They have not succeeded in getting rid of the regulatory state—often contemptuously called “the welfare state” by conservatives—but they have enfeebled it at every opportunity.<sup>122</sup> The

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<sup>119</sup> See, e.g., 2 MORISON ET AL., *supra* note XX, at 471-525.

<sup>120</sup> See, e.g., THE READER'S COMPANION TO THE AMERICAN PRESIDENCY, *supra* note XX, at 373-78.

<sup>121</sup> See, e.g., *id.* at 436-45.

<sup>122</sup> Law making is one thing, effectiveness another. Effectiveness depends in part on the good faith of regulated entities, strikingly lacking in any number of cases. The Enron collapse has become a symbol for the era of corporate greed and malfeasance that prevailed in the 1990s. See, e.g., Kurt Eichenwald, *In Enron Case, a Verdict on an Era*, N.Y. TIMES, May 26, 2006 (online ed.); John Cassidy, *The Greed Cycle*, THE NEW YORKER, Sept. 23, 2002, at 64; Jane Mayer, *The Accountants' War*, THE NEW YORKER, April 22 & 29, 2002, at 64; Andrew Cohen, *The Enron Fallout Fell Out Years Ago*, WASH. POST, May 26, 2006 (online ed.). Recent deaths in coal mines have revealed “the sad truth . . . that safety equipment and rescue procedures have been scandalously neglected for years under company-friendly regulations that have been laxly enforced by government agencies stocked with political appointees who have come from the coal industry.” Editorial, *Death in the Mines, Action in Congress*, N.Y. TIMES, May 26, 2006 (online ed.). Barbaric working conditions still exist in the meat-packing industry. See Bob Herbert, *Where the Hogs Come First*, N.Y. TIMES, June 15, 2006 (online ed.); Bob Herbert, *On the Killing Floor*, N.Y. TIMES, June 19, 2006 (online ed.). And it is well known that administrative agencies are often captured by the industries they are supposed to regulate. See, e.g., Jane Mayer, *supra*, at 66.

Effectiveness depends also on enforcement, which has run the gamut from vigorous to slipshod to virtually nonexistent. It is hardly a secret that much of this is political at a very fundamental level. Republicans, the current administration in particular, favor less rather than more regulation; if they could, they would cheerfully dismantle much of the vast regulatory state whose origins trace to the policies of the New Deal. The Republicans' favorite strategy today for dismantling “big government” is called “privatizing,” “outsourcing,” or “competitive sourcing.” The stated goal of administration policy, as Frank Rich puts it in a critical editorial, “was to deliver ‘high-quality services to our citizens at the lowest cost.’” Instead, Rich says, “The result was low-

interests of corporate America have once again come to the fore. Looking at the country and its governance today, a dispassionate observer might say that the second Golden Age of capitalism, American style, has been ushered in with a vengeance unparalleled in history.

Students cannot understand what is happening today without a knowledge of this history. They cannot understand what the great debate is all about—why the nation is so evenly and bitterly divided between, for want of more descriptive terms, conservatives and liberals. They cannot grasp what is at stake. These remarks are not meant as political propaganda. Obviously roughly half of the country approves of the present course. We deal here with a very fundamental value judgment to which there is neither a right nor a wrong answer. My concern is that whatever answer students give be an informed one. It should know the trade-offs in death, injury, misery, and suffering which an unfettered market-economy philosophy has exacted. Capitalism is not an economic theory of selfishness and greed as its critics sometimes assert. But it does offer an ideal playing field for a people committed to the path of physical dominance. An article of faith in the corporate world is that businesses either grow or die. As our economy expanded, it

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quality services at high cost: the creation of a shadow government of private companies rife with incompetence and corruption.” See Frank Rich, *The Road From K Street to Yusufiya*, N.Y. TIMES, June 25, 2006 (online ed.). This philosophical side of governance is temperamentally more inclined either to do nothing, see, e.g., Elizabeth Kolbert, *supra* note XX (global warming); to underfund or muzzle agencies, see, e.g., Thomas L. Friedman, *C.E.O.’s, M.I.A.*, NEW YORK TIMES, May 25, 2005 (online ed.); Andrew C. Revkin, *Climate Expert Says NASA Tried to Silence Him*, N.Y. TIMES, Jan. 29, 2006 (online ed.); or to interpret, bend, or break existing rules in favor of business interests. The preferential treatment given Halliburton’s no-bid contracts in Iraq—and Vice-President Dick Cheney’s former association with the company—has raised eyebrows in more than one quarter. See Jane Mayer, *Contract Sport*, THE NEW YORKER, Feb. 6 & 23, 2004, at 80. In an editorial, the *New York Times* castigated the Bush administration for demoting “the top contract overseer of the Army Corps of Engineers after she complained of irregularities in the awarding of a multibillion-dollar no-bid Iraq contract to a subsidiary of Halliburton . . . .” See Editorial, *Banished Whistle-Blowers*, N.Y. TIMES, Sept. 1, 2005 (online ed.). The editorial also notes the firing of the director of the Justice Department’s Bureau of Justice Statistics when he refused to water down “a study’s finding that blacks and Hispanics were subject to more searches and force in police traffic stops.”

Commenting on the administration’s inept response to Hurricane Katrina, Paul Krugman, the eminent economist and an op-ed columnist for the *Times*, says that “[b]y now everyone knows that the Bush administration treated the Federal Emergency Management Agency as a dumping ground for cronies and political hacks, leaving the agency incapable of dealing with disasters. But FEMA’s degradation isn’t unique. It reflects a more general decline in the competence of government agencies whose job is to help people in need.” See Paul Krugman, *Tragedy in Black and White*, N.Y. TIMES, Sept. 19, 2005 (online ed.). In an earlier column, Krugman named some of the agencies which he thinks have been “crippled by politicization, cronyism and/or the departure of experienced professionals.” See Paul Krugman, *All the President’s Friends*, N.Y. TIMES, Sept. 12, 2005 (online ed.). The list included the Environmental Protection Agency, the Office of Solid Waste and Emergency Response, the Food and Drug Administration, the Corporation for Public Broadcasting, the Treasury Department, and the Department of Homeland Security. *Id.* For an extended argument that the line separating science from politics, ideology, and religion has been dangerously blurred under the Bush administration, see Michael Specter, *Political Science*, THE NEW YORKER, March 13, 2006, at 58. The author cites a number of disquieting examples in support of his assertion that “[f]rom the start of his first term, George W. Bush seems to have been guided more by faith and ideology than by data in resolving scientific questions.” *Id.* at 61.

was inevitable that saturation points in various markets in this country would be reached and that those who rule corporate empires would look beyond the boundaries of the United States, both for new markets and for the raw materials necessary to fuel continued growth. Capitalism, in our version, is inherently expansionist, and its interests are therefore inextricably bound up in our relations with the wider world. It is well to bear this fact in mind in considering what follows. Economic self-interest is never far below the surface in our dealings with other nations.

To clear the playing field for growth and prosperity, the people of the newly minted United States first engaged in genocide, exterminating in one way or another most of the troublesome Native Americans who had already settled our “unsettled” continent.<sup>123</sup> We then expanded the playing field in 1845 by provoking a war with Mexico in which we took by force of arms slightly less than half of that country—Texas to the Rio Grande, California, New Mexico, Arizona, and parts of Colorado and Nevada—thereby establishing the boundaries of the United States that exist today.<sup>124</sup> In 1898, we annexed Hawaii against its will and provoked a war with Spain. These ventures were vehemently opposed by many of the leading intellectuals, writers, and politicians of the day, all of whom thought America’s actions an abject betrayal of all this nation stood for.<sup>125</sup> War fever was whipped up by yellow journalism. The newspapers excelled in depicting, often spuriously, the plight of the Cuban insurrectionists under the iron heel of Spanish rule. These lurid accounts roused the humanitarian impulse of Americans, who after all had won their freedom the hard way.<sup>126</sup>

Calculating politicians and businessmen quickly grasped the economic benefits that would flow from controlling Cuba: a new market for American products and for the investment of capital, and a rich source of sugar and other products.<sup>127</sup> Captain Alfred Thayer Mahan’s enormously influential writings on sea-power told its eager consumers that we had to command the eastern and western approaches to the projected isthmian canal,<sup>128</sup> the Monroe Doctrine told us that the

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<sup>123</sup> For a sense of how this was accomplished, see HOWARD ZINN, *supra* note XX, at 125-48. The Indian point of view is captured eloquently in BLACK ELK SPEAKS (as told through John G. Neihardt) (Washington Square press, 1959) (1932).

