

Theoretical Perspectives on Lives in the Law: An Introduction

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At the beginning of *The Common Law*, Oliver Wendell Holmes famously observed, “The life of the law has not been logic; it has been experience.”¹ Holmes’s parlance is striking, as it asks us to imagine law not simply as a set of institutional practices, or as a code of impersonal rules, or as a series of doctrinal commitments, but as a living entity—a creature with its own lifeblood. Yet once we move from the level of evocative trope to actual practice, we must recognize that inasmuch as law “lives,” it does so through the practitioners and subjects who provide its pulse.²

The essays collected in the present volume are devoted to studying the persons through whom the law gains its sustenance. Our interest, however, is not in exploring how the experiences of these actors and subjects shape the life of the law. Rather, we are interested in considering the question left unaddressed by Holmes: how the lives of individuals, social groups, and nations are fashioned by their engagement with the legal.

Law, we contend, comes alive in and through the lives of persons, groups, and nations. Law takes shape through the process by which it molds biography and identity.³ Similarly, lives are formed and given meaning in and against the law, for law shapes choices, imposes constraints, provides opportunities, and serves both as an overt reference point and as an imaginative/symbolic presence.⁴

Law, moreover, is present in the way people tell their life stories,

just as it is shaped by the life stories that find their articulation through a legal vocabulary. In recent years, legal scholars with political sensibilities as divergent as Stephen Carter and Patricia Williams have turned to personal narrative to reveal the private pain created by the need to accommodate a social world forged by the very “successes” of the rights revolution.⁵ The turn to personal narrative among legal scholars has also found its echo in the courtroom; indeed, one consequence of this trend has been the appearance of the “life story” as a controlling trope of the law.⁶ Whether it be in the area of victim impact statements in the penalty phase of capital cases,⁷ or in custody disputes in family cases,⁸ or even in matters of federal antitrust law, one finds ever-increasing attention to the life story in law.⁹

Yet law’s presence in, and relevance to, the lives of individuals, groups, and nations is found not just in the stories told in legal venues. It is also to be found in the daily experiences and self-understandings never formally given legal articulation. If at times law is fully and forcefully present, at others, its attendance is elusive and shadowy. For some, then, law’s presence is deep and continuous; for others, the law may appear, if at all, only in discrete episodes and events.¹⁰ Among prisoners,¹¹ police officers,¹² welfare recipients,¹³ the law is recognizably “all over”; it is harder, however, to detect its influence among college students, gardeners, or middle-class housewives.

Yet even when elusive, the law contributes to the self-understanding and self-fashioning of individuals, groups, and nations. Writing about the Americans with Disabilities Act, David Engel and Frank Munger note, “Individual life stories weave in and out of the fabric of public events and social history. Autobiographical narratives by ordinary people reflect the influence of political change, of cultural transformations—and, at times, of legal innovation.”¹⁴ Engel and Munger’s work illustrates the complex and active ways that individuals use and reference law as they make life choices and compose their life stories.¹⁵

Another example of how law shapes personal and collective biography is provided by Carol Greenhouse’s analysis of the Supreme Court’s decision in *Brown v. Board of Education*. “*Brown*’s discourse was biographical,” Greenhouse writes. “Specifically the Court envisioned equality as the means of African American children becoming *themselves*, future adults. . . . If *Brown* defined a canonical life story for children of the civil rights era, it also periodized the timetable of the benefits of civil rights in that generation . . . [defining] an iconic life story for

a particular generation of African Americans."¹⁶ Greenhouse's account demonstrates the force of *Brown* in the lives and life stories of African Americans, reminding us that law sometimes weaves together the lives of individuals, groups, and nations. *Brown*, she contends, "defined a version of the classic ethnic success story that has been central to the twentieth-century discourses of the nation."¹⁷

While Engel's, Munger's, and Greenhouse's way of thinking about law has relevance in a comparative or even global context, it acquires particular significance in the American scene. Over a century and half ago Tocqueville noted, "Scarcely any political question arises in the United States that is not resolved sooner or later into a judicial question."¹⁸ Or, as Hendrik Hartog argues, "[T]hroughout American history law was inescapably, at times overwhelmingly, present. . ."¹⁹ And what was true in the past, is only all the more so today. As one observer puts it, "[T]he United States has become probably the most law-run and lawyer-run country in the history of mankind."²⁰ On the most basic level, this means that a sizable number of Americans live lives in the law in the most direct sense—they are legal practitioners, working for large firms or small practices, for local or federal government, for the judiciary or the private sector.²¹ There are over a million lawyers in the United States today, a staggering number when one considers that the national workforce numbers some 110 million. Each year our nation's law schools produce another fifty thousand lawyers, a number that roughly corresponds to the *total* number of lawyers presently at work in China.

The numbers, while suggestive, do not capture the full reality. While it is commonplace to claim that we live in a "litigious society,"²² the thoroughly legalized nature of American society does more than incline us to bring lawsuits at the drop of a hat.²³ Indeed, the litigious quality of our society is simply a characteristic of a deeper phenomenon—we live in a *legal culture*.

