

# THE HUMAN LAWYER<sup>1</sup>

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## I.

Roxbury is a neighborhood in Boston. It is thought by some to be one of the “worst” neighborhoods in the city. Roxbury has a very high concentration of black residents. On Warren Street, in the center of the community, lies the Roxbury District Court. Inside the Roxbury District Court sits the bustling local branch office of one of Massachusetts’s biggest industries.

One morning, a student attorney was picking up cases at arraignments as part of a third-year legal clinic. She was assigned to represent Maurice. Maurice was being held in custody, so the young lawyer went upstairs to the lockup to make her introduction. Maurice was short and thin, covered in dirt. As the student introduced herself, a man in another cell drowned out her voice, shouting at officers to flush his toilet. Maurice said “hello” to the student and complained that he, too, couldn’t get anyone to flush the toilet in the small cell that he was sharing with two other people.

They began to talk about Maurice’s life and about his case. They weren’t as rushed as usual—they still had about twenty minutes before the case would be called. Still, they had to cover all the important details of Maurice’s life history: He was homeless. He was cold. He had two children. He had a drug problem. He was a writer. His poetry book had been lost during the arrest. He knew he shouldn’t have been in that building, but he wasn’t trying to steal anything; he was just looking for shelter. He really wanted the two pieces of jawbreaker candy the officers had taken away but promised to return. He needed her to ask about them right away.

An officer walked down the hallway and slapped the large red button that controlled Maurice’s toilet. He then slapped a few others on his way

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1. The vignettes in this piece are composites based on my personal experiences and observations in law school. The names used have been changed where appropriate to respect privacy. I am grateful above all to my parents, Barbara Blackmond and Costas Karakatsanis. This piece also owes a great deal to the hard work of dozens of colleagues and friends. I am especially indebted intellectually to Derrick Bell, Geoff Brounell, Richard Chen, Greg Dworkowitz, Lani Guinier, Jon Hanson, Shuli Karkowsky, Marco Lopez, Richard Parker, Nicole Ramos, Michal Rosenn, and Phil Equality Telfeyan.

down the hall. The successive sounds of swirling water could be heard all the way down the corridor, each time slightly more distant and distorted.

The officers soon shackled Maurice and took him downstairs for the arraignment. Despite the student lawyer's best efforts, a bail of \$200 was set. After all, Maurice had a habit of getting caught "trespassing." This, for some reason, weighed particularly heavily in the judge's determination that \$200 was needed to ensure Maurice's presence at his next court date.

Maurice had no money and nobody he felt comfortable calling for money, so he returned upstairs to the lockup to await transfer to the local jail, where he would spend the next few weeks until his pretrial hearing. Perhaps then he would plead guilty so as not to be held several more weeks until a trial was scheduled. His zealous student advocate raced upstairs after him to comfort him. "The food sucks there," he informed her. "And they strip you down and poke around your ass. Plus, they won't let me do any writing," he added. "What'd the judge say about the case from '04?" She looked at her notes and answered, "He said it was for the same charge."

After a few more minutes, she got ready to leave. She had to get back to school for Administrative Law. She promised to visit him the next week at the jail. Then, he surprised her: "Why did I have to sit there behind that glass? I couldn't even hear you." She was startled because Maurice had asked a question that almost nobody else asks each day as they judge, prosecute, and defend inside that courtroom. Why does Roxbury make defendants appear in the courtroom shackled and confined in a glass box? As members of the community fill the courtroom each day, there they are, inside that cage: "us" and "the other."

She thought about every day she had walked into that courtroom and seen the glass cage filled with what seemed to be the same kinds of people charged with the same kinds of crimes. Five or six Roxbury residents were usually stuffed into the box, stepping on and over each other, pressing their faces to its glass walls in a futile effort to hear—much less understand—a snippet of the legal code-words being thrown around about their lives.

She thought about that morning after the Red Sox won the World Series, when the arrests had consisted mostly of drunken revelers. Everyone that day had been mesmerized by the sight of the college students inside the glass box. Nobody was quite sure what to say or do; the presence of wealthy white people in that glass box just seemed odd—out of place and somehow silly. The court clerk couldn't hide a smile, the probation officers pointed and joked with each other in the corner, and the lawyers stumbled through their bail arguments, not quite sure what to say. The glass cage suddenly seemed absurd, as if everyone realized they were watching a tragic comedy and their only defense mechanism was laughter.

“Next time just tell the judge I need to stand out there next to you,” Maurice told her.

“Well, the judge isn’t likely to think the cage is prejudicial, Maurice.” She couldn’t help but be troubled by her own response. She had answered him almost by reflex, and her legalistic jargon made her feel awkward and embarrassed. But the law student in her also couldn’t resist playing out in her head a legal challenge to the use of the glass cage. Her first thought was one of the great fears of public defenders: that the judge would be upset by her request and would not be as lenient on Maurice. But it was more than that. It would involve trying to convince judges that defendants shouldn’t be in glass cages and shackles when judges are making decisions about a defendant’s character, guilt, and dangerousness—when judges are deciding whether to revoke probation and send someone like Maurice to jail for a couple years; trying to convince a judge that, psychologically, it is much easier to throw another human in jail if the person already appears inside that box—much easier than if Maurice stood right in front, eye to eye, as a free human being; trying to convince a judge that the judge, as a person, is influenced by seeing a defendant shackled and caged . . .

The student attorney thought about trying to capture in legal writing the tremendous deprivation and insecurity facing the people who find themselves indigent and the sense of hopelessness they feel when they find themselves in a courtroom, pitted against the Commonwealth of Massachusetts in a fight for their liberty—when they cannot afford \$200 to avoid stumbling into each court appearance like a caged animal; trying to describe the subtle messages of inferiority that the cage sends to people like Maurice every day; and trying to explain that the cage sends the same message to all of the professionals working in the court and to all of the family members and journalists who fill the courtroom’s pews.

And then, with perhaps the four words that best describe the life of a public defender or anyone else caught in the trafficking of inequality, she put her hand on Maurice’s shoulder. “But I will try.”

## II.

Michael Riggs was starving and homeless.<sup>2</sup> He had begun using heroin after his young son drowned in the family swimming pool. For many years, he had been living a life of petty crime, depression, and addiction. On October 13, 1995, Michael walked into a grocery store and took a bottle of vitamins without paying for it, perhaps thinking they would help give him strength. In the store’s parking lot, he pleaded with employees to let him

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2. See *California Three-Strikes Prisoner Set Free*, FAMMGRAM (Families Against Mandatory Minimums, Washington, D.C.), Summer 2006, at 20, 20. See also Dean Kuipers, *Less Than Zero*, L.A. WKLY., July 12, 2001.

work at the store, scrubbing their floors to pay off his debt and to help him get food.<sup>3</sup> Instead, he was arrested. The prosecutor decided to file the case as a violation of California's "Three Strikes Law," and Michael was sentenced to twenty-five years to life in prison.<sup>4</sup>

Don't read this article like the Supreme Court justices and their law clerks read Michael's cruel and unusual punishment petition. Don't read this article as you typically read an article in a newspaper or a law journal. Let down your guard and let each word make you feel something. Think about what Michael Riggs must have felt as he took his first step into his jail cell. Did it have a smell or a flickering light overhead? What did he think as he heard the cell door shut behind him? Did his heart start beating fast? Did he have a brief moment of panic, his hands dampening with sweat? Or was he calm? Was his spirit already broken, resigned to a fraction of the life he could have had? What was the first thing another inmate said to him? Think about the emotions that raced through his body—the moments of uncertainty he felt as he lay in his cell. Maybe he thought about his young son.

We must always remember when those same emotions well up inside each of us. We all have our moments of insecurity and our moments of panic. We all have our moments of loneliness and our moments of pride. Can we see those emotions in others? The debate about rampant incarceration is not just about the billions of dollars that incarceration costs, its stunningly disproportionate impact, and the evidence that it doesn't actually work; it is also about Michael Riggs. It is about a homeless man who was hungry and weak and who stole vitamins from a supermarket. It is about Jorge Andrade, who is serving fifty years to life for stealing nine videos from K-Mart, and Gary Ewing, who is serving twenty-five years to life for stealing three golf clubs.<sup>5</sup>

The human lawyer remembers that all abstract policy debates are about real people. We owe it to those people to ensure that their stories are not shortchanged when we make the difficult tradeoffs that governing a society of humans requires. Yet some narratives hold a much more powerful place in our collective psyche than others. There is an empathy displacement that grossly skews our perceptions of social harm.

In individual criminal cases, we employ a heightened standard of proof before imposing a conviction. Liberty is of such great importance that we require evidence "beyond a reasonable doubt" before sending a human being to prison or otherwise depriving a human of her freedom. However,

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3. Kuipers, *supra* note 2.

4. Riggs v. California, 525 U.S. 1114, 1115 (1999) (denying Michael Riggs's pro se petition to declare his sentence unconstitutional).