<sup>124</sup> See 1 MORISON ET AL., *supra* note XX, at 537-56.

<sup>125</sup> Tuchman lists, among others, Charles Eliot Norton, Professor of Fine Arts at Harvard and perhaps the most distinguished academician of his day; E.L. Godkin, editor of the *Nation*; Charles William Eliot, President of Harvard; the novelist William Dean Howells; the philosopher William James; the author Mark Twain; former President Cleveland; Samuel Gompers, president of the AFL; Andrew Carnegie; and the great Speaker of the House Thomas Reed. These men and many others founded the Anti-Imperialist League, which spoke out against war, territorial acquisition, and imperialism. See *id.* at 139-40, 146, 152-53.

<sup>126</sup> See *id.* at 145.

<sup>127</sup> See *id.* at 146.

<sup>128</sup> Mahan published *The Influence of Sea Power on History* in 1890. His book was devoured around the world, particularly in Great Britain, Germany, and Japan; it and his continuing essays and books made the control of Cuba and Hawaii seem imperative to protect the isthmian canal. His views led to a radical upgrading of the navy, in particular the construction of four state-of-the-art battleships. Theodore Roosevelt and Henry Cabot Lodge immediately became disciples of Mahan. See *id.* at 130-36.

Western Hemisphere was our sphere of influence. And then there were those—among them the powerful Senator Henry Cabot Lodge and Theodore Roosevelt, both disciples of Mahan—who were convinced of the importance of sea-power and who burned with that peculiar fervor called manifest destiny. The explosion of the battleship *Maine* in Havana harbor—still unexplained, easily blamed on the Spanish at the time, but today attributed by most expert opinion to our own negligence—gave us all the excuse we needed to begin the war.

We defeated the Spanish with relative ease. The Treaty of Paris formally ended hostilities with Spain and effectively expelled it from the hemisphere. For a token payment of twenty million dollars, the treaty transferred sovereignty of the Philippines and other smaller islands to the United States, gave us a protectorate over Cuba, and the possession of Puerto Rico outright. The heated debate in the Senate over ratification of the treaty is some indication of the depth of division over the course America had set herself upon. It was ratified in 1899 by a single vote.<sup>129</sup> Barbara Tuchman recounts the sarcastic reaction of the great Speaker of the House Thomas Reed, who had ardently opposed the imperialist and expansionist fever: “‘We have bought ten million Malays at \$2.00 a head unpicked,’ remarked Reed acidly, and in the most prescient comment made by anyone at the time, he added, ‘and nobody knows what it will cost to pick them.’”<sup>130</sup>

It turned out to cost a great deal. The Filipinos were intent on independence and self-determination and fiercely resisted the substitution of one colonial master for another. Led by Emilio Aguinaldo, the Filipinos fought on for three years in a particularly cruel and bloody guerrilla war before finally yielding to superior force. At one point some 75,000 American soldiers were engaged in this war. Casualties were high, particularly among the Filipinos, and the war, as it went on, was prosecuted with singular brutality. Some of the acts of American soldiers—the use of dum-dum bullets, for example—would probably be labeled war crimes today.<sup>131</sup> America had reached a crossroads on the international stage, and it had chosen the path of imperialism. As recounted by Barbara Tuchman, the eloquent orator Albert Beveridge, soon to be a senator, put the case for the imperialists on the eve of war in words that echo uncomfortably today:

“We are a conquering race,” he proclaimed . . . “We must obey our blood and occupy new markets and if necessary new lands. . . . In the Almighty’s infinite plan . . . de-based civilizations and decaying races” were to disappear “before the higher civilization of the nobler and more virile types of man.” . . . He saw in present events “the progress of a mighty people and their free institutions” and the fulfillment of the dream “that God had put in the brain” of Jefferson, Hamilton . . . and other “imperial intellects”; the dream “of American expansion until all the seas shall bloom with that flower of liberty, the flag of the great Republic.” It was not so much liberty as trade that Beveridge saw following the flag. American factories and American soil, he said, were producing more than the American people could consume. “Fate has written our policy for us; the trade of the world must and shall be ours. . . . We will cover the ocean with our merchant marine. We will build a navy to the measure of our greatness. . . . American law, American order, American civilization will plant themselves on those shores hitherto bloody and be-

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<sup>129</sup> See *id.* at 150-61.

<sup>130</sup> *Id.* at 158.

<sup>131</sup> See *id.* at 163-66.

nighted but by those agencies of God henceforth to be made beautiful and bright.”<sup>132</sup>

The *Washington Post* joined, too, in the clamor for a war: “‘Ambition, interest, land-hunger, pride, the mere joy of fighting, whatever it may be . . . we are animated by a new sensation. . . . The taste of Empire is in the mouth of the people even as the taste of blood in the jungle.’”<sup>133</sup> It was left to Professor Charles Eliot Norton to supply the elegy for those who opposed imperialism: “‘I have been too much of an idealist about America, had set my hopes too high, had formed too fair an image of what she might become. Never had a nation such an opportunity; she was the hope of the world. Never again will any nation have her chance to raise the standard of civilization.’”<sup>134</sup>

Of the twentieth century, history will record that the United States engaged in the functional equivalent of a second Hundred Years’ War:<sup>135</sup> the Great War, World War II, and the forty-year Cold War, which turned fiercely hot in Korea and Vietnam, and the First Gulf War. All of these wars were fought ostensibly to make the world safe for freedom and democracy but, by necessary implication, to preserve and enhance our way of life as well. All cost heavily in blood and wealth,<sup>136</sup> but in many ways Vietnam occupies a niche of its own. It was a war of our own choosing, one that we didn’t need to fight. It was a war that gained nothing while costing much: the sacrifice of our reputation around the world, and at home the American people’s loss of trust in their government. As Barbara Tuchman writes, “For many, confidence in the righteousness of their country gave way to cynicism. Who since Vietnam would venture to say of America in simple belief that she was the ‘last best hope of earth’? What America lost in Vietnam was, to put it in one word, virtue.”<sup>137</sup> Her criticism of this venture is excoriating and resonates powerfully today:

In the illusion of omnipotence, American policy-makers took it for granted that on a given aim, especially in Asia, American will could be made to prevail. This assumption came from the can-do character of a self-created nation and from the sense of competence and superpower derived from World War II. If this was “arrogance of power” . . . it was not so much the fatal hubris and overextension that defeated . . . Germany and Japan, as it was failure to understand that problems and conflicts exist among other peoples that are

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<sup>132</sup> *Id.* at 153-54.

<sup>133</sup> *Id.* at 150.

<sup>134</sup> *Id.* at 167. He also said that America “‘has lost her unique position as a leader in the progress of civilization, and has taken up her place simply as one of the grasping and selfish nations of the present day.’” *Id.* at 161.

<sup>135</sup> See generally NIALL FERGUSON, *THE WAR OF THE WORLD* (2006).