If Geertz is correct that culture can be understood as the "webs of significance" that "man as an animal" spins, then the webs in which Americans find themselves suspended are quintessentially legal in nature.²⁴ The codes of law are at once omnipresent and liminal: movies and television are saturated with images and tales of legality; narratives of the law fill the ranks of the best-sellers' list;²⁵ the language of law finds expression in the small print of warnings and disclaimers that adorn the packaging of our cherished consumer products.²⁶ The culture

of legality turns the law into a tool of the miraculous and an expression of a craving for perfect justice.²⁷ To suffer a bodily injury is no longer seen as a misfortune: inasmuch as it can support a tort claim, it is an injustice demanding redress. On the other hand, a jury that returns an unpopular verdict can unleash an outpouring of community outrage that spills over into violence.²⁸ In a postexistential world, the law serves as our means of secular salvation. We expect, if not divine justice, then at least its human variety.²⁹

While the political lives of many Americans are paltry,³⁰ it might be said that we *all* live lives in the law. Many of our contacts with the world of law might seem relatively unobtrusive, yet even these are telling: upon birth, we are given a legal identity in the form of a Social Security number. The act of purchasing alcohol or cigarettes requires that we demonstrate a legal fitness to buy. The use of a credit card tethers us to a nexus of contractual relations.

What, then, does all this *mean*? Given the fact that we live in a legal culture, it may at times be difficult to separate the experiences of the practitioner of law from those of the legal subject. The practitioner, having received notification of an income tax audit, will at times find himself acting as a legal subject, while the subject, threatening to sue his neighbor, will at times act as a practitioner of sorts. Yet even if the terms of our existence within a culture of law means that the distinction between practitioner and subject often blurs, most legal scholars view differently those who dwell in the law professionally from those who periodically seek out, or find themselves drawn into, law's ambit.

In the nineteenth century, and well into the early twentieth, it was commonplace to eulogize a renowned practitioner with the phrase, "He lived greatly in the law." The locution suggests more than the mere notion of inhabiting a physical space—it powerfully conjures what perhaps could be called an "ontology of law": the idea that legal practice constitutes a form of being, offering special opportunities for ethical flourishing. Today, the act of conjoining legal practice with the notion of "living greatly" calls forth an altogether different set of associations, conjuring a life spent on manicured golf greens and tastefully renovated condos. Originally, however, the idea of living in the law was defended not in terms of its material rewards, but in terms of its benefits to character and community.³¹

If such an idea sounds vaguely quaint, it finds a robust contemporary defense in the work of Anthony Kronman. In *The Lost Lawyer: Fail-*

ing Ideals of the Legal Profession, Kronman offers a passionate defense of the ideal of the “lawyer-statesman.”³² The concept of the “statesman” finds its earliest and most influential elaboration in the work of Aristotle, who famously argued that the realm of the political represented freedom from the terrain of the private, the prepolitical arena of the household devoted to the satisfaction of our most basic, animalistic needs. Inasmuch as the realm of the political offers us the opportunity to participate in the life of the polis through deliberative acts, it makes possible those gestures of self-rule critical to the fulfillment of our nature as social beings.³³

The political, then, offers unique opportunities for ethical flourishing. In particular, it creates a laboratory for the cultivation of practical wisdom, “the excellence of the person who deliberates well about personal or political affairs.”³⁴ Practical wisdom, in turn, is conceived as a virtue of character, “a dispositional habit shaped by training and education.”³⁵ The relationship between virtue of character and civic virtue is complexly interdependent: the polis needs the statesman with practical wisdom, at the same time that the political arena creates the very crucible in which this virtue can be most meaningfully cultivated.

For Kronman, the insertion of the term *lawyer* into the statesman formula both extends and importantly repositions the original Aristotelian ideal:

The lawyer-statesman ideal points to a connection between the virtue of the statesmanship, on the one hand, and the ordinary circumstances of law practice, on the other, and implies that this basic human excellence has special meaning for lawyers as a group.³⁶

To appreciate how legal practice, at least classically conceived, requires and cultivates the interrelated virtues of civic-mindedness and practical wisdom, it is important to pay closer attention to what Kronman means by “the ordinary circumstances of law practice.”

Paraphrasing Karl Llewellyn, Kronman identifies three different “law jobs” at the heart of ordinary practice: judging, counseling, and advocacy. The judge settles legal disputes from an impartial point of view. The counselor, by contrast, occupies a more partial position, helping his clients “identify and control the legal consequences of their actions.”³⁷ The act of counseling brings the lawyer and his client closely together; in its pure form, it does not require contact with third parties.

As Kronman puts it, "When a lawyer is acting as a counselor, he must of course speak to his client, but need not speak to anyone else on the client's behalf."³⁸ The advocate occupies the most partial position, as he represents his client's interests to a third party, be it a judge, opposing counsel, or administrative agency.

