





assumptions

LAWYERS

MUST

never

MAKE

d d d

BY BRETT G. SCHARFFS¹

“You did what!?” my Uncle bellowed.

“I assumed you saw me pass you,” I said defensively.

My Uncle Dick, no children of his own, had brought 13-year-old me along on one of his epic bicycle treks down the California coast near Carmel. Inevitably he ended up waiting for me to catch up, and when I finally did, he was ready to hop back on his bicycle and begin peddling again. For once, when I caught up, he was deep in conversation with another cyclist on the side of the road. I waved and hurried on, savoring the prospect of choosing my spot to rest and wait for him for a change. Finally, I stopped and rested. So this is what it feels like to be out front, I thought.

But when 30 minutes passed, I got nervous enough to climb on my bike and pedal back. When I got to the spot where I had passed my uncle, he was no longer there. Now I was concerned, and I decided I had better continue retracing my trail, although I couldn't be sure that he hadn't passed me at some point during my rest. By the time I met up with him, he must have been pretty worried, but all I saw was anger.

“You what?” he repeated.

“I assumed you . . .”

“You assumed?” he said sarcastically. “Spell it.”

I meekly complied. “A-s-s . . .”

“Stop. What does that spell?”

“Ass?” I answered doubtfully.

“Continue,” he ordered.

“ . . . u-m-e.”

“What does that spell?” he demanded.

I hesitated. “u . . . m-e?”

“That's what assuming does,” he declared. “Makes an ‘ass’ out of ‘you’ and ‘me.’”

“Don't ever assume,” he ordered, and to his credit my Uncle Dick communicated the message with a directness and clarity that makes the experience as vivid today as it was over 25 years ago.

II | ASSUMPTIONS AND PRESUMPTIONS

Lawyers make assumptions many times every day. We may wish to think that we are all about evidence and proof—Just the facts, ma'am—but in reality, making assumptions is the bread and butter of our professional lives. An assumption involves believing something to be true without sufficient grounds for knowing it to be true. When we assume, we take something for granted without proof.² As lawyers we routinely make assumptions, sometimes formally,³ as when we write an opinion letter,⁴ sometimes informally,⁵ as when we engage in stereotyping or attempt to exploit the suspected prejudices of others.⁶

Closely related to assumptions are presumptions. A presumption relieves a party in whose favor the presumption runs of the burden of proof. “Legal presumptions . . . are not a ‘means of proof’ . . . [but rather] a dispensation of the need to furnish proof.”⁷ For example, we presume that someone is “legally dead” when they have been absent for a given length of time without evidence that they have been seen or heard.⁸ The most famous presumption in the law is the presumption of innocence,⁹ but our criminal system is based upon even deeper assumptions about individual responsibility for one’s actions.¹⁰ Some presumptions are rebuttable, such as when we presume that a child of a certain age is not capable of committing a crime.¹¹

As lawyers we often have to make snap judgments, sometimes in rapid-fire succession, which often are built on an undergirding of assumptions. We also make assumptions when we form a hypothesis and develop evidence to prove our “theory of the case.” But while making assumptions is a necessary and natural part of our professional lives, making assumptions can also get us into trouble. Making assumptions may reflect laziness or pride: laziness when we trust our impressions without doing the hard work of verification, and pride when we close our eyes to evidence contrary to our favored presuppositions. I want to suggest that lawyers are particularly prone to mistakes that arise from making assumptions. Let me explain.

III | THREE PERILOUS ASSUMPTIONS

While it would be quite easy to compile a long list of assumptions that lawyers are

prone to make and that routinely cause lawyers grief,¹² there are three assumptions that pose particular peril to lawyers. It would hardly be an exaggeration to say that these are three assumptions that a lawyer must never make.

- ① First, don’t assume you are the good guy.¹³ You probably are not.
- ② Second, don’t assume you understand the other guy. You almost certainly do not.
- ③ Third, don’t assume you are right. You are most likely wrong.