5. See Ewing v. California, 538 U.S. 11, 18, 20 (2003) (plurality opinion); Lockyer v. Andrade, 538 U.S. 63, 66, 68 (2003).

when setting broader policy, for example, in the conception of criminality, the calibration of punishment, and the treatment of offenders, we abandon those heightened standards completely. We resort to strategies that result in massive deprivations of liberty, such as imprisonment or, to borrow from another context, military invasion, with little or no indication that these strategies work, much less evidence that they work *best*. Just as we should be wary of throwing one person in jail if the evidence against her is unsound, so too should we worry about throwing millions in jail if the evidence supporting the connection between massive incarceration and a better society is unproven.<sup>6</sup>

The human lawyer reminds her peers that we often fail fully to internalize negative consequences when these consequences are visited upon certain groups, such as those who look different than us or those who live far away from our tiny bubble of experience. Without great vigilance, these stories and these costs are easily lost, and with them disappears any chance of properly evaluating the merits of any given policy.

We forget this when cigarettes kill 443,000 Americans each year<sup>7</sup> and when drunk driving kills nearly the same number of people as all illicit drug use combined (17,000).<sup>8</sup> But we are smokers, and we are drinkers. Smoking has never been criminalized, and drunk driving is barely criminalized (especially in comparison to the severe penalties attached to

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6. The great wealth of empirical evidence suggests that mass incarceration, particularly for drug offenses, fails even to advance its own stated goals and, perversely, may exacerbate the problems that, at least ostensibly, motivated the laws. See, e.g., DRUG WAR FACTS 227, 232, 235–36 (Douglas A. McVay ed., 6th ed. 2007) (discussing recidivism, as well as the disruption of families), available at <http://drugwarfacts.org/factbook.pdf>; JEFFREY A. MIRON, DRUG WAR CRIMES (2004) (arguing that drug prohibition exacerbates many of the problems it purportedly solves). No robust evidence exists linking increased incarcerative penalties to any gains in deterrence of crime, let alone gains that justify the tremendous financial costs of incarceration. The overwhelming scientific consensus is that increases in sentence length, such as those seen in American criminal justice over the last several decades during the “war on drugs,” have not had a significant effect on deterrence. See, e.g., Michael Tonry, *Purposes and Functions of Sentencing*, in 34 CRIME AND JUSTICE: A REVIEW OF RESEARCH 1, 28–29 (Michael Tonry ed., 2006) (“Three National Academy of Science panels . . . reached that conclusion, as has every major survey of the evidence . . .”).

7. Ctrs. for Disease Control & Prevention, Smoking and Tobacco Use, Fact Sheet, Tobacco-Related Mortality, [http://www.cdc.gov/tobacco/data\\_statistics/fact\\_sheets/health\\_effects/tobacco\\_related\\_mortality](http://www.cdc.gov/tobacco/data_statistics/fact_sheets/health_effects/tobacco_related_mortality) (last visited Sept. 9, 2010). More than 49,000 Americans die from the effects of secondhand smoke each year. *Id.*

8. Ali H. Mokdad, James S. Marks, Donna F. Stroup & Julie L. Gerberding, *Actual Causes of Death in the United States, 2000*, 291 J. AM. MED. ASS’N 1238, 1240, 1242 (2004) (estimating that in 2000, 17,000 Americans died from the use or the indirect effects of the use of illicit drugs and that 16,653 people were killed in alcohol-related car crashes). See also NAT’L HIGHWAY TRAFFIC SAFETY ADMIN., TRAFFIC SAFETY FACTS 111 (2005) (finding that alcohol-related fatalities resulted in 16,885 deaths in 2005), available at <http://www-nrd.nhtsa.dot.gov/Pubs/TSF2005.pdf>.

other drug laws).<sup>9</sup> Because of who is thought to engage in these activities, smoking and drinking hold a different place in our national narrative. Smoking and drinking have been relatively well-accepted parts of mainstream and wealthy culture. Because of dominant narratives and incomplete empathy, criminal law has become only a woefully imperfect approximation of social harm.

This same narrative displacement, privileging some conception of “us” to “the other,” repeats itself over the wide variety of policy areas that make up collective life. It allows great suffering, poverty, and violence all over the world. It is true that many opponents of harsh interrogation techniques or severe criminal punishments or waging wars forget that while these actions may be quite repulsive, the alternative—omitting to act—may result in an equal or greater number of deaths. But the ease with which we have engaged in these gruesome activities—from imprisoning a significantly higher proportion of our population than any society in the world,<sup>10</sup> to imprisoning blacks at a rate six times that of South Africa during apartheid,<sup>11</sup> to waging dozens of wars and supporting countless

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9. See, e.g., Mark Houser, *Exceptions the Rule for DUI Sentences*, PITT. TRIB.-REV., June 8, 2003 (discussing a Pennsylvania law that allows a special exception to mandatory sentences permitting drunk drivers with multiple convictions to spend most of their “incarceration” at home or in half-way houses). See also NHTSA, ON DWI LAWS IN OTHER COUNTRIES (2000) (reporting that most countries, as well as most states in the United States, have established fines and licensing sanctions for impaired driving offenses), available at <http://www.nhtsa.dot.gov/people/injury/research/pub/dwiothercountries/dwiothercountries.html>.

As a result of drug-sentencing policy, more than fifty-three percent of those in federal prisons in the United States were sentenced because of a nonviolent drug offense. See HEATHER C. WEST & WILLIAM J. SABOL, U.S. DEP’T OF JUSTICE, PRISONERS IN 2007, at 22 tbl.11 (2008) (reporting that 95,446 of 179,204 federal inmates were incarcerated for drug offenses in 2007), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/p07.pdf>. The number of drug offenders in prisons and jails increased 1100% between 1980 and 2003. MARC MAUER & RYAN S. KING, THE SENTENCING PROJECT, A 25-YEAR QUAGMIRE: THE WAR ON DRUGS AND ITS IMPACT ON AMERICAN SOCIETY 10 (2007), available at [http://www.sentencingproject.org/doc/publications/dp\\_25yearquagmire.pdf](http://www.sentencingproject.org/doc/publications/dp_25yearquagmire.pdf). This harsh sentencing persists even though alcohol use is much more highly correlated to violent crime than drug use. See JENNIFER C. KARBERG & DORIS J. JAMES, U.S. DEP’T OF JUSTICE, SUBSTANCE DEPENDENCE, ABUSE, AND TREATMENT OF JAIL INMATES, 2002, at 6 tbl.7 (reporting that among jail inmates in 2002, 37.6% of violent offenders used alcohol at the time of their offense and only 21.8% used drugs), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/sdatj02.pdf>. The United States Code requires lengthy, mandatory minimum sentences for possessing and distributing illegal drugs. See, e.g., 21 U.S.C.A. § 841 (West 2010).

10. Bruce Western & Becky Pettit, *Mass Imprisonment*, in BRUCE WESTERN, PUNISHMENT AND INEQUALITY IN AMERICA 11, 14–15 (2006).

11. LANI GUINIER & GERALD TORRES, THE MINER’S CANARY 263 (2002). Blacks constitute only fourteen percent of the nation’s drug users. MAUER & KING, *supra* note 9, at 20. Incredibly though, blacks constitute thirty-seven percent of those arrested for drug offenses and fifty-six percent of those in state prisons for drug offenses. *Id.* Blacks constitute seventy-four percent of those sentenced to prison for a drug offense. AM. CIVIL LIBERTIES UNION, CRACKS IN THE SYSTEM: TWENTY YEARS OF THE UNJUST FEDERAL CRACK COCAINE LAW 3 (2006), available at <http://www.famm.org/Repository/Files/cracksin>

dictators all over the globe,<sup>12</sup> to spending more on a military than the next forty-five highest spending countries combined<sup>13</sup>—is truly quite shocking.

All this because we haven't listened to enough stories and because we haven't experienced enough other ways of life. We treat some lives with a certain nonchalance. The human lawyer is not afraid to make difficult tradeoffs, but she is cavalier with no life. The human lawyer is sensitive to forgotten stories. The human lawyer embraces "costs" and "benefits," but she has a richer understanding of each.

Michael Riggs got out of prison after about ten years due to a claim of ineffective assistance of counsel.<sup>14</sup> But there are many more people like Michael, Gary, and Jorge whose stories never make it to the Supreme Court or into the pages of a law journal.

Human lawyers must weave these stories into the fabric of our culture's ever-improving narrative.

### III.

A friend from law school was back at home in New Jersey for winter break, and she got a very expensive speeding ticket. She is a fanatical observer of the speedometer when in her car, and she has a fairly weird obsession with respecting speed limits. On this particular occasion, she was actually driving two or three miles per hour below the labeled limit! There must have been some sort of mistake with the radar gun; perhaps she rubbed the cop the wrong way when she argued with him after being pulled over. In any case, she scheduled a court date for when she would be home from school in January, and she was committed to fighting what she viewed as a minor injustice and a major inconvenience.

When she went into court to make her passionate stand, she was informed that her court date had been changed. She had received no notice. The clerk told her the new date. My friend politely informed the clerk that this wouldn't be possible because she now lived in Boston and could not return for the later date. She asked instead where she could go

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system\_20061025.pdf.

12. A few of the most overt uses of American force in the twentieth century include Hawaii, the Philippines, Nicaragua, Guatemala, Cuba, Puerto Rico, Iran, Iraq, South Vietnam, Chile, Grenada, and Panama. *See generally* HOWARD ZINN, A PEOPLE'S HISTORY OF THE UNITED STATES: 1492-PRESENT (new ed. 2003).