All three jobs, Kronman insists, enlist and train the virtue of practical wisdom. Obviously the act of judging provides the least controversial case, as most would agree that the good judge must reason in a civic-minded fashion, balancing qualities of empathy and detachment. Yet the counselor and advocate must likewise exercise practical wisdom, inasmuch as the lawyer's role is not simply to identify the most suitable means for the client to realize his or her goals, but to deliberate with the client about these goals. To do this, Kronman claims, a lawyer

needs to place himself in the client's position by provisionally accepting his ends and then imaginatively considering the consequences of pursuing them, with the same combination of sympathy and detachment the lawyer would employ if he were deliberating on his own account.³⁹

Because legal practice, at least classically conceived, requires and cultivates the interrelated virtues of civic-mindedness and practical wisdom, the figure of the lawyer-statesman, Kronman concludes, "may be said to embody not merely a generalized conception of political virtue but a distinctive professional ideal."⁴⁰ This neo-Aristotelian position⁴¹ asks us to imagine a life lived in the law—as judge, counselor, or advocate—in both ontological and ethical terms. Offering the chance to cultivate prudence and to engage in civic deliberation, these careers encourage the development of those excellences that lie at the core of a fully constituted and free human agent.⁴²

Kronman's argument is, it should be noted, distinctly Burkean: he views the past nostalgically, finding in the late nineteenth and early twentieth centuries a golden age of the ideal of the lawyer-statesman. That this period was also distinguished by odious and elaborate forms of exclusion, in which legal practice, especially in its more statesmanly and privileged domain, was largely the work of men of a specific background and upbringing, Kronman acknowledges; still, he believes the past offers a more pleasing picture of the possibility of a fully realized life in the law than does the present. The instrumentalization of legal

education as evidenced in the rise of law and economics, and the replacement of the intimate practice with the gigantic and impersonal firm structured according to principles of corporate organization,⁴³ have, Kronman claims, “led to the degradation of the ideal of the lawyer-statesman.”⁴⁴

At the heart of the neo-Aristotelian position thus lies a fundamental ambivalence about contemporary law: at the same time that legal practice is freed from the fetters of race, gender, and class to reward the virtues of character in a more meritocratic fashion, the very social organization of law marginalizes the value of these traits. This ambivalence, in turn, generates a tension between the normative and the descriptive: between the belief that a life in the law should provide unique opportunities to become an ethically flourishing human agent, and a recognition that present-day reality leaves these opportunities radically compromised.

A very different theory of what it means to live in the law is associated with liberal theory. The Aristotelian-republican position, we have seen, is committed to the belief that visions of the good life are, and should be, defined through acts of public—that is, legal—deliberation. Liberalism, by contrast, has defended the notion that the law should remain largely agnostic with respect to visions of the good, and instead should be dedicated to the articulation and defense of the principles and institutions of social justice.⁴⁵ Given this position, it is possible to view a life in the law as less dedicated to the realization of the good than to the pursuit of justice.⁴⁶

The liberal position thus frames a dramatically different understanding of what it means to live a life in the law. Inasmuch as the law must remain agnostic with respect to the good, legal practice is not, liberalism insists, an arena dedicated to deliberating about ultimate ends and purposes. Human goals and purposes exist, the liberal claims, anterior to the deliberative struggles waged in law’s arena, and in this regard, the law functions more as a tool for the furtherance or frustration of ultimate ends, and not as a source of clarification about the wisdom of these ends.

Extrapolating from this position, it can be said that a career in the law is not a particularly fruitful terrain for the cultivation of a richly embodied subjectivity or ethical sense. Who we are as a person exists prior to, and independent of, our work as a lawyer. For the liberal, then, the idea of a living in the law is something of a misplaced metaphor—

for we do not live *in* the law; rather, life is altogether elsewhere. The law merely provides the means of material sustenance such that we can pursue our private visions of the good elsewhere—in leisure activities, in the synagogue or church, among friends and family.

The fact that liberalism separates professional role from personal identity, is, however, more than the mere consequence of the belief that ultimate purposes exist anterior to the arena of law and politics. Inasmuch as liberalism remains dedicated to the concept of social justice, the divorce between professional responsibility and personal belief serves as a critical tool of justice itself. Nowhere is this more apparent than in the liberal ideology of zealous advocacy that buttresses the adversarial system of justice.⁴⁷ Republican legal theorists have long insisted that the conventional practice of zealous advocacy should be checked by a “public interest” exception. Before advancing an argument on behalf of a client, republicans have argued, a lawyer should pay attention to “history and institutions,” asking whether the larger public interest is served by such partisan advocacy.⁴⁸ Many liberals have attacked this position, questioning whether lawyers are properly equipped to make such determinations about the public interest.⁴⁹

More trenchantly, liberals such as Monroe Freedman insist that a public interest limitation on zealous advocacy would erode our system of criminal justice by making it difficult for those accused of the most notorious crimes to secure adequate representation.⁵⁰ Freedman’s argument builds on the basic tenants of liberalism, for it observes that a system of zealous advocacy is predicated on a separation of the professional and the personal. When we read, for example, that a prominent criminal defense attorney has volunteered to represent Timothy McVeigh or Ted Kaczinski, we do not conclude that the attorney supports the substance of his or her client’s rage against government or technology. On the contrary, the only substantive belief that we might impute to the attorney is the thin notion that he or she believes that every accused is entitled to adequate representation.

Building in a public interest limitation on zealous advocacy, however, would dramatically change this equation. With such a limitation, the formal space between professional commitment and personal belief would effectively collapse; suddenly, the willingness of an attorney to represent a particular client could be read as indicative of the attorney’s substantive support of his client’s actions and beliefs.⁵¹ This, in turn,

could easily result in a state of affairs in which persons accused of politically or socially sensitive crimes would struggle to secure the aid of counsel, as the potential advocate might be loathe to be associated with the accused and his or her alleged conduct. Thus the vigilant preservation of a formal space between professional obligation and personal belief is necessary for the protection of our system of criminal justice.