Now, please do not misunderstand me. It is as important for me to avoid making these assumptions as it is for you. And, while you are probably not the good guy, you might well not be the bad guy either. You very well may understand the other guy, in a partial and limited way. And you are probably not entirely wrong. Although your spouse and I are certain that you are not entirely right.

Unfortunately, avoiding these assumptions requires a large dose of self-doubt, empathy, and humility, and there is precious little in our professional education or practice that helps us cultivate this particular set of habits or traits of character. Indeed, our professional lives are organized and structured in a way that almost compels us to make these particular assumptions.

IV | THE ORGANIZATION AND STRUCTURE OF OUR PROFESSIONAL LIVES

What is it about the professional lives of lawyers that makes us particularly prone to assuming that we are the good guy, that we understand the other guy, and that we are right? Three features of the legal profession are of particular significance, each of which is closely related to one of these three assumptions.

Ⓐ THE ADVERSARIAL SYSTEM

First and most obviously, ours is an adversarial profession, and this means we take sides. There are two important implications of this rather pedestrian observation. First, we tend to identify with the side we are on. As we identify with our cause, we tend increasingly to think of it as being good, or right, or just. Naturally, we come to think of ourselves as the good guys. Second, we tend to caricaturize, villainize, or in extreme cases even dehumanize our opponents. This tendency is a

well-documented feature of rivalries, feuds, and war.¹⁴ While this tendency is hopefully less severe in the law than when facing a mortal enemy, there is still a strong propensity to think of the other side as the bad guys. The reality, of course, is likely much more complex, and in most situations there will be good and bad, right and wrong, as well as the potential for abuse on both sides. As Isaiah Berlin said, quoting Immanuel Kant, “Out of timber so crooked as that from which man is made nothing entirely straight can be built.”¹⁵

This risk of assuming you are the good guy is particularly acute for prosecutors, who quite naturally view themselves as being on the side of truth and justice. But prosecutors are in a uniquely powerful position and face a particular proclivity to abuse the weapons at their disposal. For example, I have an acquaintance who was indicted nine years ago for securities fraud. For nearly a decade he was bullied and hounded by prosecutors who never quite got around to pursuing or resolving his case. From time to time he was threatened with a lengthy prison sentence, and the government attorneys tried to cajole him into being a witness against his father, who had been in business with him. Over this period of almost 10 years, he spent more than a hundred thousand dollars on lawyers’ bills. Finally, on the eve of trial, the government offered him a deal. He pled guilty to one misdemeanor. The negotiated description of his alleged misconduct was so technical that even as a professor who teaches securities law it was difficult to discern exactly what he had done wrong. Nevertheless, this criminal indictment hung over his head for nearly 10 years, caused many sleepless nights, and took a toll on his marriage, not to mention his relationship with his father, which has been all but destroyed.

I suspect the prosecutors in this case have little or no idea the ordeal they put this man through. Indeed, they probably think they showed statesmanship and restraint in allowing him to plead to a lesser offense and avoid prison. They probably assume they were the good guys and that they let him off easy.

Ⓑ STEREOTYPING

A second reason we make unwarranted assumptions relates to the ways in which we rely upon stereotypes. As lawyers we are in the business of making quick assessments.

We often deal with people or situations that seem quite familiar, and we become adept at noting patterns and similarities. After years of practice we lawyers may come to believe that there is nothing we haven't seen before.

One of my mentors, Dean Anthony Kronman, has argued that legal training, especially the case method, cultivates in students an attitude of "moral cosmopolitanism that is best expressed, perhaps, by the old Roman motto *nihil humanorum alienum meum est*, 'nothing human is foreign to me.'¹⁶ Lawyers are less likely to be gullible than they were before beginning their legal training, but they are also less likely to be trusting, and are unlikely to be surprised by human selfishness and perfidiousness. Having seen so much so many times, it becomes easy for lawyers to mistakenly think they know exactly what is going on when they encounter a situation that looks very familiar.