13. CHRISTOPHER HELLMAN & TRAVIS SHARP, CTR. FOR ARMS CONTROL & NON-PROLIFERATION, THE FY 2009 PENTAGON SPENDING REQUEST—GLOBAL MILITARY SPENDING 1 (2008), [http://www.armscontrolcenter.org/policy/securityspending/articles/fy09\\_dod\\_request\\_global/](http://www.armscontrolcenter.org/policy/securityspending/articles/fy09_dod_request_global/).

The human lawyer asks herself simple but mind-altering and life-changing questions. For example, what would the world look like if the approximately \$700 billion spent on the military this year were spent instead on the Peace Corps?

14. *California Three-Strikes Prisoner Set Free*, *supra* note 2, at 20.

to contest the ticket right away. The clerk was unsympathetic, and she indicated that if my friend failed to appear on the scheduled date, a warrant would be issued for her arrest. Her other option, according to the clerk, was to admit to the violation and pay several hundred dollars. She had no other recourse.

For just a second, when threatened with a warrant, she felt a powerful feeling of helplessness. She wanted more information. Her eyes darted around the crowded lobby. Who could she talk to about the court's procedures? Who could help her? Who knew what was going on? Was this treatment even legal for speeding tickets? She felt that sensation in her chest—that pang of being treated unfairly. That feeling overwhelmed her as she stood at the courthouse counter.

These moments of emotion are the fires from which the human lawyer is forged. Once she experiences them, she remembers them and holds them close to her heart. *They help her understand other people.*

My friend left the courthouse and went home. She soon felt better. Under that threat though, my friend ended up just giving in and paying the hefty fine. Luckily she could afford it. Thank goodness the whole thing was relatively minor and would probably never happen to her again.

#### IV.

One morning in the middle of August 2006, forty-three Harvard Law School students gathered in a small classroom in Hauser Hall, room 102, for the *Harvard Law Review's* orientation. The thirty men and thirteen women were regaled with stories of their potential impact on legal "scholarship" and their ability to publish student writing.

As long as they gave extra weight to articles from Harvard professors, as long as those articles had a roadmap in the beginning, as long as they got permission from respected professors before they published any piece, as long as the articles claimed in their introductions to be entirely novel, and as long as the articles didn't make them think too hard about our culture or their lifestyles, they were completely free to help select the new and exciting wave of legal "scholars."

As long as their own ideas fit within the student writing guidelines and other procedures outlined in their internal manuals—the Greenbook, the Brownbook, the Whitebook, and the Blackbook—and as long as their citations conformed to the Bluebook, they had virtually unlimited control to leave their mark.

#### V.

The first idea for this article was a choose-your-own-adventure story to be published as a note in the *Harvard Law Review*. It was to be about a



law student and the people she met at law school. It would have discussed some of the wonderful things she saw in the law, such as its insistence on requiring reasons and its emphasis on logical rigor in the translation of principles and shared values into outcomes. The note would have also examined the problems she saw in legal education and legal culture, such as restrictions on how reasons are expressed in legal writing, incomplete perceptions of social harm, and systemic flaws that undermine the actual rigor of legal decision-making processes. The note was also to be about the difficult pressures the student faced in her personal life, especially in making decisions like choosing a career. At the end of the adventure, readers would find themselves with a career or with positions on particularly pressing legal problems that were logically consistent with earlier choices they had made about their own stated values.

Another student editor said: “They’ll never let you publish that!” I asked why. “Because it’s not legal ‘scholarship.’” Then, the person added, smiling: “Plus, everyone knows that requiring logical consistency with our values would have meant overturning Warren McCleskey’s death sentence.”<sup>15</sup> In my heart I knew the person was right. People rarely tested (with any rigor) their daily actions or beliefs for logical consistency with their deeply held values. There is comfort and stability in intellectual and moral laziness. My choose-your-own-adventure wasn’t going to be published—at least in that format. The very idea violated the Brownbook, the Greenbook, the Whitebook, and even portions of the Blackbook. The books, like those who depended on them, were all afraid of “too much justice.”<sup>16</sup>

## VI.

After Hurricane Katrina, law students from around the country rushed to New Orleans. Some went because the hurricane was a watershed moment of consciousness—one of those moments when the mind wrestles with striking evidence that the world contains much more of what you abhor than you had thought.

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15. *McCleskey v. Kemp*, 481 U.S. 279 (1987) (rejecting an equal protection challenge to the racially disparate application of the death penalty in Georgia and upholding Warren McCleskey’s death sentence).

16. *Id.* at 339 (Brennan, J., dissenting) (responding to the majority’s contention that granting McCleskey’s claim in the death penalty context would open the door to racial discrimination claims throughout the criminal justice system and accusing the majority of fearing a criminal justice system truly free of racial bias). Just like the Supreme Court justices, *Harvard Law Review* editors and other law students—worried about prestigious clerkships and successful careers—are often very risk averse. We are hesitant to live principled lives in accordance with our own values, and we are scared of the logical conclusions of our own views. As a result, just like the majority in *McCleskey*, we are afraid of what living up to our own stated values would mean in a world so full of genuine suffering and need.

Others went because what Katrina exposed was a little too egregious for comfort, and small amounts of guilt meant that the wounds had to be covered over before life could go on swimmingly. And some went both because they wanted to help and because law schools were offering free trips to warm weather.

But everyone went because, in some sense, they care about other people. Just as an internal computer triangulates the position of millions of tiny ants as they construct a mobile civilization, human colonies, for all their multitude of intricacies, seem to have an internal compass of compassion.

Some of the students who went to New Orleans tell the story of Julian, a public defender whom they met. Julian's house had been flooded and destroyed. A fallen tree had almost evenly divided his pick-up truck in half, and he was using the bed of the truck as a makeshift office. He didn't have a working phone.

The morning the students met this unforgettable character was a busy one in the local New Orleans courtroom. The students sat in the back of a row of small pews, watching the scene unfold like a group of foreign election observers. In the middle of an arraignment for first-degree murder, the defendant informed the court that he didn't think he was the right "Dwayne Jackson" because he had been picked up for something totally different and because he was in his twenties. Dwayne the alleged murderer was in his forties. After a few minutes, the judge apologized to twentysomething Dwayne, but told him that he would have to stay in the city jail for a while since they couldn't transport him back to wherever it was that they had found him. Dwayne was sad because, in the months since the hurricane, he had made some friends and amassed some belongings at a different prison facility, and now he couldn't even go back to that makeshift home.

The judge then started to arraign another murder case. The judge appointed Julian (who by now had taken almost all of the cases since the students arrived) to represent the defendant. The defender calmly raised a few doubts to the judge: "Judge, I don't believe I can take this case. If I do, it'll be my twenty-first pending capital murder case." The judge had no one else there to whom he could assign the case, but had any lawyer in American history ever come close to this total of capital cases? So the judge took a recess in order to complain about the city's justice system to the visiting law students. None of them could take the case either.

Supreme Court cases about rules of criminal procedure just seemed out of touch to the students after they saw Julian. The vague images most of the law students had of the front lines of poverty hardly aligned with the way that law was actually lived and experienced.

After court, the students sought out Julian to tell him how appalled

they were at what they had seen in this hurricane-ravaged courtroom. Julian told the students that, even before the hurricane, his office could afford only about half of the lawyers it needed to provide adequate representation to indigent New Orleanians. Now, with only a small fraction of even that already inadequate staff, they were probably below even the Supreme Court's definition of effective assistance.<sup>17</sup> Worse still, because of Louisiana's pretrial detention statutes, many of Julian's clients spent weeks and weeks in jail before being formally charged with a crime.<sup>18</sup> This period was often longer than the sentence the person would have received had she been found guilty the day she was arrested.

That the hurricane turned those weeks into months perhaps shocked elite law schools enough to send a few of their brightest to the area, but it hardly seemed to rattle this seasoned veteran of injustice. The hurricane brought many to the front lines, but it didn't seem at all to change the nature of the battle Julian was fighting there in the trenches. In the fight to improve the lives of marginalized people, the human lawyer has always worked from a broken truck, and every day is hurricane season.

## VII.

Every year a famous public interest lawyer comes to Harvard Law School to speak to the new class of 1Ls. He always speaks in the north classroom in Austin Hall, and he always talks about the wonderful people he has met throughout his life working with disadvantaged communities and throughout his career as a lawyer working against the death penalty. The first-year students sit quietly with tears welling in their eyes and running slowly down their faces. Some cry because they hadn't imagined the poverty and injustice of which he tells and against which his remarkable career has stood as a small fortress of hope. Others cry because of the purity in his eyes and the passion in his words—because it is beautiful to hear about a life devoted to reducing the suffering of others. Every year these students go that night to a drinking event sponsored by student organizations, and they talk over beers and mixed drinks about how it was the best speech they've ever heard.

Every year most Harvard Law School graduates begin their careers at corporate law firms with neither fireworks nor fanfare. Those few hours in Austin Hall are a distant memory of a time when they felt free to think like

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17. See *Strickland v. Washington*, 466 U.S. 668 (1984) (establishing a two-pronged test for "ineffective assistance of counsel," including a "performance" prong that has been interpreted to have very little bite and a "prejudice" prong that forces those with ineffective lawyers to prove, amid complex litigation, exactly how a constitutionally defective lawyer might have affected their case).

18. See LA. CODE CRIM. PROC. ANN. art. 701B(1)(a) (Supp. 2009) (allowing forty-five days of custody before charging document must be filed for a misdemeanor and sixty days for a felony).

human lawyers.