Granted, some of the most interesting recent contributions to liberal legal theory have attempted to bridge the gap between the communitarian and the classical liberal position. David Luban's theory of the "good lawyer," for example, attempts to bring together the liberal and neo-Aristotelian position.⁵² Yet notwithstanding these efforts, the prevailing liberal ideology of practice, as buttressed by the case method of legal education, continues to insist that the lawyer furthers the cause of justice precisely to the degree that he or she lives in the law thinly as a practitioner and not fully as richly constituted being.

As we have seen, neo-Aristotelian and liberal theories have competed to offer a normatively compelling account of legal practice. As we shift our focus, however, from the practitioner to the legal subject, we find less theoretical diversity and richness for the simple reason that liberal theory, until recently, has powerfully dominated understandings of the legal subject, and that this theory largely lacks a robust picture of what it means to live a life in the law. This is not to say that classical liberalism lacks a theory of the legal subject altogether. For liberal theory, the legal subject is the possessor of a bundle of inviolate rights. These rights, most liberals would argue, are not created by legal decree. Rather, the law's responsibility is to recognize and protect these preexisting, foundational rights of persons.⁵³

In this regard, liberalism can be said to have a "thin" conception of personhood in three separate, though interrelated, ways. First, inasmuch as the individual is conceptualized in terms of the rights that attach to him or her, the theory lacks a richly embodied vision of human subjectivity.⁵⁴ Certainly, the theory is committed to basic notions of the subject's capacity to reason and to act as a free agent (indeed, liberalism is unintelligible absent these assumptions), but the liberal subject largely remains a being emptied of self. Secondly, insofar as these rights, as a normative matter, exist antecedent to the political and legal process, law is not viewed as an arena for the struggle over the meaning and contours of rights. While the law may provide a

forum for the fight over the *recognition* of rights, it is not a crucible for their deliberative fashioning.

Thirdly, to the extent that the law must remain agnostic with respect to the good, and instead must devote itself to the articulation and defense of principles and institutions of justice, then our “life in the law” is thin in a final and most crucial sense. As legal subjects, we are intended to experience the law thinly. The law is not there to guide us toward ultimate ends or purposes, as it is for the republican and communitarian; it is meant to secure a basic regime of justice such that each of us can independently pursue his or her own life project. In this regard, we experience the law strongly only when we violate a basic principle of justice, such as, for example, Mills’s canonical harm principle.⁵⁵ For the liberal, then, the notion of a “life in the law” remains something of an oxymoron.

In recent years, however, the liberal position has invited stern critique. Communitarians and civic republicans, for example, have attacked the hegemony of a discourse of rights—the tendency to translate all struggles over human ends and purposes into an abstract vocabulary of principle.⁵⁶ This discourse, of course, has been responsible for numerous constitutional breakthroughs, particularly during the Warren Court, and specifically in the areas of civil rights law and the articulation of a jurisprudence of privacy. Yet perhaps it was the very power of the liberal discourse of rights to reshape American constitutional understandings that has most contributed to present critiques. Communitarians insist that because all civic questions—such as, for example, whether there is speech that our society should not tolerate—are seen through the filter of abstract rights, we have bartered away the capacity to deliberate collectively and concretely about our deepest values.

Law-and-society scholars, by contrast, have critically examined the real-world operation of the rhetoric of rights.⁵⁷ Against the vision of a citizenry empowered with constitutional armor, these scholars have shown that the rhetoric of rights has done little to empower the most marginalized of our citizens, persons who remain painfully under-equipped to deploy the discourse to their advantage.⁵⁸ These scholars have drawn attention to the gap between law on the books and law in practice, revealing the often dramatic discrepancy between the bold promise of doctrine and the painful shortcomings of reality.

Perhaps more importantly, a new generation of sociolegal scholars have emphasized law’s constitutive role in society.⁵⁹ Strongly influ-

enced by the work of Michel Foucault and other theorists of postmodernism, these scholars see law less as an instrument for defending rights and dispensing justice, and more as a force that shapes social relations and constructs codes of behavior. Contending that social life is run through with law, these scholars insist that the relevant category for study is not the external one of causality (as the reference to effects would suggest) but the internal one of meaning.⁶⁰ In bold outline, the constitutive view suggests that law shapes society from the inside out, by providing the principal categories in terms of which life is made to seem largely natural, normal, cohesive, and coherent.

These critiques, in turn, have found strong echoes within the legal academy. Legal feminists, perhaps most prominently Catharine MacKinnon, have, for example, interrogated the liberal vision of a life outside the law. Focusing on the issue of pornography, MacKinnon has insisted that the alleged neutrality of the law has the real-world consequence of allying the law with the life projects of misogynists and pornographers.⁶¹ The staying of state power is, she argues, an instance of its exercise. Critical race theorists, writing on the question of racist speech, have similarly interrogated liberal shibboleths of neutrality.⁶² These theorists have insisted that the failure of the state to offer legal cognizance to the harms occasioned by racist speech must be explained in terms of the law's refusal to attend to the voice and lives of the marginalized Other. Thus both legal feminists and critical race theorists remind us that a life outside the law—one purportedly free from legal administration and decree is—in fact, a life subordinated to other, perhaps less salutary, forms of social domination.