<sup>136</sup> We entered World War I belatedly in 1917 when Germany took the fateful decision to resume unrestricted submarine warfare in hopes of starving Britain to death before we could act. This decision, which inevitably meant the sinking of our ships and the loss of American life, forced Wilson’s hand and led him to ask for a declaration of war on April 2, 1917. Our participation lasted for just over a year but was decisive in tipping the balance in favor of the Allies. Even so, our losses were heavy: 114,000 killed with total casualties of 324,170. See NIALL FERGUSON, *THE PITY OF WAR* 295 & table 32 (1999). In World War II we had little choice but to fight, roused to action by the Japanese sneak attack on Pearl Harbor in 1941 and the declarations of war by Japan and Germany that immediately followed. Our losses in that war were 292,000 killed. See JOHN KEEGAN, *THE SECOND WORLD WAR* 591 (Penguin Books, 1990) (1989).

<sup>137</sup> BARBARA W. TUCHMAN, *THE MARCH OF FOLLY*, *supra* note XX, at 374.

not soluble by the application of American force or American techniques or even American goodwill. “Nation-building” was the most presumptuous of the illusions. . . . [O]nly the inhabitants can make the process work.<sup>138</sup>

We all but destroyed a country to make it safe for freedom and democracy. We lost over 50,000 killed and countless others maimed in body and spirit, at a cost of \$20 billion a year for ten years. Hundreds of thousands of Vietnamese perished, many of them innocent civilians, women and children. Half a million American soldiers and overwhelming air power were fought to a standstill by what American policy planners contemptuously thought of as a fourth-rate nation, a rabble of Asians. We fatally underestimated the determination of the Vietnamese to unite their country and free it of foreign domination.<sup>139</sup> It was the first war that America lost.

Since 1990, the United States has been the world’s only superpower. Despite the absence of threat posed by the erstwhile Soviet Union, we continue to spend more on the ability to wage war than the rest of the world’s nations combined. Such overwhelming power raises the troubling question of empire. In his study of the rise and fall of the British Empire, the acclaimed historian Niall Ferguson writes that “[p]erhaps the most burning contemporary question of American politics is, Should the United States seek to shed or to shoulder the imperial load it has inherited [from Great Britain]?”<sup>140</sup> In a later book, he directly considers this question.<sup>141</sup> He believes that the United States is well positioned in its wealth and power to shoulder the burden of empire; indeed, he argues that we have long been an empire, albeit one in denial, and he thinks that “many parts of the world would benefit from a period of American rule.”<sup>142</sup> But the word “empire,” in America’s case, needs careful qualification. We have no territorial ambitions. We have no wish to rule other countries as Great Britain once ruled India. We have no tradition of colonization in the grand European style of the nineteenth century.<sup>143</sup> When we intermeddle in the affairs of other nations, our strategy is one of in and out. We have, as Ferguson notes, a very short attention span, one not conducive to ruling a country or to effective nation building.<sup>144</sup> Temperamentally, Americans would prefer to stay at home.

In what sense, then, is America an empire? President Bush has now proclaimed that it is the divinely ordained mission of the United States to spread

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<sup>138</sup> *Id.* at 357.

<sup>139</sup> *Id.* at 376.

<sup>140</sup> NIALL FERGUSON, *EMPIRE, Introduction*, at xii (2002).

<sup>141</sup> *See* NIALL FERGUSON, *COLOSSUS* (2004).

<sup>142</sup> *See id.* at 2, 301-02.

<sup>143</sup> Ferguson makes the salient point that unlike Great Britain, we have no tradition of foreign-service administrators with knowledge of the culture, language, and history of other countries. *See id.* at 209-11. He notes that “[a]t Oxford and Cambridge a hundred years ago ambitious students dreamed of passing the ICS [Indian Civil Service] exam and embarking on careers as imperial proconsuls. Today the elite products of the Ivy League set their sights on law school or business school . . . .” *Id.* at 211.

<sup>144</sup> *See id.* at 293 (footnote omitted); *see generally id.* at 286-302.

freedom and democracy to other nations and to end tyranny in the world.<sup>145</sup> His rhetoric uncannily echoes that of Woodrow Wilson,<sup>146</sup> and it sounds suspiciously like the language of empire—a declaration of intent to shape the entire world in our own image. His words have a noble ring and resonate with Americans, whose hearts have always gone out to oppressed peoples, and who for the last five years have been systematically terrorized by terrorism—told over and over again that “Islamofascists” pose a deadly threat to our national security. But if Vietnam and now Iraq have taught us anything, it is that freedom and democracy can’t be imposed on a people by main force. It is a lesson President Bush might have learned had he fought in Vietnam instead of staying home playing soldier while others died there. As Louis Menand puts it, the one thing that we can be fairly confident that other people want is “not to be told by someone else what to want. It is the

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<sup>145</sup> President Bush issued his latest national security strategy on March 16, 2006, the *Washington Post* reports, “reaffirming his doctrine of preemptive war against terrorists and hostile states with chemical, biological or nuclear weapons, despite the troubled U.S. experience in Iraq.” See Peter Baker, *Bush Restates Terror Strategy*, WASH. POST, March 16, 2006 (online ed.). The article quotes from this critical document: “‘ If necessary, however, under long-standing principles of self defense, we do not rule out use of force before attacks occur, even if uncertainty remains as to the time and place of the enemy’s attack. . . . When the consequences of an attack with WMD are potentially so devastating, we cannot afford to stand idly by as grave dangers materialize.’” *Id.* The article continues to say that

the new version of the strategy underscores in a more thematic way Bush’s desire to make the spread of democracy the fundamental underpinning of U.S. foreign policy, as he expressed in his second inaugural address last year. The opening words of the strategy, in fact, are lifted from that speech: “It is the policy of the United States to seek and support democratic movements and institutions in every nation and culture, with the ultimate goal of ending tyranny in our world.”

*Id.* Without saying what action would be taken against them, the strategy singles out seven nations as prime examples of “despotic systems”—North Korea, Iran, Syria, Cuba, Belarus, Burma and Zimbabwe. Iran and North Korea receive particular attention because of their nuclear programs, and the strategy vows in both cases “to take all necessary measures” to protect the United States against them. *Id.*

<sup>146</sup> Russell Shorto notes the striking similarity between Presidents Bush’s rhetoric and that of Woodrow Wilson:

[a]fter World War I, President Woodrow Wilson took the manifest-destiny concept global as he proclaimed his belief that the United States had “seen visions that other nations have not seen” and had become not only “a determining factor in the history of humankind” but, echoing the gospel of Matthew, “the light of the world.” President Bush hewed to the same theme as he pressed to invade Iraq. “We go forward with confidence, because this call of history has come to the right country,” he said in his third State of the Union address. “The liberty we prize is not America’s gift to the world; it is God’s gift to humanity.”

Russell Shorto, *All Political Ideas Are Local*, N.Y. TIMES, Oct. 2, 2005 (Magazine) (online ed.). To this, Shorto adds: “The straight-up claim to a religious basis for the entire national project has always been a source of tremendous strength for the U.S., and for a leader who can evoke it convincingly it is even better than wrapping yourself in the flag. It’s a magic button that rallies popular support around the holy trinity: God, America, liberty.” The eminent historian Arthur Schlesinger, Jr., writes that “George W. Bush is the most aggressively religious president Americans have ever had. American conservatives applaud his ‘faith-based’ presidency, an office heretofore regarded as secular.” See Arthur Schlesinger, Jr., *Forgetting Reinhold Niebuhr*, N.Y. TIMES, Sept. 18, 2005 (online ed.).

threat of outside control that makes terrorists and political strongmen possible”<sup>147</sup> Former Secretary of State Madeleine Albright is equally blunt: “I’m for democracy, but imposing democracy is an oxymoron. People have to choose democracy, and it has to come up from below. . . . I think Iraq may end up being one of the worst disasters in American foreign policy.”<sup>148</sup> As to national security, no country poses a threat to the existence of the republic. September 11th, the president’s incessant rallying cry, was a horrific event, but it posed no threat to our existence as a nation any more than did the devastation wrought by Hurricane Katrina.<sup>149</sup> No nation—not North Korea or a nuclear-empowered Iran—would dare launch a direct attack on the United States. They know they would be obliterated in the retaliation that would follow. America has neither the wealth nor the military manpower, short of a reinstatement of the draft, to remake the world.<sup>150</sup> As for terror-

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<sup>147</sup> See Louis Menand, *The Devil’s Disciples*, THE NEW YORKER, July 28, 2003, at 83, 86. See also Robert D. Kaplan, *We Can’t Force Democracy*, WASH. POST, March 2, 2006, at A21: “The lesson to take away [from Iraq] is that where it involves other despotic regimes in the region . . . the last thing we should do is actively precipitate their demise. The more organically they evolve and dissolve, the less likely it is that blood will flow. . . . Political change is nothing we need to force upon people; it’s something that will happen anyway.”