### VIII.

“I’m entitled to my opinion.”

“You have no right to judge me.”

These two phrases are common in conversation, and they are cousins. These standard verbal shields are surprisingly common phenomena in law school and among law students. We have all heard them from that guy in our first-year Criminal Law class who starts talking about how rape laws are too harsh on men or in response to the class “socialist” telling her classmates that they shouldn’t be going to work for corporate law firms.

These shields are dangerous because they are used to neutralize a person who is making us think about our life in an uncomfortable way: “I’m not going to engage with you, friend, because in our culture, it is simply not acceptable to challenge someone else’s beliefs or choices.” We all do it—we all have this marvelous psychological defense mechanism.

Thankfully, this defense mechanism only kicks in when we perceive the challenge to be a relatively close moral call; otherwise, going through our typical days would become quite difficult. For example, if someone we know robs a homeless person or shoots a child, we generally feel comfortable passing judgment on them. We have no problem saying to them: “What you did was wrong.” In fact, as a society, we even require them to give reasons or justifications for their behavior or face punishment.

While perpetuating gender inequality in the law school classroom or helping America’s corporations grow wealthier or spending hours upon hours watching the National Football League might initially seem less obviously wrong in our minds, our hesitation in judging the decisions of people who engage in these activities is certainly not that they are entitled to behave in any way they wish without regard to the well-being of others. Rather, it is that we don’t seem to be as sure empirically that advocating more lenient definitions of rape or working for a corporate law firm or devoting enormous time and energy to watching and discussing professional sports is leading to serious harm. However, evidence that these activities actually do lead to harms that we care about, if it exists, would have to be taken very seriously. If such evidence exists and is presented, it becomes a sword that we must allow to pierce these verbal shields.

When we say we are each entitled to our opinions and, for example, to our choice of careers, we are simply acknowledging a background legal rule regarding free speech or freedom from (mostly government) coercion in our everyday decisions. We are not, as some seem to presume, making a moral statement. For in the world of morality, once we have decided our

own underlying values, we are not entitled to believe anything we wish. Given a set of values, we cannot take positions or engage in activity without regard for the consequences of those positions and actions on the realization of our values, without evaluating the consistency of our positions, or without examining the evidence in support of our beliefs in the same sense that we are not permitted to believe in mathematics that  $2+2=5$ . That's just not how morality works.

Moral questions can be extremely difficult. They are intellectually trying; people for many centuries have discussed and debated them without reaching definitive answers. They are also psychologically trying, because they ask us to evaluate how we are living vis-à-vis others and perhaps even ask us to make some changes to our own lives.

It is precisely when facing such difficult dilemmas that the input of others becomes most valuable. After all, what better way to help us test if we are living well-reasoned lives consistent with whatever our own values might be?

The pervasiveness of anti-intellectual defense mechanisms in law schools is bizarre because legal minds are otherwise trained to support positions with articulable reasons.

The human lawyer leaves these shields at home; she uses her sword.

The human lawyer does not question the *values* of others, but she always supports her beliefs and actions with reasons and asks others to do the same. She understands that there are real effects on people's lives attached to our beliefs and to our actions. She asks herself constantly if she is living her life in accordance with her moral values about how her life should impact other people. The human lawyer also recognizes the daunting practical, emotional, and psychological nature of this task. That is why the human lawyer cries for help: "Please judge me!"

## IX.

This was one of the most tension-filled trials the court had staged in many years. Both sides had prepared first-rate teams of lawyers, and each day the jury listened carefully to the evidence presented. After all, it was one of the most important decisions in her life.

Many of the arguments and pieces of evidence were the same as last week, when she was deciding between donating her tax refund to a hospital in Haiti or spending it on an iPhone. But that trial had been in small claims court, and the decisions are fairly automatic there, based largely on habit and common-law rules previously developed in the higher courts. Although the Rules of Moral Evidence apply equally there, small claims court is usually too overwhelmed with daily decisions to engage in rigorous litigation over every moral case. Even bigger cases that were fully litigated in district court—such as the one concerning what topic she

should choose for her new law review article or the one concerning whether she should stop spending hours watching professional sports—failed to garner as much media attention as this case.

This case just felt different. Choosing a career was a big deal. There was a series of motions dates and preliminary hearings in which basic values were discussed and agreed upon. At least with respect to the issues in this case, there had been surprisingly little disagreement between the parties about what constituted basic moral goods. The sides had no trouble crafting jury instructions detailing the substantive law of her own moral code.

The prosecution was challenging her previously stated desire to work at a corporate law firm. If the jury ruled in its favor, she would have to take a different approach to her career, at least until new evidence surfaced warranting a new trial. The prosecution's position was essentially seeking a significant change in her life, and perhaps in the lifestyle that she lived. The defense was holding firmly to her way of life and to the way of life practiced by so many of her peers, whose own grand juries had yet to return any moral indictments.

The trial was difficult for the judge to police. There were a lot of thorny evidentiary questions. For example, the Rules of Moral Evidence clearly prohibited consideration of psychological factors that might *explain* her decisions if those factors were not sufficiently relevant as moral *justifications* under the Rules.

The two sides were hotly contesting several main issues: the extent to which corporate law firms affect pervasive inequality, whether high corporate salaries were excessive personal luxuries in a world of staggering need, and the significance of the opportunity cost involved in working in corporate law when services were so badly needed elsewhere in the legal system.

The defense began its closing argument. It argued passionately about the need to build wealth so that she could adequately support her family and so that she might later be able to give back to the community. The defense stressed traditional barriers for women in the corporate setting and highlighted the potential expressive message that she could send by working at a corporate law firm.

The prosecution countered with striking evidence about average American family incomes and argued that the defense was drastically overestimating the amount of money needed to live a happy family life.<sup>19</sup>

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19. The median American household earned an estimated \$50,303 in 2008. CARMEN DENAVAS-WALT, BERNADETTE D. PROCTOR, JASON C. SMITH, U.S. CENSUS BUREAU, INCOME, POVERTY, AND HEALTH INSURANCE COVERAGE IN THE UNITED STATES: 2008, at 6 (2009), available at <http://www.census.gov/prod/2009pubs/p60-236.pdf>. The median first-year salary at a large corporate law firm in New York City was \$160,000 in 2009, not

The prosecution also questioned these asserted rationales and presented evidence that others who had made the defense's arguments were now seen living luxurious lifestyles; going to nice clubs and restaurants; buying expensive cars, televisions, and houses; wearing expensive clothes; and sending children to costly private schools. The prosecution noted that there were other ways to advance the cause of gender equality that did not contribute to massive social inequality. The prosecution argued that the desire for an enormous salary was inconsistent with the defense's own positions at the prior motion hearing concerning the moral obligation to help others. Finally, the prosecution presented evidence of the role that corporate law firms pursuing profit played in some of the most egregious and harmful activities in the history of the United States.<sup>20</sup>

The human lawyer has a courtroom in her head. The human lawyer litigates all her moral decisions.

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including potentially lucrative bonuses. Ass'n for Legal Career Prof'ls (NALP), NALP Bulletin, How Much Do Law Firms Pay New Associates? A 14-Year Retrospective as Reported by Firms (Sept. 2009), <http://www.nalp.org/2009septnewassoc salaries?s=first%20year%20associate%20salary>.

20. See e.g., *United States v. Philip Morris USA, Inc.*, 449 F. Supp. 2d 1, 28–29 (D.D.C. 2006) (explaining and criticizing the role of corporate lawyers in strategizing for and covering up the tobacco industry's misconduct for decades and averring that the role of lawyers in deceiving the American public was "a sad and disquiet chapter" in the history of the legal profession), *aff'd in relevant part*, 566 F.3d 1095 (D.C. Cir. 2009). The deceptive actions of those corporate lawyers are all the more egregious when you consider that approximately 443,000 Americans die each year as a result of tobacco. See Ctrs. for Disease Control & Prevention, *Smoking & Tobacco Use, Fast Facts*, [http://www.cdc.gov/tobacco/data\\_statistics/fact\\_sheets/fast\\_facts/index.htm](http://www.cdc.gov/tobacco/data_statistics/fact_sheets/fast_facts/index.htm) (last visited Jan. 18, 2010).

In addition to some of the more high-profile endeavors of corporate lawyers—such as the tobacco litigation, cases concerning the murder and mistreatment of union workers in developing countries, and cases involving the use of chemicals like Agent Orange—large corporate law firms spend each day defending corporations against discrimination suits, protecting companies from paying for the potential damage their products cause, designing executive compensation systems, and structuring complicated financial deals and intricate contract provisions that help banks and other large financial institutions extract significant rents from the rest of society. Corporate lawyers represent large agriculture businesses using resource-driven litigation to threaten small farmers; credit card companies and mortgage lenders looking to extract ever-increasing interest rates from borrowers experiencing difficult financial conditions; corporate banks foreclosing on homeowners; private prison corporations looking to create and perpetuate unsound and unjust criminal laws; and numerous corporations, shell corporations, and wealthy individuals seeking to shelter their income and assets from government taxation and therefore deprive society of significant revenue each year; and a host of other interests that, with the help of corporate lawyers, have come to dominate American social policy and law.