Finally, the influence of Foucault upon the study of organized legality has prompted other scholars to move beyond showing how neutrality rationalizes social inequality, to demonstrate how the very concept of neutrality is predicated on elaborate microtechnologies of power and control. Although liberalism might stay the overt exercises of state coercion, it nevertheless is based upon, the Foucauldian insists, a vast system of governmentality that dictates the terms of, and recuperates the existence of, a disciplined citizenry.⁶³ In this respect, the very notion of a "life outside the law" is merely an expression of the very ideological apparatus that creates rule-governed subjectivity. All lives are necessarily and inevitably lives lived in the law.

The essays in this volume expand upon—and imaginatively challenge—these understandings of what it means to live a life in the law.

They help map the various ways law enters the lives of individuals, groups, and nations, at the same time that they contribute to the more general effort to theorize what a life in the law entails. While they begin in different locations—some obviously inside the law, some seemingly removed from it—together they reveal the manifold ways that law informs lives and life stories.

Prina Lahav's contribution, a study of the Chicago Seven trial, is the only essay to focus specifically on the classical concern of writers such as Kronman: on the consequences that legal practice has on the lives of its practitioners. But instead of locating in legal practice opportunities for ethical flourishing, Lahav paints a more complex picture, one that attends to the law's power to serve as a site for the definition of a collective group identity.

The leading protagonists of the notorious Chicago Seven trial were, Lahav notes, all Jewish: William Kunstler served as the lead defense attorney; Abbie Hoffman was the most flamboyant and famous of the defendants, and Judge Julius Hoffman presided over the controversial proceeding. This, Lahav argues, was not entirely coincidental as American Jews have long been attracted to careers in the law and to socially progressive politics.⁶⁴ On one level, one could explain this fact by harking back to the talmudic tradition, the way in which Judaism is organized around the exhaustive interpretation of legal texts.

At times, Lahav embraces this argument, insisting that the law provided a secular terrain upon which Jews could cultivate their religious values. More interestingly, however, Lahav argues that American Jews found in the law an arena in which their religiosity could be erased and sublimated. The discourse of liberalism thus provided them with a powerful vocabulary of assimilationism, fulfilling the dream of putting the emphasis on the word *American* in the designation of their hyphenated identity. Here, then, we find the embrace of legal practice, and the fight for social justice, as part of the larger project of defining group identity through an act of liberal erasure.

Sarah Barringer Gordon, by contrast, focuses on the experience not of the legal practitioner, but on the individual legal subject, in this case, the defendant in a notorious nineteenth-century infanticide trial. Her study of the Hester Vaughn trial nevertheless unexpectedly echoes aspects of Lahav's essay. Like Lahav, Gordon observes how the process of translating Vaughn's life experience into the discourse of liberal

legality had the consequence of erasing the particulars—and difficulties—of her character.

Both the trial judge and the liberal suffragists who turned the Vaughn trial into a cause célèbre transformed a concrete life into an abstract principle, ultimately turning Vaughn into an overdetermined signifier, a potent symbol readily enlisted by any legal or political cause. More disturbingly, Gordon locates in legal discourse, especially as deployed by the suffragists, the tendency to salvage womanly innocence through a process of denying agency. It was only by turning Vaughn's experience into a tale of rape and insanity—a construction that Gordon insists the facts did not support—that the liberal suffragists were able to construct a picture of legal innocence for the gendered legal subject.

The vision of the legal subject as an entity lacking meaningful agency is also the critical focus of Frank Munger's contribution. Like Gordon, Munger is interested in the gendered legal subject: his essay is a subtle examination of how law constructs the identity of women. But unlike Gordon, his focus is not on the individual legal subject, but on women as a social group; and more explicitly than Gordon, Munger tells a story of class: he is interested in examining "how law becomes active in the lives of poor women." As discussed earlier, one consequence of the rights revolution after World War II was a tendency to describe the lives of poor women in Manichaean terms. On the one hand, liberal advocates saw rights as tools of empowerment, potent weapons with which the poor could extract justice from an indifferent, if not hostile, system. Others, however, saw the discourse of rights as largely a sham, doing little to confer meaningful agency upon an underclass of victims.

Between these irreconcilable pictures of the potent agent and the hapless victim, Munger sketches a third alternative. Listening closely to the stories that poor, often black, women tell of their lives, Munger asks us to see these women as occupying a complex middle ground between agent and victim, as he explores the strategies by which poor women resourcefully resist the law's construction of their dependency. In so doing, Munger reveals how these women live lives in the law in the most complicated sense. On the one hand, we encounter an underclass trapped in cycles of dependency at least partially of the law's making; on the other, we meet persons who, contra Kronman's elite narrative of legal practice, have learned resourcefully to negotiate the shoals of

legal administration to protect their moral identity not *through* but *from* the law.⁶⁵

Like Munger, Vicki Schultz is concerned with the collective identity of women, and she, too, implicitly offers a critique of Kronman's elite narrative of legal practice. Schultz does not locate in legal practice particularly rich or unique opportunities for ethical flourishing and self-actualization; rather, she passionately insists that *all* work can, or rather, should, offer these opportunities. Yet she specifically challenges the arguments of feminists who defend the idea of paying mothers for domestic work. Here her work seems to agree with Munger's study of how regimes of welfare contribute to cycles of dependency and enforced domesticity.