<sup>148</sup> Interview with former Secretary of State Madeline Albright. Deborah Solomon, *State of the Secretary*, N.Y. TIMES, April 23, 2006 (Magazine) (online ed.).

<sup>149</sup> The historian Joseph J. Ellis has said forthrightly what I suspect many Americans have now come to believe: that all that has followed in the wake of September 11th has been a massive overreaction.<sup>149</sup> Ellis does not minimize the tragic nature of September 11th, but he argues that horrific though it was, it was not an event that threatened the existence of the republic as have other crises in our history—the War for Independence, the War of 1812, the Civil War, World War II, and the Cold War. He reminds us of past reactions to events in our history that were perceived at the time as threats to national security—the threat of war with France and prosecutions under the Alien and Sedition Acts of 1798; the suspension of the writ of habeas corpus during the Civil War, allowing the preëemptive arrest of suspected Southern sympathizers; the Red Scare of 1919 and the round-up of socialists, syndicalists, and other dissidents; the internment of Japanese Americans during World War II; the Communist witch hunts and purges during the McCarthy era. He ends with a telling observation:

In retrospect, none of these domestic responses to perceived national security threats looks justifiable. Every history textbook I know describes them as lamentable, excessive, even embarrassing. Some very distinguished American presidents, including John Adams, Abraham Lincoln and Franklin Roosevelt, succumbed to quite genuine and widespread popular fears. No historian or biographer has argued that these were their finest hours.

. . . [I]t defies reason and experience to make Sept. 11 the defining influence on our foreign and domestic policy. History suggests that we have faced greater challenges and triumphed, and that overreaction is a greater danger than complacency.

See Joseph J. Ellis, *Finding a Place for 9/11 in American History*, N.Y. TIMES, Jan. 28, 2006 (online ed.). The author is a professor of history at Mount Holyoke College. Bob Herbert, op-ed columnist for the *New York Times*, has been relentless in his condemnation of President Bush for cynically manipulating a tragedy for his own purposes. See Bob Herbert, *The Fear Factor*, N.Y. TIMES, April 17, 2006 (online ed.).

<sup>150</sup> See NIALL FERGUSON, *COLOSSUS*, *supra* note XX, at 290-92.

ism, an intelligence establishment that actually works<sup>151</sup> and cooperation with other nations would seem the obvious answer.<sup>152</sup>

What I suspect is really meant by the mantra of “freedom and democracy,” in a way never carefully spelled out, is a world of nation-states that are “friendly” to us, no matter what their form of government. We want nations that accept our leadership and do our bidding, that embrace our version of capitalism, that welcome intercourse, trade, economic penetration and exploitation, and that will support us in any action we might take against hostile countries. In speaking of freedom and democracy and the end of tyranny in the world, President Bush seems to have something like cultural identity in mind. Yet there has always been a vast disconnect between nations that are “friendly” and those that are culturally similar. Since World War II, we have labeled any number of despotic regimes as “friendly” because they have been useful to us. We have turned a blind eye to power-crazed tyrants who disappeared their citizens with death squads, who oppressed their poor while enriching themselves, who stifled dissent, who tortured, raped, and murdered their people, who even perpetrated genocide.<sup>153</sup> We have played an active role in promoting or blocking regime changes whenever it seemed expedient, even conniving in several instances at the assassination or attempted assassination of leaders whose policies we didn’t like.<sup>154</sup> This is hardly

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<sup>151</sup> See, e.g., David Ignatius, *Fix the Intelligence Mess*, WASH. POST, April 21, 2006, at A23 (“You would have thought it was impossible to make our intelligence problems even worse, but the Bush administration has accomplished that.”).

<sup>152</sup> See, e.g., Julianne Smith & Thomas Sanderson, *Evaluating Our Partners and Allies Five Years Later*, WASH. POST, Sept. 11, 2006 (online ed.). (noting failure of U.S. “to foster long-term cooperative partnerships”): “Most damaging has been the decline of U.S. moral authority, stemming first and foremost from the invasion and botched occupation of Iraq, but also from Abu Ghraib, Guantanamo, and the renditions of terror suspects.”

<sup>153</sup> In the interests of oil, we deposed Iran’s prime minister, Mohammad Mossadegh, and reinstalled the Shah, who ruled with some ruthlessness until 1979. See STEPHEN KINZER, *supra* note XX, at 117-28. In Guatemala, President Guzmán challenged the power of United Fruit and was duly deposed and replaced by an authoritarian and despotic government. See *id.* at 129-47. Ngo Dinh Diem was deposed and murdered in Vietnam; under Diem and his successors our “friendly” regime there dealt brutally with all opposition. See *id.* at 148-69. In Chile, we deposed President Salvatore Allende, who wanted to nationalize much of Chile’s wealth, and imposed the despotic regime of Augusto Pinochet on the Chilean people for many years. See *id.* at 210-14. General Manuel Noriega was tolerated in Panama for years because of his usefulness, despite the many repressive and criminal measures he took. See *id.* at 239-59. The state of affairs in El Salvador, a “friendly” nation, is recounted in JOAN DIDION, *SALVADOR* (1983). We tolerated for many years the repressive regime of Fulgino Batista in Cuba because he welcomed massive American investment. Because Cambodia was hostile to the newly united Vietnam, we persisted in recognizing the Khmer Rouge as the “legitimate” government of that country, turning a blind eye to the genocide there. See SAMANTHA POWER, *supra* note XX, at 87-154. And because of our hostility towards Iran, stemming from the hostage crisis there, we subsidized Iraq during the Iraq-Iran War and overlooked Saddam’s attempt to destroy his Kurdish population. See *id.* at 171-245. Ally or tyrant? The answer seems to depend on the shifting sands of political expediency.

<sup>154</sup> Ngo Dinh Diem in Vietnam, of course, and the puerile attempts of the CIA to assassinate Fidel Castro. In some cases of regime change, the deposed rulers were murdered by those who took power in their stead. The suicide of Salvatore Allende in Chile at the height of the coup can be laid at the doorstep of the CIA.

cultural identity, and it is certainly not freedom and democracy.<sup>155</sup> Cultural identity in practice sounds more like imperialism—the extension of American influence throughout the world.