## X.

Figure 1: The Supreme Court:<sup>21</sup>

MM  
 MMM  
 MMM  
 MMM

Figure 2: The Supreme Court:

WW  
 WWW  
 WWW  
 WWW

Did some of the same flaws that produced these distributions infect the doctrine crafted at the very same time?

## XI.

On the third floor of Gannett House, the *Harvard Law Review* has a "Supreme Court Office." Until relatively recently, pictures of the current justices and portraits of the Court in the 1930s filled the walls. Editors inheriting that room as an office have used its space as a temple to worship the justices, old and new. It is one of the many shrines to that institution at Harvard Law School, where larger-than-life portraits of the justices and other legal celebrities follow the students from room to room and building to building.

On their frequent visits to the law school, justices, even more than professors, are treated as emperors. Students huddle in the aisles of large lecture halls just to get a glimpse.

A longtime Harvard professor, known for being uniquely contrarian, famously painted the office red on a personal whim when, as a student, he became Supreme Court Chair in the 1970s. In 2007, a fight ensued after another Supreme Court Chair removed some of the pictures of the justices and marked over the faces of old-time racists like Justice James Clark McReynolds. Some editors were angered: "We have to respect the Supreme Court. It is a great institution."

In the history of that office, these brief moments of color are slowly

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21. See Supreme Court of the U.S., Members of the Supreme Court of the United States, [http://www.supremecourt.gov/about/members\\_text.aspx](http://www.supremecourt.gov/about/members_text.aspx) (last visited Sept. 9, 2010).



eroded by the daily tide of law school normalcy—vivid memories turned dull and grey and eventually washed away into the ocean by wave after wave of thoughtlessness.

Throughout much of its history, the Supreme Court has been openly hostile to or completely out of touch with important social narratives. It has been out of touch with the stories of people like Maurice and Michael and Dwayne. Idolatry of the Supreme Court and the legal establishment can lead us to sit by while these stories are ignored.

Lawyers, perhaps more than those in other professions, build up their heroes and cheer their rockstars. The human lawyer respects people because of their kindness, the quality of their ideas, and their contributions to alleviating suffering and promoting human flourishing; she never respects someone because other law students do. She challenges idolatry. She is aware that idolatry allows old orthodoxy to go unquestioned and existing flaws in decision making to go unremedied.

## XII.

This article was first written as a note to be published in the *Harvard Law Review*. The *Harvard Law Review*, as a matter of policy, makes room for every member to publish a note. After the piece was reviewed and edited by a number of student editors and approved by the Notes Committee, the President of the journal, pursuant to his plenary authority, cancelled the piece's publication.

## XIII.

It was nearing 3:00 p.m., and the professor was moving quickly through another lecture on constitutional law. He had just told a story about a hilarious idiosyncrasy he had discovered in the personality of one of the justices while he was clerking on the Supreme Court. Now he was analyzing the Court's decision in a recent affirmative action case. It was a truly virtuoso performance . . .

A second-year student looked around the room at her friends, their faces staring deeply into the screens of their laptop computers. She sat there quietly, listening to the rhythmic concerto of computer keys that filled the room. What began as her subtle frustration at a potential oversight in his lecture slowly grew into moderate outrage. She didn't want to raise her hand because no one had spoken in the class in over thirty minutes. Maybe she wasn't as smart as him anyway—maybe her idea was stupid. She had often heard other students joke about how useless many of their fellow classmates' comments were. Surely no one cared about her opinion. After all, they were paying money to learn from "expert" legal minds. Maybe she could just ask him after class. She would have to jump out of her seat without putting her stuff into her backpack so

she could beat the usual after-class rush down to the podium.

Then she saw Jamie raise his hand. Jamie was one of the few students who consistently spoke in class. Because of his politically conservative views, Jamie was often in the minority. She usually disagreed with him, but she found herself strangely interested and happy whenever Jamie intervened. On affirmative action, Jamie fought back. He engaged the professor, and he spoke to his putative superior with a tone of confidence and skepticism that bordered on disrespect. He even interrupted the professor to correct a mischaracterization of his question. It certainly stood out among the general adulation.

Many students seemed annoyed at Jamie, as if he was breaking some unwritten rule. The crescendo of plastic keys, slowly building throughout the lecture, had stopped abruptly in silence. The class waited, their hands perched over the computer keys, for a signal from the puppeteer that would tell them how to regard and record Jamie's arguments.

Jamie worked hard every day so that his views would not be marginalized—reduced to a footnote in the quasi-liberal law school experience. Jamie refused to take the path of least resistance.

The human lawyer, regardless of her political beliefs, sets an example of individuality for her peers. The human lawyer challenges conformity because it prevents us from confronting the issues that our peers are ignoring. It prevents us from feeling the stories that have been systematically hidden with the glosses of legal and popular culture. It also guides our career choices with the same invisible force that holds our hands in the unison of limbo above our keyboards. The human lawyer is acutely aware that pervasive conformity slowly suffocates individual liberty.

#### XIV.

Every night after finishing her reading for the next day at the library, a third-year law student walks home from the law school to her apartment on Massachusetts Avenue. Every night she passes a homeless man who sleeps on a small wooden bench under the street's only broken streetlamp.

A flattened cardboard box always lies at his feet, and a small gym bag full of his possessions always sits on the bench next to him, his arm resting over it as if to protect it. Many nights, the man sits motionless, wrapped in layers of clothing; only his curly beard pokes through the hole between his knit hat and the blanket he has tucked under his neck.

One night, the student was returning late from dinner and drinks, treading through the fresh snow with her rubber boots. She arrived outside her apartment and stopped to look at the ball of cloth and man sleeping upright on his bench. An inch of snow rested precariously on his right shoulder as his head lay tilted to the left. Her heart went out to him.

She had gone out of her way to spend a total of less than twenty minutes outdoors the whole day. She knew he would be spending the entire night outside, recoiling with shivers at each gust of wind.

She couldn't imagine what it would be like every night to call that bench home.<sup>22</sup> Not in Cambridge; not in the winter. How could she pretend to know all that he was going through? At one moment she almost hated herself for pitying him. How could she be worthy to think about him, to share a street with him, to write about him in her journal? The next moment, she hated herself for stupid luxuries she had and for not doing more to help him. In the past, she had placed bread or fruit next to his bag or talked to him if he were awake. Whenever he smiled at her and said, "God bless you," she felt triumphant. He even made her cry one night as she looked back and saw him devouring the bagels she had brought from the law review's kitchen.

But he was the fourth homeless person she had seen on her walk home. What was she to do? What would it mean to do enough to help him? Where could she draw the line? What about the thousands of homeless people like him or the millions of others living in poverty or struggling through the other troubles of life?

These are questions that the human lawyer cannot answer. The human lawyer can at most help us think about these things by making sure that the processes we use are as free from coercion and error as possible. She can tell us to be vigilant in ensuring that we always have good reasons when making decisions in our personal lives and when developing our laws. She can tell us to watch out for problems like psychological bias, selfishness, conformity, idolatry, misinformation, logical errors, and defense mechanisms. She can tell us not to brush aside certain stories—to think about the man on the bench—when we debate broader policy. But each of us must find our own answers to the problems of life that make each day difficult and fascinating.

No doubt we will make mistakes, and we will change our minds, and we will do wonderful things.

## XV.

On a warm evening in February, I joined a small group of people on the steps of the capitol in Montgomery, Alabama. We stood below the star that proudly commemorates where Jefferson Davis took the oath to become the president of the Confederacy. Behind us was the famous

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22. Approximately 664,414 people are homeless on any given night in the United States. U.S. DEP'T OF HOUS. & URBAN DEV., THE 2008 ANNUAL HOMELESS ASSESSMENT REPORT TO CONGRESS 21 (2009), available at <http://www.hudhre.info/documents/4thHomelessAssessmentReport.pdf>. About twenty percent of those homeless in shelters are children. *Id.* at iii.

white rotunda, which looked beautiful against the pink sky. In front of us, the sun set over Dexter Avenue, and in the fading light we could just make out the fountain that marked the city's old slave market.

Down the capitol steps stretched a long black tarp on which dozens of names and dates were painted neatly in white. Our group stood at the foot of the steps in an imperfect, quiet circle. As six o'clock neared, we knew Danny Joe Bradley was about to be killed.

I stood still and my eyes darted from the candle in my hands to the faces of my companions to the top of the rotunda. As I looked at the sky over the rotunda's dome, I began to think about Danny Joe Bradley. Somewhere in Alabama he was being led down a hallway. Was he noticing the tiled walls and the overhead lights? Did he nod his head to the prisoners he passed or meet eyes with the guards that led him from room to room? I wondered what he was thinking. Maybe he was thinking about his family or perhaps of friends he had made on death row. Maybe he was thinking about good and bad things that he had done. Maybe he was worried that it would be painful when the chemicals entered his blood. Maybe he was thinking about something much more mundane. Maybe he was too panicked and nervous to have a coherent train of thought.

Then I realized that I was hungry. I thought about where I might get dinner after I left the vigil. I could cook rice again at home, but I had eaten rice or pasta four days in a row. I thought about stopping to pick up a burrito on the way back to my apartment. But did I really want to go to Moe's? I was pretty mad that even though they had a "hero discount" for military personnel and police officers, the person at the register always refused to give it to public defenders. They were also a fairly large corporation—did I really want to support that business model? I caught myself before I got into yet another internal debate about corporations or factory farming. But then I quickly felt ashamed that my mind had wandered. I felt like I should have been thinking about Danny Joe Bradley. Danny Joe Bradley's mind would never again meander as mine had just then.