Interestingly, however, Schultz's work straddles the liberal and the communitarian. Like the liberal, she deploys a discourse of rights, arguing that we all "have a right to a life's work," and that such work is an anchor of good citizenship. Yet like the communitarian, she does not see work as merely the instrumental means by which the laborer supports his or her corporation or family; rather, she sees work as the process through which the individual constitutes him- or herself through a process of meaningful collaboration within a community. We are, then, less law's subjects than "labor's subjects," constructed in large part by the form of our gainful employment.

Building on the pioneering work of Richard Sennet, Schultz suggests that law, as a tool of social order, requires the stability created by a society-wide "commitment to work performed over the course of a life." In defending her belief that we all have a right to "full and equal participation in decently paid, life-sustaining work," Schultz endorses a number of "universal structural solutions." These include imaginative, if not utopian, reforms such as the adoption of a reduced work week, the offering of periodic sabbaticals to all workers, and the creation of a new ethos of appreciation for service jobs. Here Schultz explicitly defends the power of law to effect such change, at the same time that she acknowledges that a remaking of the laws of work will be both a cause and consequence of a radically redefined understanding of how we are constituted by what we do.

If the focus of the essays collected in this book has traveled from the individual in Lahav and Gordon, to the collective in Munger and Schultz, Annette Wieviorka offers perhaps the most capacious understanding of what it means to live in the law. In examining the recent

trial of Maurice Papon for complicity in crimes against humanity, Wieviorka reveals how the very identity of a nation can be defined through juridical and legal acts. Specifically, she shows that the trial served to reshape a collective understanding of the Vichy period, challenging the vision of Vichy as a mere puppet regime of the Nazis (an image, in part, created by an earlier act of juridical theater, the Touvier trial). Against this prevailing understanding, the Papon trial presented a picture of Vichy as an administrative entity with its own logic and agency (and here we hear echoes, albeit on a national level, of Munger's study of welfare women).

On one level, Wieviorka's essay brings us full circle, returning us to Lahav's insight that legal proceedings can serve as shadow trials, acting out dramas rife with liminal legal meaning. (The trial of the Chicago Seven was, Lahav notes, filled with references to the Holocaust and the Eichmann trial.) On another level, Wieviorka's study of Papon, a leading "lawyer-statesman," offers the most emphatic challenge to Kronman's elite theory of legal practice, reminding us that just as law offers opportunities for ethical flourishing, it creates equally powerful opportunities for moral abjection. Yet finally, and most distinctively, Wieviorka's essay reminds us of the power of the law not simply to define individual and group subjectivity, but to define the very character of a nation, and to dictate the terms of the memories and stories upon which national identity is anchored.⁶⁶

Taken together, these essays challenge the shibboleths that have informed liberal, neo-Aristotelian, and communitarian notions of what it means to live in the law. These challenges, however, eschew a simple repudiation of the discourse of rights and the tenets of liberal legality. Certainly they demonstrate the power of the law to define the terms of personal, collective, and national identity. But they also remind us of the power of persons, groups, and nations to construct counternarratives, to define a space of accommodation in which we live more creatively in and through the law.

NOTES

1. Oliver Wendell Holmes Jr., *The Common Law* (Boston: Little, Brown, 1946), 1.
2. John Noonan, *Persons and Masks of the Law: Cardozo, Holmes, Jefferson, and Wythe as Makers of the Masks* (New York: Farrar, Straus and Giroux, 1976).