Bush's Wilsonian rhetoric may simply mask the aspiration for economic dominance: to some, perhaps, a form of empire, but something more accurately and credibly described as economic imperialism. The messianic vision of spreading freedom and democracy throughout the world as espoused by Bush and probably genuinely held by his coterie of neoconservative advisors—the divine mission, a holy war, a crusade—is a chimera. Creating a free and democratic world would hardly serve our own interests, for such a world would vote against us on far too many critical issues. Yet the real irony is that even the idea of economic dominance has its feet stuck in the cement of the past. American capitalism—in whose interest so much has been sacrificed—may be poised to bite the hand that feeds it. What the current political climate has failed to grasp are the implications of globalization. Capitalism is amoral and knows no geographic boundaries. Its allegiance is to profit and loss, not to nations. American capitalism is in the process of losing its American identity. The future belongs to powerful transnational corporations, not to nations, for that is where the power and money will lie. If we strip away the president's visionary and obviously impractical rhetoric, what is left are the economic interests of America's corporate empire and its desire to play a major role in an increasingly globalizing economy. What this portends for the United States remains to be seen.<sup>156</sup>

America had greatness thrust upon it at the end of World War II, from which we emerged as one of two superpowers and, by default, the leader of the free world. Since 1990, we have been the world's only superpower. Such status raises once again the specter of "manifest destiny"—that amorphous concept which blends hubris or pride of place with a deeply rooted sense of superiority, one that makes us believe not only that we are destined to play an influential, even commanding role on the world stage, but also that we have a God-given way of life that everyone should want to embrace. The siren song of empire beckons. The very fact that we possess such overwhelming military power is a constant temptation to use it as a quick fix for whatever we perceive to be wrong with the world. We yielded to this temptation in Vietnam with disastrous results. In Iraq, we proved what no one ever doubted—that we can topple the regimes of far weaker countries with relative ease. But we also proved that we have little ability to control what happens afterwards. We have lost, at this writing, more than 2,900 killed and many others horribly shattered since our unprovoked invasion and occupation

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<sup>155</sup> A good example of a "friendly" nation today is Uzbekistan, a brutally repressive regime but an ally in our war on terror. See Craig Murray, *Her Majesty's Man in Tashkent*, WASH. POST, Sept. 3, 2006 (online ed.) (the author, formerly Britain's ambassador to Uzbekistan, lost his job and his reputation for trying to tell the truth about conditions in the country, including the routine use of torture).

<sup>156</sup> See Edmund L. Andrews, *Fed Chief Sees Faster Pace for Globalization*, N.Y. TIMES, Aug. 25, 2006 (online ed.) ("The emergence of China, India and the former communist-bloc countries implies that the greater part of the earth's population is now engaged, at least potentially, in the global economy," Mr. Bernanke said. "There are no historical antecedents for this development."'). See generally THOMAS L. FRIEDMAN, *THE WORLD IS FLAT* (2005).

of Iraq. Nobody seems to care how many innocent Iraqis have died in the violence we unleashed. “A team of American and Iraqi epidemiologists estimates that 655,000 more people have died in Iraq since coalition forces arrived in March 2003 than would have died if the invasion had not occurred.”<sup>157</sup> Nobody knows how many jihadis we have created who may one day, once again, strike at the United States.<sup>158</sup> This seems a peculiar way to fight a war on terror. Before we are done with Iraq, we will have spent, according to reliable estimates, somewhere between a trillion and two trillion dollars.<sup>159</sup> Yet we persist in clinging to the be-

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<sup>157</sup> See David Brown, *Study Claims Iraq’s ‘Excess’ Death Toll Has Reached 655,000*, WASH. POST, Oct. 11, 2006, at A12. This estimate is the result of a peer-reviewed study conducted by a panel of eminent scholars under the auspices of MIT and published in the prestigious British medical journal *Lancet*. As Eugene Robinson wrote in the *Washington Post*, “We now have reputable evidence—not proof, I’ll allow, but science-based evidence from respected scholars, published in one of the world’s most prestigious medical journals—that the humanitarian tragedy in Iraq is much, much worse than anyone had suspected.” See Eugene Robinson, *Counting the Iraqi Dead*, WASH. POST, Oct. 13, 2006, at A29. For a more conservative estimate, putting the count at somewhere between 44,000 and 49,000, see Iraq Body Count, at <http://www.iraqbodycount.org/>.

<sup>158</sup> George Packer, who knows as much about Iraq as anyone, wrote in August 2005 that

[j]ihadis are crossing the borders into Iraq . . . far faster than they can be killed or kill themselves. A recent study by an Israeli researcher shows that they are predominantly young Saudis, inflamed by footage of the fighting in Iraq and by incendiary sermons from their imams. Do they hate us for who we are, or for what we do? That turns out to be the wrong question. Most of the new jihadis had no connection to terrorism before the Iraq war; the American occupation has filled them with fantasies of violent death. But they come from a region in Saudi Arabia where the most extreme Islamist ideology was already flourishing, directed against Shiite Muslims as well as against “crusaders and Jews.” They have the sympathy of millions of fellow-travellers. The war in Iraq is the trigger, not the reason, for their self-annihilation.

A better question is . . . what can be done to persuade the millions of Muslims on whose support the jihadis depend to abandon their ideology? . . . [While] gaps are opening in the ranks of radical Islam . . . over the morality of killing innocents . . . radical Islam is not a problem that Muslims can sort out alone. The grand gamble of the architects of the Iraq war was that a democratic state in the heart of the Middle East would change the political dynamic throughout the region. Right now, the best we can salvage is an Iraq that doesn’t descend into communal violence on a large scale. . . . [N]o one should imagine that an American departure will end suicide bombings in Iraq, or anywhere else. . . .

In Iraq, America has run up against the limits of war in an ideological contest. . . . No one really knows how American influence can be used to disinfect Islamist politics of violent ideas. This is the first problem. The second is that the Bush team has shown such bad faith, arrogance, and incompetence since September 11th that it seems unlikely to figure it out.

George Packer, *Name Calling*, THE NEW YORKER, Aug. 8 & 15, 2005, at XX, XX. As to the limits of war, former Secretary of State Madeleine Albright agrees with Packer: the invasion of Iraq, she says, was “‘intended as a demonstration of American power; it instead has shown the limits of that power.’” Leo Sandon, *Madeleine Albright Finds Voice on Religion*, TALLAHASSEE DEMOCRAT, June 17, 2006, at D1-2 (reviewing and quoting from Madeleine Albright’s book *The Mighty and the Almighty: Reflections on America, God, and World Affairs* (2006)). See also Philip Shenon & Mark Mazetti, *Study of Iraq War and Terror Stirs Strong Political Response*, N.Y. TIMES, Sept. 25, 2006 (online ed.) (“the Iraq war has invigorated Islamic radicalism and worsened the global terrorist threat, said the assessment by American spy agencies . . .”)

<sup>159</sup> See Joseph E. Stiglitz, *The High Cost of the Iraq War*, Economists’ Voice, March 2006, [www.bepress.com/ev](http://www.bepress.com/ev). Stiglitz is a 2001 Nobel laureate in Economics and a professor at Columbia

lief of a free, democratic, and of course friendly Iraq in the heart of the oil-rich Middle East. Whether the result will be worth the cost in blood, wealth, and sacrifice of America's moral values is a question that will haunt us for many years to come.<sup>160</sup>

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University; this study was done in conjunction with Linda Bilmes, a budget expert at Harvard. They write: "Even we, as opponents of the war, were staggered by what we found. Our estimates range from slightly less than a trillion dollars (our conservative estimate) to more than \$2 trillion (our moderate estimate)." See also Bob Herbert, *George Bush's Trillion-Dollar War*, N.Y. TIMES, March 23, 2006 (online ed.) (commenting at length on the Stiglitz study).