I had long been deeply troubled by the death penalty. But in that instant, I suddenly recognized another of its most important conceptual flaws: it denies Danny Joe Bradley that next moment of thought. It ignores that there is always a next moment in which you can decide to do the right thing—to be a better person. It denies that next moment in which you can have hopes and dreams and beliefs and kindness—in which you can actualize your humanity.<sup>23</sup>

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23. No matter who you are—whether you are someone like George Bush, Antonin Scalia, and Barack Obama or someone like Paul Robeson, Mahatma Gandhi, and Simone de Beauvoir—the incredible thing about human life is that there is always a next moment in which you must make a new decision about what is right.

Death row inmates in Alabama have founded their own nonprofit organization whose board consists entirely of those sentenced to die. It is called Project Hope to Abolish the Death Penalty. That night, we each wore pins with Project Hope's slogan: "Execute Justice, not People."

Project Hope's members produce a print publication every few months in which death row prisoners write down their thoughts and experiences.<sup>24</sup> The pieces contained within *On Wings of Hope* are, at various times, profound, beautiful, surprising, and funny. The endeavor is, most of all, a testament to what can be done with that next moment.

Danny Joe Bradley never got that next moment. The human lawyer cherishes that next moment, and she understands that, with it, she can always do better.

## XVI.

Part A of this Vignette describes the law's process of reasoning from basic values to doctrinal outcomes. Part B argues that this reasoning process is susceptible to flaws that are often difficult to perceive and suggests general rules of thumb for uncovering when systemic flaws are at work. Part C describes how these flaws also exist in analogous decision-making processes in our personal lives. Part D briefly concludes.

### A.

Law promises us what mere chance cannot: intellectual rigor. Outcomes must be consistent with a stated value (or set of values), and a court will invalidate an outcome if it is inconsistent with that value. A court starts from a shared value—whether gleaned from a statute, a constitution, or perhaps something just floating in the ether of our culture, such as: "A person's race should not affect the length of her sentence"; or "A person's gender should not affect his salary"; or "Things that tend to interfere with a person's liberty should be minimized"; or "Poverty should not affect the quality of an education or the likelihood of going to jail." The law then has to explain and justify why a particular outcome is consistent with that principle. This notion of the law as almost a science—indeed, as the science of reasoning, has been a popular conception of legal practice and scholarship throughout much of the field's history.<sup>25</sup> As law

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24. For more information on the publication and its past issues, see its website, Project Hope to Abolish the Death Penalty, *On Wings of Hope*, [http://virgilturtle.com/phadp/index.php?option=com\\_content&task=view&id=114&Itemid=87](http://virgilturtle.com/phadp/index.php?option=com_content&task=view&id=114&Itemid=87) (last visited Sept. 9, 2010).

25. See C.C. LANGDELL, *A SELECTION OF CASES ON THE LAW OF CONTRACTS*, at viii–ix (2d ed. 1879). See also Duncan Kennedy, *Legal Education and the Reproduction of Hierarchy*, 32 J. LEGAL EDUC. 591, 596 (1982) (discussing the tendency of law schools to teach the law as separate from policy precisely because of this mystical scientific attribution known as "legal reasoning").

schools and legal “scholars” have become increasingly dominated by and intertwined with other disciplines, this technical reasoning and attempted analytical rigor have remained a central authentic characteristic of legal education and law as a distinct discipline. It can be a wonderful characteristic, one that can make a vital contribution to human thought and decision making.

Consider, for instance, the potential practice of shackling a criminal defendant during pretrial hearings or sentencing. Basic background principles implicated might include the desire to provide fair proceedings and the general rules against restricting liberty and avoiding unnecessary pain. The law would ask if physically restraining a defendant would influence (perhaps unconsciously) the decision-maker, cause pain, inhibit thought or movement, infringe on dignity and humanity, and/or interfere with communication and participation in the defense. It would also ask whether and to what extent shackling responded to any identifiable safety risk by protecting other people present in the courtroom or if shackling enabled the court to become more efficient and if there were other alternatives that had similar benefits but fewer potential harms. In other words, the law would make a series of empirical assumptions and inquiries about the physical world and human behavior and then make a decision based on reasons and evidence. The assumptions, evidence, and the chain of reasoning from values to outcomes should be explicit so that they can be questioned, reviewed, challenged, and changed if new information or flaws came to light.

## B.

Often, the law does not actually work like this. Other less obvious things are also happening. Many cases turn on facts and stories that together determine the kind of reasoning eventually employed. Once the mind is made up, legal reasoning is like a game that can be played to perfection, either consciously or unconsciously. Almost any analog or distinctive feature can be seized upon, at least superficially, as a reason to treat a case the same or differently, even if such a move lacks true intellectual rigor.

Judges often reach conclusions first, whether knowingly or unknowingly. That sense of how she might want a case to come out unquestionably infuses her whole decision-making process with a strong psychological undercurrent. A judge may even try to swim straight ahead for a while using the power of her own reasoning, but as we watch her from the shore, she has often drifted far away from her desired path.

The central problem is that it is extremely difficult to determine the quality of legal reasoning simply by looking at the process of the reasoning itself. From our judge’s perspective, she may have stayed nicely on a

straight course, swimming under her own power. No doubt she would be surprised if she looked back and found herself so far adrift from where she entered the water. But judges, like all humans, are filled with subconscious biases and automatic cognitions.<sup>26</sup> These attributes shape attitudes, beliefs, and behavior.<sup>27</sup> Unconscious cognitive biases might even lead judges to believe that their rational processes are determining the result when in fact the causal connection was partially or entirely reversed. There also is imperfect information about the world, and judges often have to rely on intuitions about things like human behavior or the potential systemic effects of a given rule. Intuitions can be very dangerous, especially in a culture with so much inequality; after all, if culture shapes our intuitions, flaws in culture will be perpetuated in even the most basic of intuitions.

These cognitive problems are compounded by the fact that many of the most relevant empirical questions leave just enough room for credible belief—for doubt. But we should be skeptical of human cognitive processes and be sensitive to the psychology involved. Empirical beliefs should be independent of wishful thinking, yet lawyers and judges repeatedly come to empirical conclusions that just so happen to support a desired result.<sup>28</sup>

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26. For an excellent introduction to the topic of unconscious bias and its potential connection to various areas of law, see generally Kristin A. Lane, Jerry Kang & Mahzarin Banaji, *Implicit Social Cognition and Law*, 3 ANN. REV. L. & SOC. SCI. 427 (2007) (discussing how experimental psychology has provided substantial evidence that the human mind can operate without conscious awareness of the sources of influences on it and summarizing recent efforts of legal scholarship to consider how the law can and should adopt such findings). See also Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CAL. L. REV. 945 (2006) (discussing the pervasiveness of implicit bias and potential implications for human behavior and law); Jon Hanson & Kathleen Hanson, *The Blame Frame: Justifying (Racial) Injustice in America*, 41 HARV. C.R.-C.L. L. REV. 413 (2006) (describing the complicated social psychological phenomena and pervasive biases that allow us to tolerate a world that is deeply inconsistent with the values we purport to hold); Jon Hanson & David Yosifon, *The Situational Character: A Critical Realist Perspective on the Human Animal*, 93 GEO. L.J. 1 (2004) (arguing that the dominant “rational actor” model of human agency should be replaced with a new conception that incorporates the influences of situation).

27. An enormous body of research is beginning to catalog the extent to which human behavior is influenced by unconscious biases. For a meta-analysis of this literature, see Anthony G. Greenwald, T. Andrew Poehlman, Eric Luis Uhlmann & Mahzarin R. Banaji, *Understanding and Using the Implicit Association Test: III. Meta-analysis of Predictive Validity*, 97 J. PERSONALITY & SOC. PSYCHOL. 17 (2009) (recommending the use of both an implicit association test and self-report measures jointly as predictors of behavior). Other research has produced startling results in real-world analysis of legal cases. See, e.g., Jennifer L. Eberhardt, Paul G. Davies, Valerie J. Purdie-Vaughns & Sheri Lynn Johnson, *Looking Deathworthy: Perceived Stereotypicality of Black Defendants Predicts Capital-Sentencing Outcomes*, 17 PSYCHOL. SCI. 383 (2006) (finding that, in cases involving a white victim, the more stereotypically black a defendant is perceived to be, the more likely that person is to be sentenced to death).

28. This phenomenon is so pervasive that it can be found in nearly every debate on law and policy. For example, “trickle down economics” is fairly obviously a gimmick that

We must search diligently within the ultimate results of legal decisions for patterns, *particularly along dimensions important to our conceptions of social justice.*

Both the physical world and the human mind are simply too complicated for us to understand with any precision. Perhaps the only way effectively to evaluate any kind of policy, then, is to look at patterns and outcomes. If laws consistently produce outcomes inconsistent with certain fundamental values, we should be extremely skeptical of the social or individual decision-making processes that produced them, even if we cannot precisely identify where the flaws in the reasoning occurred.<sup>29</sup> Identifying these unconscious biases can be difficult. However, if certain groups have consistently fared worse, there may be good reason to believe that something, perhaps something hidden, is consistently creeping into decision making, especially when cases implicate certain conflicts between social groups.<sup>30</sup>

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relatively wealthy groups invented and employ (perhaps even in good faith) to justify massive economic inequality. But the workings of the American economy are complicated enough that it is hard to prove the “theory” wrong completely, so people are allowed to maintain a culturally credible belief in the hypothesis.