3. Austin Sarat and Thomas R. Kearns, eds., *Law in Everyday Life* (Ann Arbor: University of Michigan Press, 1993).
4. Patricia Ewick and Susan Silbey, *The Common Place of Law: Stories from Everyday Life* (Chicago: University of Chicago Press, 1998).
5. See Stephen Carter, *Reflections of an Affirmative Action Baby* (New York: Basic Books, 1994); also, Patricia Williams, *The Alchemy of Race and Rights* (Cambridge: Harvard University Press, 1991).
6. See Carol Greenhouse, "A Federal Life: *Brown* and the Nationalization of the Life Story," in *Race, Law, and Culture: Reflections on Brown v. Board of Education*, ed. Austin Sarat (New York: Oxford University Press, 1997).
7. Austin Sarat, "Victims, Vengeance, and the Identities of Law," *Social and Legal Studies* 2 (1997): 163.
8. See Leonra Lapidus, "Maintaining the Status Quo: Institutional Obstacles in a Child Custody Dispute," in *Law Stories*, ed. Gary Bellow and Martha Minow (Ann Arbor: University of Michigan Press, 1996).
9. See, for example, Peter Brooks and Paul Gewirtz, eds., *Law's Stories: Narrative and Rhetoric in the Law* (New Haven: Yale University Press, 1996); also Bellow and Minow, *Law Stories*. Indeed, the rise of this trope has contributed to a recentering of legal discourse, away from the formalism of the early twentieth century (which continues to define, in clichéd terms, the standard picture of legal discourse).
10. For an interesting example of the place of law in the life of a single community, see Carol Greenhouse, *Praying for Justice: Faith, Order, and Community in an American Town* (Ithaca: Cornell University Press, 1986).
11. See Fox Butterfield, *All God's Children: The Bosket Family and the Tradition of American Violence* (New York: Knopf, 1995).
12. Jerome Skolnick, *Justice without Trial: Law Enforcement in a Democratic Society* (New York: John Wiley, 1966).
13. Austin Sarat, "'The Law Is All Over': Power, Resistance and the Legal Consciousness of the Welfare Poor," *Yale Journal of Law and the Humanities* 2 (1990): 343.
14. David Engel and Frank Munger, "Rights, Remembrance, and the Reconciliation of Difference," *Law and Society Review* 30 (1996): 8.
15. Engel and Munger, "Rights, Remembrance," 14.
16. Greenhouse, "A Federal Life," 171, 170. Also Jon-Christian Suggs, *Whispered Consolations: Law and Narrative in African American Life* (Ann Arbor: University of Michigan Press, 2000), chap. 8.
17. Greenhouse, "A Federal Life," 186.
18. Alexis de Tocqueville, *Democracy in America*, vol. 1, trans. Henry Reeve (New York: Knopf, 1984), 280.
19. Hendrik Hartog, "Abigail Bailey's Coverture," in *Law in Everyday Life*, ed. Sarat and Kearns, 107.
20. Harold Berman, William Greiner, and Samir Saliba, *The Nature and Functions of Law*, 5th ed. (Westbury, N.Y.: Foundation Press, 1996), 3.
21. See Michael Kelly, *Lives of Lawyers: Journeys in the Organizations of Practice* (Ann Arbor: University of Michigan Press, 1994).

22. See, for example, Jethro Lieberman, *The Litigious Society* (New York: Basic Books, 1981); and Lawrence Friedman, *Total Justice* (New York: Russell Sage, 1985).

23. Many dispute the accuracy of this perception, arguing that it is based on anecdote, "horror story," and myth rather than a close look at reliable evidence. See, for example, Marc Galanter, "Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) about Our Allegedly Contentious and Litigious Society," *UCLA Law Review* 31 (1983): 56.

24. Clifford Geertz, *The Interpretation of Cultures* (New York: Basic Books, 1973), 5.

25. Richard Sherwin, *When Law Goes Pop: The Vanishing Line between Law and Popular Culture* (Chicago: University of Chicago Press, 2000).

26. See Susan Silbey and Austin Sarat, "Critical Traditions in Law and Society Research," *Law and Society Review* 21 (1987): 165, for a discussion of the importance of attending to such facts about law.

27. Friedman, *Total Justice*.

28. One example is discussed in Robert Gooding Williams, ed., *Reading Rodney King/Reading Urban Uprising* (New York: Routledge, 1993).

29. See, for example, Judith Shklar, *The Faces of Injustice* (New Haven: Yale University Press, 1988), arguing that matters once seen as misfortunes increasingly are viewed as injustices.

30. Periodically we have the chance to vote, which most of us ignore. We may identify with a particular political party, but most Americans will never contribute to a political cause or attend a political meeting or rally.

31. Louis Brandeis, for example, defended the progressive ideal of the "people's lawyer," an advocate dedicated to challenging the power of great corporations. See generally David Luban, *Lawyers and Justice: An Ethical Study* (Princeton: Princeton University Press, 1988).

32. Anthony Kronman, *The Lost Lawyer: Failing Ideals of the Legal Profession* (Cambridge: Harvard University Press, 1993).

33. This championing of the domain of the political is shared by many contemporary communitarians and civic republicans. See, for example, Michael Sandel, *Democracy's Discontent: America in Search of a Public Philosophy* (Cambridge: Harvard University Press, 1996).

34. Kronman, *The Lost Lawyer*, 41.

35. *Ibid.*

36. *Ibid.*, 109.

37. *Ibid.*, 121.

38. *Ibid.*, 122.

39. *Ibid.*, 130. For a useful discussion of the role that lawyers play in helping to clarify client interests, see William Simon, *The Practice of Justice: A Theory of Lawyers' Ethics* (Cambridge: Harvard University Press, 1998).

40. Kronman, *The Lost Lawyer*, 109.

41. Kronman distinguishes his argument from the position of contemporary civic republicans such as Cass Sunstein and Frank Michelman, who, Kron-

man argues, seek to separate Aristotle's discussion of the practical wisdom from the characterological argument upon which it originally depended.

42. Kronman's views have been the subject of much insightful criticism. For a sample, see Tanina Rostain, "Ethics Lost: Limitations of Current Approaches to Legal Regulation," *Southern California Law Review* 71 (1998): 1273; William Simon, "Virtuous Lying: A Critique of Quasi-Categorical Moralism," *Georgetown Journal of Legal Ethics* 12 (1999): 433; Charles Silver and Frank Cross, "What's Not to Like about Being a Lawyer? A Life of Counsel and Controversy," *Yale Law Journal* 109 (2000): 1443.

43. As Kelly notes, "The lives of lawyers are . . . a form of multilayered narrative, an effort by lawyers to merge satisfactorily their individual life stories with the organization in which they practice" (*Lives of Lawyers*, 219–20).