<sup>160</sup> Every sentient American knows by now that the United States has changed the rules of war to suit itself. We know that President Bush's administration has called prisoners of war "unlawful combatants" so that they can be imprisoned indefinitely without legal recourse of any kind, mistreated, and in some cases tortured. See, e.g., Michiko Kakutani, *Following a Paper Trail to the Roots of Torture*, N.Y. TIMES, Feb. 8, 2005 (online ed.) (reviewing *THE TORTURE PAPERS* (Karen J. Greenberg & Joshua L. Dratel eds., 2005)); James Risen & Tim Golden, *3 Prisoners Commit Suicide at Guantánamo*, N.Y. TIMES, June 11, 2006 (online ed.); Editorial, *The Deaths at Gitmo*, June 12, 2006 (online ed.) (deriding the administration for "creating a netherworld of despair beyond the laws of civilized nations, where men were to be held without any hope of decent treatment, impartial justice or, in so many cases, even eventual release"); Mourad Benchellali, *Detainees in Despair*, N.Y. TIMES, June 14, 2006 (online ed.) (from a two-and-one-half-year detainee at Guantánamo: "I cannot describe in just a few lines the suffering and the torture; but the worst aspect of being at the camp was the despair, the feeling that whatever you say, it will never make a difference."); David Ignatius, *A Prison We Need to Escape*, WASH. POST, June 14, 2006, at A23 (Guantánamo); Editorial, *Homicide Unpunished*, Wash. Post., Feb. 28, 2006, at A14 (Abu Ghraib); Anthony Lagouranis, *Tortured Logic*, N.Y. TIMES, Feb. 28, 2006 (online ed.) (Abu Ghraib); Jane Mayer, *The Experiment*, THE NEW YORKER, July 11 & 18, 2005, at XX (Guantánamo). We know of the CIA's "extraordinary rendition" program, under which it flies suspected terrorists to foreign countries where they can be interrogated and tortured with impunity. See Jane Mayer, *Outsourcing Torture*, THE NEW YORKER, Feb. 14 & 21, 2005, at 106; Scott Shane et al., *C.I.A. Expanding Terror Battle Under Guise of Charter Flights*, N.Y. TIMES, May 31, 2005 (online ed.). The life of Maher Arar, a Canadian software engineer, a man of unblemished record, married with two children, has been all but ruined. He was seized by U.S. authorities at Kennedy Airport in 2002 and flown to his native Syria where he was mistreated and tortured for ten months, then abruptly released when even professionals could find nothing to link him to terrorism. See Bob Herbert, *No Justice, No Peace*, N.Y. TIMES, Feb. 23, 2006 (online ed.); Bob Herbert, *Our Dirty War*, N.Y. TIMES, April 20, 2006 (online ed.) (recounting second known case, that of Khaled el-Masri, a German citizen seized in Macedonia in December 2003, rendered to Afghanistan, and held for five months until the CIA learned it had the wrong man). We know that the CIA maintains a number of secret prisons in Eastern European countries where suspected terrorists, number unknown, are held. See, e.g., Craig Whitlock, *Probe of Detainee Transfers Finds Many CIA Flights*, WASH. POST, April 27, 2006, at A20. We know about the abuse and torture of prisoners at Abu Gharib and the holding compound at Guantánamo Bay. We know that the FBI has expanded powers under the Patriot Act to invade the privacy of American citizens. See Editorial, *The House's Abuse of Patriotism*, N.Y. TIMES, Oct. 31, 2005 (online ed.) (Patriot Act "significantly crimped civil liberties by expanding law enforcement's power to use wiretaps, search warrants and other surveillance techniques, often under the cloak of secrecy."); and we know that President Bush has authorized the National Security Agency to monitor e-mails and overseas and domestic telephone calls by Americans without judicial oversight. See, e.g., Editorial, *Adventures in Testifying*, N.Y. TIMES, April 11, 2006 (online ed.) ("Bush believes he has the authority to intercept not just international calls but also domestic calls between American citizens"). At this writing, the president is pressing Congress strongly for the authority to try suspected terrorists by military commission, overriding the Supreme Court's decision in *Hamdan v. Rumsfeld*, \_\_\_ U.S. \_\_\_ (2006), and for legislation that will immunize the CIA, its private contractors, and other high officials from prosecution for possibly having committed war crimes in violation of the Geneva Conventions. See, e.g., Editorial,

No one could estimate what our actions around the world have cost in the last half century. We know, of course, what our own body count has been—young Americans, serving their country, dead before their time: more than 50,000 killed in Korea, more than 50,000 in Vietnam, over 3,000 and counting in Iraq and Afghanistan. The number of seriously wounded in body or spirit far exceeds those killed; and there is no adequate measure in these cold statistics of the grief, pain, and suffering felt by loved ones at home. Nor is there typically any mention of the millions of innocent civilians caught in the crossfire, lumped under the heading of “collateral damage” and quickly forgotten. It hardly matters to us that the United States has lost its reputation as a beacon of freedom, democracy, and decency and that it has sunk, in the world’s eyes, to just another hated and feared imperialistic power. The wealth squandered in these ventures abroad, Vietnam and Iraq in particular, is staggering. It is wealth, obviously, that could have been spent far more usefully at home or elsewhere around the world helping those in need. There is no doubt that America is an imperialistic nation. Whether we will become an empire remains to be seen. The urgent question is whether imperial domination, no matter what it is called, can possibly be worth the price.

#### IV. “TWO ROADS DIVERGED IN A YELLOW WOOD”<sup>161</sup>

What history tells us at the most fundamental level is what every Christian should know: that to live by the sword is to die by the sword. Building the richest and most powerful nation on earth exacted a cost that very few law students, individually, would be willing to pay. How many would volunteer to lose a leg and sink with their families into abject poverty so that railroads could spread throughout the nation? How many would choose to die in the Triangle Shirtwaist fire so that others could be comfortably clothed? How many would volunteer for Iraq and daily face death or terrible injury to bring freedom and democracy to that divided nation? Looking at history forces the question whether it is morally right to ask others to do what you, yourself, would be unwilling to do. In history are the beginnings of empathy and identification, and perhaps also of the impulse to find a better way—a life of the spirit, as our religious and spiritual icons have counseled down through the centuries.<sup>162</sup>

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*Stampeding Congress*, N.Y. TIMES, Sept. 15, 2006 (online ed.). As Lord Hurd, foreign secretary during Prime Minister Thatcher’s tenure, caustically put it, “[T]he world only works if the world’s only superpower follows the rules like everyone else.” Joel Brinkley, *Rice Faces Cancellations and Catcalls on British Visit*, N.Y. TIMES, March 31, 2006 (online ed.).

<sup>161</sup> ROBERT FROST, “The Road Not Taken,” in MOUNTAIN INTERVAL (1920).

<sup>162</sup> Anthony O’Hear, in much the same vein as Zukav, writes that

[i]f, in order to make sense of our activity, we do have intimations of a level of reality beyond the narrowly material or the purely biological, we should look favourably on those systems of belief and practice which, over the centuries, have attempted to articulate those intimations and make sense of them, even though since the eighteenth century these systems have been routinely dismissed as obscurantist prejudice. I am thinking here of those religious systems that have been the fruit of long experience, thought and reflection, such as Christianity, Hinduism and Buddhism.

Saying this is not to advocate a straightforward commitment to any traditional religion. Each is at best a partial revelation. None has a monopoly of truth or of sanctity. Each is fatally mired in outdated metaphysics. But, given the way their message has been

Whether the knowledge gained from a study of history will make any difference in the career paths that law graduates choose for themselves is impossible to say. But it at least can create an awareness of choice; and it has the added benefit of being interesting, which is more than one can say for a standard casebook on corporations. As legal education is presently structured, the larger issues I have tried to raise—issues dealing with human motivations, what this nation has done, and what it is doing today—hardly seem germane and are easily deferred to another day. Law students will soon enough discover that today’s legal profession is a business rather than a noble calling devoted to helping those in need. They will discover that they are serving clients whose main concern in one way or another boils down to the pursuit of power, money, or sex, and who are willing to pay handsomely to get what they want. They will discover that it is difficult to advocate for such clients, day in and day out, without feeling the pressure to adopt their values as their own. Effective advocacy, after all, usually comes from honesty—from identifying with and believing in a client’s cause. In theory it may be possible to keep one’s personal beliefs and moral values separate from those of clients, but in practice it’s not so easy.<sup>163</sup> The day may come when they will sense they have reached a crossroads. They can continue in the service of the wealthy and privileged, or they can take the less traveled road of helping those who cannot help themselves. Perhaps images will return of what drew them to the law in the first place—images of justice and injustice, stemming perhaps from bitter personal experience, or lingering from movies or television, or from a book like *To Kill a Mockingbird*.<sup>164</sup> Many students come to law school in hopes of making a difference, of contributing something to society rather than forever taking from it. But today’s legal education soon dissipates these aspirations with its relentless concentration on doctrine and rules. The pressure to conform is intense, driven in no small part by the awareness of staggering debt which must sooner or later be repaid.