Or, for example, take any of the cases in which courts have upheld harsh prison sentences by superficially invoking the idea of deterrence. Although most evidence discredits the simplistic view of “deterrence” offered by courts without serious reflection, *see supra* note 6, it is the kind of empirical question that is very difficult conclusively to prove. So, the courts are permitted casually to invoke the concept and to maintain the clean hands of perceived intellectual credibility. *See Harmelin v. Michigan*, 501 U.S. 957, 1007–08 (1991) (Kennedy, J., concurring in part) (noting the “clarity” of the mandatory life sentence for cocaine possession and its connection to deterrence, one of the “first purposes of criminal law”).

The same concept animates the Supreme Court’s entire jurisprudence surrounding police interrogation. The Court apparently assumes that reciting a few quick “warnings” has some meaningful role in making less coercive police interactions with those who are largely frightened and unsophisticated. The Court similarly assumes that, during a police encounter, a person can freely consent to being searched. Anyone who works in the criminal justice system knows that these “warnings” and this “knowing and voluntary” “consent” are utterly insufficient to protect those subjected to custodial interrogations and complete fictions given the actual psychological dynamics at work during those interactions. The Supreme Court is making empirical assumptions about how coercive those interactions are and what it would take to diffuse them without a sufficient understanding of what it is like to be in that situation and how police interactions are truly experienced by those who live in certain communities. Instead of crafting meaningful rules, the Court allows officers to exploit people so long as they follow a few hollow procedures that, in the empirical view of the judges, magically transform inherently coercive situations into free and intelligent dialogues. *See generally Davis v. United States*, 512 U.S. 452 (1994) (demonstrating the unsupported assumption of both the majority and the dissent that simply giving *Miranda* warnings is sufficient to render an interaction knowing, voluntary, and intelligent).

29. Laws, beliefs, policies, and other results consistent with very common flaws in decision making should of course be viewed with even greater skepticism than outcomes that are inconsistent with the operation of those biases.

30. Strong evidence suggests that corporations and wealthy individuals have fared better in court than others. *See, e.g.,* Stephen Breyer, *The Federal Sentencing Guidelines*



## C.

Similarly, in her own internal debates or in discussions with others about decisions in their personal lives, the human lawyer reasons from basic values to more complicated positions on larger issues.

The brilliance of Socrates' method is that he recognized that people answer questions differently when they think they know where the line of questioning is going. By failing to disclose the ends, and by building little by little, Socrates minimized this problem. He got honest answers to relatively simple questions. Then he showed how a person's stated beliefs on more complicated issues or a person's behavior in a number of daily situations were inconsistent with the progression of seemingly harmless and unrelated smaller answers they had just given. In the same way, the human lawyer holds the hand of her foe at each stage of the argument; as long as people are holding positions and behaving consistently with their stated values, the human lawyer has done her job. She does not question another person's values.

But in analyzing her own decisions and the decisions of others, the human lawyer understands that students of the law are formidable

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*and the Key Compromises upon Which They Rest*, 17 HOFSTRA L. REV. 1, 20–21 (1988) (noting that prior to the imposition of the Federal Sentencing Guidelines, courts were far more lenient on white-collar criminals (typically wealthier offenders) than on those convicted of similar common law crimes). See generally D. Michael Risinger, *Navigating Expert Reliability: Are Criminal Standards of Certainty Being Left on the Dock?*, 64 ALB. L. REV. 99 (2000) (noting that civil defendants—usually corporations—fare much better than criminal defendants—usually the indigent—in judicial opinions concerning expert testimony, even though the expert-evidence analysis is meant to be doctrinally identical); Alec Karakatsanis, *A Tale of Two Doctrines* (May 2008) (unpublished manuscript, on file with author) (analyzing the doctrinal divergence in the Supreme Court's proportionality jurisprudence between the civil punitive damages and criminal punishment contexts and discussing the similar divergence in the Supreme Court's statutory interpretation of substantive criminal law in cases involving white-collar criminals as opposed to cases typically involving indigent defendants). Cf. *The Supreme Court, 2006 Term—Leading Cases*, 121 HARV. L. REV. 185, 275 (2007) (discussing how courts have used the Fourteenth Amendment to perpetuate dominant notions of class and culture).

Evidence also shows that other marginalized groups consistently fare poorly in court. See, e.g., U.S. SENTENCING COMM'N, FINAL REPORT ON THE IMPACT OF *UNITED STATES V. BOOKER* ON FEDERAL SENTENCING 106 (2006) (noting that, when controlling for other factors, immigrants receive federal prison sentences almost thirty-six percent longer than U.S. citizens do), available at [http://www.usc.gov/booker\\_report/booker\\_report.pdf](http://www.usc.gov/booker_report/booker_report.pdf). These kinds of trends repeat themselves in myriad ways throughout our culture and our law. See, e.g., N.Y. CIVIL LIBERTIES UNION, *THE ROCKEFELLER DRUG LAWS: UNJUST, IRRATIONAL, INEFFECTIVE* (2009) (noting that while whites constitute the vast majority of drug users and dealers in New York, blacks and Latinos constitute the vast majority of those sent to jail for drug-related offenses), available at [http://www.nyclu.org/files/publications/nyclu\\_pub\\_rockefeller.pdf](http://www.nyclu.org/files/publications/nyclu_pub_rockefeller.pdf). See also *supra* note 11.

We must always be sensitive to these outcomes, whether we are examining salary differences based on gender or trends concerning which charitable causes people of certain classes choose to support. The potential for bias and other flaws is simply too great, in both our laws and in our lives, to proceed without vigilance.

adversaries. Lawyers are very good at anticipating the logical conclusion of arguments and evidence, and they often construct psychological barriers so that the anticipated arguments and evidence do not have a strong effect on them by the time they are introduced in the chronology of conversation. In this way, because lawyers often do not even actively recognize these barriers, they are similar to the unsuspecting judge drifting away in the strong undercurrent.

After their initial reasons for supporting a certain outcome have been discredited, lawyers are also very adept at changing the reasons for which they support that outcome. In fact, in law school, students are taught to dip quickly into the well of alternate reasons, even if those reasons had little impact on the actual decision or little traction beyond sounding nice at first glance. Instead of leading a lawyer to question why she arrived at that position in the first place, evidence of a faulty decision-making process is usually just the first step in finding some other way to justify maintaining a belief or a way of life with which the lawyer has already become comfortable. Indeed, these skills can be quite useful in the zealous representation of a client or in the professional defense of a legal position. But we cannot afford to be biased advocates in our personal lives.

This would be a fairly innocuous eccentricity in the personality of the lawyer as a species if patterns did not emerge so frequently in the outcomes of their decisions. Much as with the laws discussed in Part B, lawyers (like other people) are not making mistakes that result in a random distribution of errors in their personal lives.

For this reason, the human lawyer reviews the outcomes of personal decisions and looks for trends in her own decision making. She also seeks to commit her interlocutors to reasons in support of their positions or behavior. After she successfully questions those reasons, she anticipates another battle over a new wave of reasons. With each set of outcomes and each set of new rationalizations, the human lawyer builds evidence about how most people make decisions. The human lawyer also remembers each flaw that she finds across many different types of argument and culls the data for patterns.

#### D.

Legal cases and personal decisions implicate a whole range of situations, each with its own subtle differences that make it a part of real life. Law is supposed to unpack these situations, identifying similarities and differences and applying evidence to settle disputed claims. The goal of this endeavor is to develop rules for behavior that create a world consistent with the underlying values we have articulated. The human lawyer never forgets this ultimate mission. The human lawyer vigorously audits our laws and her own personal decisions, and she always wears her

outcome glasses to correct for potential myopia.

## XVII.

Most law review articles begin with a roadmap. Most novels do not. Lawyers are obsessed with the reader getting one meaning from a text. This is perhaps the law's greatest strength and its greatest weakness. For lawyers, arguments progress neatly from one point to another, and assumptions and logical connections can be isolated and evaluated.

Decision making through rigorous reasoning is surely an underutilized process in other areas of our lives. (We often fail to test each of our personal beliefs and decisions for logical consistency with our values or to make sure that each of our actions is based on deep thought and sound evidence. We often act based on gut feelings or emotions, habit, unreflected assumptions, or cultural norms.) But despite the benefits of rigorous reasoning, a single-minded focus on this reasoning process can be a poor way of introducing and developing new legal paradigms and giving voice to new experiences. In the process of isolating and communicating a single meaning, a subset of potential meanings is slowly and systematically suffocated. What starts as a few errant snowflakes becomes an avalanche of forgotten human experiences on the mountain of legal "scholarship" and judicial opinions that define our shared legal universe.

Legal decisions are made and legal commentary is written on the level of shared cultural consciousness. The belief among the faithful seems to be that this shared consciousness can be achieved only through rational argument (or, more precisely, that which commonly passes for rational argument in legal discourse). Legal scholarship often appears intentionally to rid itself of emotion. It is true that a few pages in a judicial opinion or in a law journal is indeed an imperfect medium for communicating the complex workings of the human mind; human thought is overwhelmed with panic, insecurity, joy, fear, frustration, sorrow, exhilaration, and other sensations that can only be experienced and can never quite be described.