44. For a bracing account of the influence of big firms upon the changing nature of legal practice, see Lincoln Caplan, *Skadden: Power, Money, and the Rise of a Legal Empire* (New York: Farrar, Straus and Giroux, 1993).

45. Certainly the most influential work of contemporary liberalism defending such a position remains John Rawls's *A Theory of Justice* (Cambridge: Harvard University Press, 1971).

46. See, for example, Owen Fiss, "Foreword: The Forms of Justice," *Harvard Law Review* 93 (1979): 1–58.

47. For a discussion of this ideology see William Simon, "The Ideology of Advocacy: Procedural Justice and Professional Ethics," *Wisconsin Law Review* (1978): 30.

48. See Marvin Frankel, "The Search for Justice: An Umpireal View," *University of Pennsylvania Law Review* 123 (1975): 1031–59. See also Marvin Frankel, *Partisan Justice* (New York: Hill and Wang, 1980).

49. Such an objection, it should be noted, fails adequately to challenge the neo-Aristotelian view, as Kronman insists that the inability to deliberate well about public concerns is less a cause than a consequence of the present-day social organization of law.

50. See Monroe Freedman, *Lawyers' Ethics in an Adversary System* (Indianapolis: Bobbs-Merrill, 1975). See also Monroe Freedman, *Understanding Lawyers' Ethics* (New York: Matthew Bender, 1990).

51. This problem is discussed in Austin Sarat and Stuart Scheingold, "Cause Lawyering and the Reproduction of Professional Authority: An Introduction," in *Cause Lawyering: Political Commitments and Professional Responsibilities*, ed. Austin Sarat and Stuart Scheingold (New York: Oxford University Press, 1998).

52. See Luban, *Lawyers and Justice*.

53. For a canonical statement of this position, see John Locke, *Two Treatises of Government*, ed. Peter Laslett (Cambridge: Cambridge University Press, 1988).

54. The extreme of this position is again found in Rawls, *A Theory of Justice*. A powerful critique of the Rawlsian picture of the thin self is found in Michael Sandel, *Liberalism and the Limits of Justice* (Cambridge: Cambridge University Press, 1982).

55. See John Stuart Mill, *On Liberty* (Indianapolis: Bobbs-Merrill, 1976).

56. See Sandel, *Democracy's Discontents*; also Frank Michelman, "Law's Republic," *Yale Law Journal* 97 (1988): 1493–1537.

57. For one example see Engel and Munger, "Rights, Remembrance."

58. See Sarat, "Law Is All Over."

59. David Trubek, "Where the Action Is: Critical Legal Studies and Empiricism," *Stanford Law Review* 36 (1984): 575. Also Robert Gordon, "Critical Legal Histories," *Stanford Law Review* 36 (1984): 57.

60. See Gordon, "Critical Legal Histories"; also Christine Harrington and Barbara Yngvesson, "Interpretive Sociolegal Research," *Law and Social Inquiry* 15 (1990): 141. We should emphasize at the outset that there are considerable differences between and among those we have lumped together as taking the constitutive view. For example, Barbara Yngvesson's study, "Making Law at the Doorway: The Clerk, the Court, and the Construction of Community in a New England Town," *Law and Society Review* 22 (1988): 409, draws attention to the power of legal officials in shaping the (social) meanings of the "good neighbor," or "dutiful parent," but this effect of law on social meaning seems quite different from what, say, Gabel and Feinman have in mind when they contend that contract law encodes an invasive ideology, an idealized (and generally unarticulated and unexamined) way of thinking about conflicts and agreements that tends to legitimate (as natural and necessary) various oppressive socioeconomic realities. See Peter Gabel and Jay M. Feinman, "Contract Law as Ideology," in *The Politics of Law: A Progressive Critique*, ed. David Kairys (New York: Pantheon, 1982). In the first case, the law's effect on social meaning is relatively transparent and explicit; in the other, social meaning is engendered systemically and is, as a result, less easily detected.

61. See, for example, Catharine A. MacKinnon, *Only Words* (Cambridge: Harvard University Press, 1993).

62. See, for example, Mari Matsuda, Charles Lawrence, Richard Delgado, and Kimberlè Crenshaw, *Words That Wound: Critical Race Theory, Assaultive Speech, and the First Amendment* (Boulder, Colo.: Westview, 1993).

63. See Michel Foucault, "Governmentality," *Ideology and Consciousness* 6 (1979): 5–21; also *Discipline and Punish: The Birth of the Modern Prison*, trans. Alan Sheridan (New York: Vintage, 1979).

64. See Jerold Auerbach, *Unequal Justice: Lawyers and Social Change in Modern America* (New York: Oxford University Press, 1976); and Robert Burt, *Two Jewish Justices: Outcasts in the Promised Land* (Berkeley: University of California Press, 1988).

65. For another example of this type of relationship to law, see Lucie White, "Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G.," *Buffalo Law Review* 38 (1990): 1.

66. See Austin Sarat and Thomas R. Kearns, "Writing History and Registering Memory in Legal Decisions and Legal Practices: An Introduction," in *History, Memory, and the Law*, ed. Austin Sarat and Thomas R. Kearns (Ann Arbor: University of Michigan Press, 1999). Also Lawrence Douglas, *The Memory of Judgment: Making Law and History in the Trials of the Holocaust* (New Haven: Yale University Press, 2001).