A part of our history, overtly legal enough to satisfy any critic, deals with those lawyers who rose above law as a business: lawyers who were willing to stand up for lost or unpopular causes and whose courage and vision of justice helped the system keep faith with itself. There were lawyers who represented the Haymarket defendants,<sup>165</sup> Sacco and Vanzetti,<sup>166</sup> Eugene Scopes,<sup>167</sup> Leopold and

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verified in the lives of creative, reflective and holy people over many centuries, it is more than possible that each contains important truths, and, more important perhaps, important pointers to truth. It is possible that each could give us important pointers to the way we should lead our lives today.

ANTHONY O’HEAR, *supra* note XX, at 243-44.

<sup>163</sup> See, e.g., JAMES GOULD COZZENS, *BY LOVE POSSESSED* (1957). For some dramatic cinematic illustrations, see *The Devil’s Advocate* (Warner Bros. 1997); *The Verdict* (XX 1982).

<sup>164</sup> HARPER LEE, *TO KILL A MOCKINGBIRD* (1960).

<sup>165</sup> Chiefly William Perkins Black, a prominent corporation lawyer whose firm represented many of Chicago’s financiers and manufacturers. See PAUL AVRICH, *THE HAYMARKET TRAGEDY*, *supra* note XX, at 250-52. Initially he did not want to take the case because he was not a criminal lawyer. But no one else could be found, either because of fear at the unpopularity of the case or because of the small fee the defendants could offer. When Black, a Civil War hero who had won the Congressional Medal of Honor at age 19, told his wife he was going to represent the defendants,

Loeb,<sup>168</sup> the Scottsboro Boys.<sup>169</sup> There were lawyers who fought for the careers and reputations of those persecuted by government during the McCarthy era.<sup>170</sup> There were lawyers who fought to save Ethel and Julius Rosenberg from the electric chair<sup>171</sup> and who sought to keep the government from destroying the career of Robert Oppenheimer, a man to whom the nation owed a profound debt for his work in developing the atomic bomb.<sup>172</sup> There was Ward Stephenson, who, for a trifling fee, gave years of his life in a labor of love to win Clarence Borel's case and in the process to break the back of the asbestos industry.<sup>173</sup> There were federal judges who ignored death threats and endured opprobrium in their communities to enforce orders putting an end to de facto segregation in the South.<sup>174</sup> There was Charles Swift, a navy lawyer who challenged the constitutionality of the mili-

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she protested. "'I *must* take it,' he replied, echoing Martin Luther's celebrated pronouncement. 'I can do no otherwise, God helping me. A great wrong has been done. I must do all I can to right it.'" *Id.* at 251-52.

<sup>166</sup> At trial, the famous labor lawyer Fred Moore came from California to defend them. Jeremiah and Thomas McAnarney, the latter appointed by Calvin Coolidge when he was governor of Massachusetts, also participated. William Thompson took over the case after Moore withdrew and argued the post-trial motions. There was a defense fund from supporters, but the attorneys obviously received little for their work. See DOUGLAS LINDER, *THE SACCO-VANZETTI CASE: AN ACCOUNT* (2000), <http://www.law.umke.edu/faculty/projects/trials/SaccoV/SaccoV.htm>. The conviction was controversial around the world; among the supporters of Sacco and Vanzetti were Albert Einstein, H.G. Wells, Thomas Mann, and the Vatican. Felix Frankfurter, then a Harvard law professor, attacked the verdict in an *Atlantic Monthly* article. See COURT TV, *THE GREATEST TRIALS OF ALL TIME, The Fight to Save Them*, <http://www.courttv.com/archive/greatest/trials/sacco.vanzetti/fight.html>.

<sup>167</sup> Clarence Darrow, of course.

<sup>168</sup> Again Clarence Darrow.

<sup>169</sup> New York attorney Samuel Liebowitz represented the defendants for four years without pay. See SCOTTSBORO TRIAL HOMEPAGE, *Samuel Liebowitz*, [http://www.law.umkc.edu/faculty/FTrials/scottsboro/SB\\_bLieb.html](http://www.law.umkc.edu/faculty/FTrials/scottsboro/SB_bLieb.html).

<sup>170</sup> Among them were Paul Porter and Abe Fortas of Arnold, Fortas & Porter, Thomas Emerson, and Joseph Rauh. See GEOFFREY R. STONE, *supra* note XX, at 420-21.

<sup>171</sup> See generally RONALD RADOSH & JOYCE MILTON, *THE ROSENBERG FILE* (1983); LOUIS NIZER, *THE IMPLSION CONSPIRACY* (1973). Among the volunteers who helped in the appeals from the Rosenbergs' conviction were Malcolm Sharp, the eminent contracts teacher at the University of Chicago, and Fyke Farmer, a Tennessee lawyer who raised the novel point of statutory interpretation that almost succeeded in staying the execution, at least from June to the beginning of the Court's October Term.

<sup>172</sup> See KAI BIRD & MARTIN J. SHERWIN, *AMERICAN PROMETHEUS: THE TRIUMPH AND TRAGEDY OF J. ROBERT OPPENHEIMER* 487-550 (2005).

<sup>173</sup> See BRODEUR, *supra* note XX, at 39-70. The author traces the long history of the asbestos litigation, which culminated in the Fifth Circuit's ground-breaking decision in *Borel v. Fibreboard Paper Prod's Corp.*, 493 F.2d 1076 (5th Cir. 1973) (Wisdom, J.). Stephenson's contingency fee in *Borel* was \$23,462, which represented years of work on behalf of Clarence Borel, who was dying of asbestosis. See BRODEUR, *supra*, at 64.

<sup>174</sup> For example, Frank M. Johnson, Jr., who served as a federal district judge in Alabama from 1955 to 1979. He was a target of white supremacists who once firebombed his mother's home, and was publicly excoriated by Gov. George Wallace. Among his rulings were those desegregating public facilities in Alabama. It was his order, in 1965, that enabled Martin Luther King, Jr., to lead the famous march from Selma to Montgomery. See ENCYCLOPEDIA BRITANNICA ONLINE, *BRITANNICA BOOK OF THE YEAR, Johnson, Frank M.* (2000).

tary commissions at Guantánamo Bay, a case ultimately decided by the Supreme Court in favor of his client.<sup>175</sup> His reward for doing his duty as a lawyer was to be denied promotion, effectively ending his career in the Judge Advocate General's Corps.<sup>176</sup> There were those who gave, and who are still giving today, countless hours of their time to stop the state from executing inmates on death row. There have been lawyers throughout history, in short, who fought for causes—not for money but because they believed in those causes and thought it was the right thing to do. These were lawyers who went against the grain and who refused to acquiesce in whatever hysteria happened to be gripping the country at the moment.

Many of today's lawyers are unhappy with their work, and certainly law school does little to dissipate the malaise that has settled over the profession. One of the foremost experts on happiness, Professor Martin E.P. Seligman, identifies three levels of happiness, which Joel Garreau summarizes in his book *Radical Evolution*.<sup>177</sup> The first is the pleasant life: "It's about base pleasures, raw feelings, thrills, orgasms."<sup>178</sup> Garreau thinks these will be easy criteria to meet—all that's needed are drugs.<sup>179</sup> Then there's the good life, which is what Jefferson appears to have meant in his choice of the phrase the "pursuit of happiness" and Aristotle in his concept of eudaemonia: "the exercise of vital powers along lines of excellence in a life affording them scope."<sup>180</sup> Finally, there's the "pursuit of a meaningful life."<sup>181</sup> According to Seligman, "meaning consists in attachment to something bigger than you are. The larger the thing that you can credibly attach yourself to, the more meaning you get out of life."<sup>182</sup> It is easy to see that the pursuit of power, money, and sex dominate the first level and can easily infiltrate the second. Garreau expands on the third level and the concept of "meaning":

Introducing compassion into the equation is at the core of meaning. "Without more kindness in the world, technological power would mainly serve to increase men's capacity to inflict harm on one another," Bertrand Russell once wrote. Compassion may thus be at the core of successfully managing transcendence—of coming up with a practical way to Prevail over the blind forces of change.