But these sensations can be *felt*, and legal writing could help us feel them. In particular, stories can help us make these emotional connections—to come to our own understanding about a person or an issue in a way that reasoned argument may not on its own. That is why, in our personal lives, we rely heavily on feelings, relationships, emotional bonds, and other experiences to inform our sense of how our lives connect to others.

Shared consciousness can and sometimes should be much more than the product of rational argument. We can share in irrationality—in things that we cannot easily derive from or explain with reasons. And we often do; when we meet eyes with one we love or when we look at a picture of an anonymous student standing in front of a tank.

It is this irrationality that narrative helps to capture. It is this irrationality that helps define our humanity. Stories help us create emotional bonds, and they help us sense how others are experiencing the world. The emotions and insights gained from stories are thus vital for developing the kind of holistic understanding of the human experience that is necessary before we can engage in rational argument about the rules that should govern collective human interaction. Legal commentators should thus embrace narrative rather than hiding it.

By learning about and experiencing as many different people and ways of life as possible, we learn something that helps us participate in rational argument with a more authentic understanding of *exactly what is at stake*.

Only this way will we become sensitive and humble enough to recognize different, new, or more subtle forms of coercion that are the enemy to all who value liberty. Only through this sharing can we understand and appreciate the true possibilities of shared human existence. Thus, prior to making decisions based on reasons through rational argument, the human lawyer embraces the vicissitudes of the human experience. This is especially important when she does not have direct personal experiences and connections to a particular issue. As a result, she has a much richer understanding of the positive and negative effects of legal rules—especially rules that affect others very different from her.

We should be more honest about the importance of *both* robust rational argument and emotional connections.

Perhaps while, in our personal lives, we undervalue rationality as a method of decision making, the legal system undervalues emotion and narrative as a source of a more nuanced understanding of the human animal with which its decisions are designed to interact.

The human lawyer learns a lot from law in her private life and learns a lot from her private life in law.

## XVIII.

It was the morning of a second-year student's last set of on-campus interviews. She walked to the Charles Hotel, where the corporate law firms had all set up shop. On the way, she was forced into several awkward greetings with people walking busily back and forth—people she hadn't seen since her first-year section meetings. Harvard students traversed Massachusetts Avenue like schools of fish in navy blue and grey business suits.

As she waited in the fancy hotel suite, she suddenly forgot the name of the first firm she was interviewing with at 9:40. After all, she had already been to seventeen interviews. The panic that precedes inevitable embarrassment abruptly subsided, however, when she noticed the firm's

initials molded into the chocolate covered pretzel that she was about to eat. What a great firm! All the others just gave out generic chocolate-covered pretzels. This one showed style and class, as well as a prescient understanding of the practical problems likely to face a law student in the nervous moments before her interview. Finally a way to tell them apart!

She thought about what she could possibly ask about during her interview. She was, by now, an expert on the wonderful world of exciting pro-bono projects that the firms marketed. She also had a selfish desire not to hear the same speeches again about the firm's extraordinary diversity committee. She felt bored and exhausted—the last couple weeks of interviews had taken their toll, physically and emotionally. Two weeks of rushing around, throwing on her suit and a smile, and then running back to class; in all the commotion, she hadn't had time to think about why she constantly felt anxious. She had a nagging stress—a feeling that something was incomplete. For some reason, she started thinking about it at that moment.

She wondered what life would be like at the firm. Maybe she'd just do it for a little while. It'd probably be really fun in the summer. Most of them promised a lot of group events at nice restaurants and bars. Plus, she had loans, and she would certainly feel more liberated if she could pay them off quickly. Maybe working at a firm wouldn't be so bad, and she could still spend some of her time and money on other things. On the other hand, the work seemed kind of boring—would anyone do it if it paid less? Representing great wealth also seemed removed from her former work as a teacher. How could she turn away from what she really cared about? Could she really have an impact on the world? She'd be working within the vast corporate system, and any efforts she made, even from such a privileged position, would be like whispering from a mountaintop.

But the firm was so easy. She already had six offers, and four gift boxes of dried fruits, chocolates, and computer accessories covered her kitchen table. The choice seemed rather automatic. It seemed comfortable; removed from anything personal or painful. It seemed like everyone chooses one career or another.

But *her* career choice was important. It concerned how she wanted to use her mind every day. It concerned how she wanted to use the energy that animates her body. It would help to define the brief time she has in this world. She could be very comfortable financially doing other work; after all, plenty of people, and even many law students, survive without all that money.

But what else could she do? Some of the other options seemed like a waste of her education. And it seemed so hard to get a public interest job—what if she found herself unemployed? After all, she was limited in her choices by the legal market—limited to filling the jobs that were out

there. Did she even have a viable alternative? Even if she did, public interest people were sometimes so judgmental and self-righteous. She also hadn't spent that much time doing public interest work; was it too late now? Probably not, but she hadn't yet built the relationships and social capital to compete in that world, and she didn't speak its jargon.

It was so hard because, frankly, not even many public interest jobs seemed to offer real social change. Did civil rights lawyers actually do anything? Were they in touch with the communities they purported to represent? Would defending an indigent person really help the next three or four who would be arraigned the following day? Maybe none of these discrete individual choices, even ones as large as to what pursuits to devote her career, were likely to make a dent in the vast injustice around her.

Was shouting under water any better than whispering from a mountaintop?

But maybe these kinds of lawyers were holding the fort, at least preventing a siege. The poor were getting terrible legal help in civil and criminal cases in communities everywhere. She could easily find a job working with the indigent somewhere. Maybe poverty lawyers were doing their best within the budget constraints of legal culture and labor markets—amidst the constraints of American social conscience. Maybe there was something noble and authentic in this fight, at least if done right. Maybe one small choice and one person at a time is all we can ask for. Maybe she must accept her finitude.

Perhaps all she could do was what she thought was right, even if the enormity of the task was daunting. Only then could she understand the kind of synergy needed for real improvement. Through this, there was a slight chance of eventually expanding the budget.

Perhaps her career choice wasn't the kind of decision for her to make alone. Hopelessness resides in the lonely—in those who face life's problems without connecting with others. Perhaps it was not even the kind of problem that could be conceptualized on an individual level. Perhaps this was a problem for all human lawyers to tackle together. In the combination of finites, infinity awaits in the distance.

## XIX.

My friend gave me a picture some time ago that now sits above the desk in my bedroom. In it, a small infant is huddled to the ground, her forehead resting against the dry earth. Her bony arms reach up toward her face, exposing her emaciated rib cage. A small white necklace shines in the sun around her neck. Her legs are coiled, as if she were using them to push slowly forward along the dusty soil. In the background, a few feet away, sits a vulture, waiting to pounce.

My friend told me that this little girl was from the Sudan and that the

photo was taken just outside a food station toward which the little girl was attempting to crawl. My friend told me that the photographer did not help the little girl. My friend told me that the photograph won a Pulitzer Prize and that the photographer committed suicide shortly thereafter.<sup>31</sup>

The picture sits on my desk because each day it reminds me what is at stake. It brings life to statistics that I had often heard but never felt.<sup>32</sup> It reminds me that I cannot know what it is like to be a child without food. It reminds me that there are children in desperate need in my neighborhood, in my city, in my state, in my country, and in my world. It makes me emotional each day, and it reminds me that I can do more.

## XX.

Humans are frail, weak, irrational, and insecure. But they are also beautiful, kind, thoughtful, and strong. At their worst, they are automatic flesh robots. At their best, they are dynamic, biological thinking machines. So what is the law student? She is usually floating somewhere between these poles of human possibility.

As a student, she has learned about some of the wonderful things in the law, such as its insistence on requiring reasons and its emphasis on logical and evidentiary rigor in the translation of principles and values into outcomes. She has also learned about some of its flaws, such as restrictions on how reasons are expressed in legal writing and the systemic flaws and informational deficiencies that undermine the actual rigor of legal decision-making processes.

As a human, she is still developing—still cultivating her intellectual faculties and learning about her own biases, weaknesses, and defense mechanisms. She faces difficult pressures in her personal life, when making decisions like choosing a career. And she is just beginning to come to grips with her own power to affect other people's lives.

The law student is very much an evolving organism. But dangers lurk in the gene pool. Legal reasoning often glides by the intricacies of human life, and the organisms it produces often exhibit a stunted humanity. The totalizing nature of both law school and our culture in general can mask the petty and irrational things that drive us, further preventing us from pursuing with vigilance lives and laws that are consistent with our values.

When we confront these dangers honestly, both in ourselves and in our laws, we can become more human lawyers.

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31. To view the image and to learn more about the photographer, see *A Pulitzer-Winning Photographer's Suicide* (NPR broadcast, Mar. 2, 2006), available at <http://www.npr.org/templates/story/story.php?storyId=5241442>.

32. One child dies every five seconds from starvation. FOOD & AGRIC. ORG. OF THE UNITED NATIONS, THE STATE OF FOOD INSECURITY IN THE WORLD 4 (2004), available at <ftp://ftp.fao.org/docrep/fao/007/y5650e/y5650e00.pdf>.125.