"Evolution moves toward greater complexity, greater elegance, greater knowledge, greater intelligence, greater beauty, greater creativity, and more of other abstract and subtle attributes, such as love," observes Ray Kurzweil. "And God has been called all these

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<sup>175</sup> See *Ramdan v. Rumsfeld*, \_\_\_ U.S. \_\_\_ (2006).

<sup>176</sup> See Editorial, *The Cost of Doing Your Duty*, N. Y. TIMES, Oct. 11, 2006 (online ed.).

<sup>177</sup> See JOEL GARREAU, *supra* note XX, at 260-62. Prof. Seligman is president of the American Psychological Association, Fox Leadership Professor of Psychology at the University of Pennsylvania, and the author of *Authentic Happiness*.

<sup>178</sup> *Id.* at 261.

<sup>179</sup> *Id.*

<sup>180</sup> *Id.* (quoting Martin E.P. Seligman).

<sup>181</sup> *Id.*

<sup>182</sup> *Id.* In an article in the *New York Times*, Prof. Darrin McMahon quotes John Stuart Mill to much the same effect: "Those are only happy who have their minds fixed on some object other than their own happiness; on the happiness of others, on the improvement of mankind, even on some art or pursuit, followed not as a means, but as itself an ideal end. Aiming thus at something else, they find happiness by the way." Darrin M. McMahon, *In Pursuit of Unhappiness*, N. Y. TIMES, Dec. 29, 2005 (online ed.).

things, only without any limitation: infinite knowledge, infinite intelligence, infinite beauty and so on. Of course even the accelerating growth of evolution never achieves an infinite level, but as it explodes exponentially it moves rapidly in that direction. So evolution moves inexorably toward our conception of God, albeit never quite reaching the ideal. Thus the freeing of our thinking from the severe limitations of its biological form may be regarded as an essential spiritual quest.”

“Someday after mastering winds, waves, tides and gravity, we shall harness the energies of love,” writes Pierre Teilhard de Chardin. “And then, for the second time in the history of the world, man will discover fire.”<sup>183</sup>

The point that Garreau is making is that the continuing evolution of the human race must be in the direction of love, compassion, and kindness rather than the relentless pursuit of external power. He is talking about the development of a multi-sensory way of experiencing the world, leading to what Gary Zukav calls “authentic power”<sup>184</sup>—a belief in the existence of something greater than one’s self: a higher power, to use a familiar term, but one far removed from the petty religious squabbles that take up so much of our time and energy. For some this power can be called God, although it is clearly a far more eclectic concept.<sup>185</sup>

For lawyers sentient enough to realize that they have reached a point of divergence, the choice can be simple if they believe that it is more important to help those who cannot help themselves than to bill two thousand hours a year for paying clients, earning a handsome salary in return. There is more than enough injustice in our world, and the victims are seldom able to pay for the representation they need. The road to happiness—or at least to a sense of fulfillment and peace of mind—is in giving these victims a voice. The victims I have in mind are all around us, and frequently in very large numbers: they are elderly people who need wills, health-care directives, humane nursing-home treatment, or help in dealing with vast bureaucracies and their maze of rules and regulations; they are aliens seeking permanent residence or other benefits and who must deal with a backlogged, impersonal, and often unsympathetic immigration system; they are children who are abused or in trouble with the law; inmates of penal institutions written off by their attorneys the moment sentence is pronounced; abused spouses; couples who need but can’t afford a divorce; workers who suffer race, gender, or

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<sup>183</sup> GARREAU, *supra* note XX, at 262. Ray Kurzweil’s is not exactly a household name. He is a computer genius, born in 1948 and educated at MIT. Garreau writes that “[s]oon after college, Kurzweil developed three technologies. He invented the first practical flatbed scanner, launching a multi-billion dollar industry. He invented the character recognition device that could read any typeface, not just those weird ones that were designed specifically for computers. And he invented the first full text-to-speech synthesizer.” *Id.* at 89; *see id.* at 87-106. Kurzweil’s synthesizer, working somewhat like book-copying on a Xerox machine, enables users to have books read to them, a marvelous advance over Braille.

<sup>184</sup> *See* ZUKAV, *supra* note XX, at 26-32.

<sup>185</sup> In *United States v. Seeger*, 380 U.S. 163 (1965), holding that an agnostic applicant was entitled to exemption from military service as a conscientious objector by reason of “religious training and belief,” the Court chose to quote the eminent theologian Paul Tillich. Speaking of God, Tillich said: “‘And if that word has not much meaning for you, translate it, and speak of the depths of your life, of the source of your being, of your ultimate concern, *of what you take seriously without any reservation*. Perhaps, in order to do so, you must forget everything traditional that you have learned about God . . . .’” *Id.* at 187 (quoting PAUL TILlich, *THE SHAKING OF THE FOUNDATIONS* 57 (1948)).

ethnic discrimination at the hands of employers; people, straight and gay, who want to adopt homeless children but who cannot negotiate the typical bureaucratic maze; women, teen-age girls especially, who want to exercise their right to abortion in unsympathetic, pro-life states;<sup>186</sup> the animals who share the planet with us and who some believe have rights, too;<sup>187</sup> and an environment incapable of speaking for itself that is systematically being destroyed by the seemingly unstoppable forces of the thirsty capitalist engine. The list goes on and on.

Easier said than done, some will object, and rightly so. If and when the epiphany comes, career change may be financially difficult, even impossible, given commitments to home-mortgage and car payments, children's educational expenses present and future, and so on. But this is only to emphasize the importance of imparting an awareness of choice at an early stage in lawyers' careers. Some graduates, of course, will never perceive a choice and will go wholeheartedly for the pleasant life. Some, on the other hand, need no urging to look for a niche in the public-interest sector, even though compensation for this work tends to fall at the lower end of the salary spectrum. Still others, with the luxury of choice, will choose a law firm that takes its pro bono obligation seriously and actively encourages and rewards such service. But almost any experienced attorney can make time in a busy schedule to take a few pro bono cases on the side. Some of the malaise that seems to have settled over the legal profession might in this way be lifted. Attorneys who take this path are very likely to find that they are leading a meaningful life, not just a pleasant or good one.

The world we live in is complex and is becoming increasingly so with each passing day. For all the advances in technology and conveniences, it has become in many ways a far more bewildering world for many people, a much more difficult one to navigate than ever before. Yet complexity is precisely what lawyers are trained to deal with. They cannot solve all the world's problems, but in small ways they can make a difference—in the lives of those whom they represent, and in their own.

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<sup>186</sup> See, e.g., Editorial, *Kiss-and-Tell No More*, N.Y. TIMES, APRIL 22, 2006 (online ed.). A federal judge ruled that the Kansas attorney general exceeded his authority under the relevant statute in requiring the reporting to child-abuse agencies of "every instance of suspected consensual sex among teenagers of similar ages, including any pregnancy, sexually transmitted disease or request for contraception." *Id.*

<sup>187</sup> See, e.g., GARY FRANCIONE, INTRODUCTION TO ANIMAL RIGHTS 81-102, 130-50 (2000) (discussing the importance of viewing animals as more than property or resources); HENRY S. SALT, ANIMALS' RIGHTS 67-78 (Soc'y for Animal Rights 1980) (1892) (introducing the idea that animals possess rights just as humans do)..