We assume we understand the other guy because we have become expert in assessing situations and people. This can lead us to making confident, and often inaccurate, assumptions about people or situations based upon a paucity of real evidence. Thus, one of the most common quips about lawyers is "Often wrong, never in doubt." We may jump to conclusions too quickly. For example, we are all familiar with how biases and prejudices of various types tend to become more hardened and extreme as we grow older.

© PASSING JUDGMENT

Closely related to assumptions made when stereotyping are assumptions made when passing judgment. As lawyers we are constantly passing judgment on others: Are they telling the truth? Can they be trusted? Are they virtuous or vicious? Over time we get better at making snap judgments. The tendency to pass judgment emphatically and confidently grows stronger as we gain experience and expertise—indeed, simply as a facet of growing older. As we age, our mode of problem solving gradually changes from one based upon analysis and calculation to one based upon pattern recognition. In his book *The Wisdom Paradox*, neuroscientist Elkhonon Goldberg describes this process:

Frequently, when I am faced with what would appear from the outside to be a challenging problem, the grinding mental computation is somehow circum-

vented, rendered, as if by magic, unnecessary. The solution comes effortlessly, seamlessly, seemingly by itself. What I have lost with age in my capacity for hard mental work, I seem to have gained in my capacity for instantaneous, almost unfairly easy insight.¹⁷

Today some people urge us to believe that the immediate judgments we make in a blink of an eye are more accurate and reliable than the decisions we make when we engage in a lengthy process of investigation, thought, and deliberation. For example, in his book *Blink*, Malcolm Gladwell describes an experiment involving student evaluations of teachers. A psychologist gave students "three ten-second videotapes of a teacher—with the sound turned off—and found they had no difficulty at all coming up with a rating of the teacher's effectiveness."¹⁸ When the clips were cut back to five seconds, "the ratings were the same." These ratings were "remarkably consistent even when she showed the students just two seconds of videotape." When these snap judgments were compared with evaluations made by students after a full semester in a professor's class, the outcomes were essentially the same. "A person watching a silent two-second video clip of a teacher he or she has never met will reach conclusions about how good that teacher is that are very similar to those of a student who has sat in the teacher's class for an entire semester. That's the power of our adaptive unconscious."¹⁹

But our instantaneous judgments and snap assessments are almost certainly incomplete and quite probably wrong. Why?

For one thing, our stereotypes and judgments often rest upon prejudices that we don't even suspect we possess. For example, in the past 30 years since putting up screens between musicians auditioning for orchestra jobs and the committees evaluating them has become commonplace, "the number of women in the top U.S. orchestras has increased fivefold."²⁰

Another cause of our proclivity to judge imperfectly is the human capacity for self-deception, which is surely one of our most highly developed capacities. Consider the hypocrite who beheld the mote (a small particle or speck of dust) in his brother's eye, but failed to consider the beam (a large piece of timber or metal that is long in proportion to its thickness) that was in his own eye.²¹ Why is it that we have such a keen eye for spotting self-deception in others, but a big blind spot

for recognizing it in ourselves? Part of the reason, I suspect, is that we tend to judge ourselves based upon our intentions, whereas we judge other based upon their actions.

V | CORRECTIVE ACTIONS

I would like to suggest several concrete steps we can take to counteract the tendency to make unwarranted assumptions, including the assumption that we are the good guy, the assumption that we understand the other guy, and the assumption that we are right.

Ⓐ KEEP AN OPEN MIND

First, when trying to counter these powerful assumptions, it is important to keep our minds open to contrary evidence. Myson of Chen, one of the Seven Sages, advised, "We should not investigate facts by the light of arguments, but arguments by the light of facts."²²

Judge Learned Hand is often considered the most influential American judge who was never on the Supreme Court. Judge Hand was famous for the painstaking and evenhanded approach he took to the law. Justice Felix Frankfurter occasionally referred to Hand as the "modern Hamlet," and Hand's biographer, Gerald Gunther, noted that Hand "was uncertain about the proper result in most cases, even after decades of judicial experience."²³ Hand believed that every judge should first and foremost entertain the possibility that he or she might be mistaken. Hand said:

Of those qualities on which civilization depends, next after courage, it seems to me, comes an open mind, and, indeed, the biggest courage is, as Holmes used to say, to stake your all upon a conclusion which you are aware tomorrow may prove false.²⁴

The truth is we may not be the good guy and we almost certainly do not understand the other guy. This is not only because we have not walked the proverbial mile in his moccasins, we often lack the imagination and empathy to even consider what such a journey might look and feel like. A few years ago I wanted to learn more about the word "empathy," so I looked it up in my 13-volume *Oxford English Dictionary*. Imagine my surprise when the word "empathy" was nowhere to be found.²⁵ Upon reflecting on my treatment at the hands of my tutors as a student at



One of the most common quips about lawyers is

“Often **WRONG**, never in **DOUBT**.”



Oxford, it seemed to me quite fitting that this was a concept that was not even a linguistic possibility at Oxford.²⁶

One reason why we sometimes trust our assumptions more than we should is that we mistake having our assumptions *vindicated* with having them *justified*. Consider prejudice and stereotyping. Perhaps I believe that Mormon men are narrow-minded and sexist, even though I haven't really ever known any Mormon men. I have heard this about

Mormons and have no reason to doubt that it is true. I meet a Mormon man and he behaves in a way that I view as being narrow-minded and sexist. My assumption about Mormon men has been vindicated. I saw what I was expecting to see. I can say emphatically that every Mormon man I have met is narrow-minded and sexist. With this firsthand experience, my assumption about Mormon men will likely become even stronger, and my sense that my assumption is valid will be

stronger, too. Indeed, after a few more verifying experiences, I probably won't even view this as an assumption, but rather a fact.

But the fact that one of our assumptions has been vindicated does not mean that it is or was justified. Justification involves having a sufficient basis in reason for believing something to be true. A belief that Mormon men are narrow-minded and sexist is only justified if, based upon a broad array of evidence and proof, a general rule can be inferred from a



As we identify with our cause . . . we tend to **CARICATURIZE**,

large number of cases. Even then, a justified belief will probably be qualified by a variety of caveats and limitations that have emerged from our observation of numerous examples of the phenomena in question to account for exceptions and variations.

It is easy to mistake vindication as justification, especially given our tendency to give more weight to evidence that confirms our presuppositions and to discount evidence that calls our assumptions into doubt. Perhaps this explains why many members of minority groups are so sensitive to portrayals of members of their groups that reflect stereotypes. The American writer Jessamyn West once observed, “We want the facts to fit the preconceptions. When they don’t, it is easier to ignore the facts than to change the preconceptions.”²⁷ This tendency to ignore facts that do not fit our preconceptions, while problematic for everyone, can be even

more problematic for the lawyer. As La Rochefoucauld memorably said, “There is nothing more horrible than the murder of a beautiful theory by a brutal gang of facts.”²⁸ Many a courtroom lawyer has witnessed the massacre of their beautiful theories.

® BE A SKEPTIC, NOT A CYNIC

A second protective measure against making unwarranted assumptions lies in the distinction between being a skeptic and a cynic. When I was a student, Dean Guido Calabresi repeated like a mantra, “For a lawyer skepticism is necessary, cynicism devastating.” What is the difference between being skeptical and being cynical, and why is it important that a lawyer be one, but dangerous if he or she is the other? I had thought of the two terms as more or less synonymous. In time, however, I began to understand what Dean Calabresi may have meant by this distinction.

A lawyer must be skeptical. We see people acting at their self-interested worst. Clients do not always tell the truth, even to their lawyers. Memories tend to be selective and self-serving. Opposing counsel often engage in grandstanding and gamesmanship. A lawyer cannot afford to take things at face value; the unexpected and improbable must be foreseen and planned for. How things will look in litigation must be anticipated at a time when partners seem to see eye to eye. Lawyers encounter human beings treating each other with almost inconceivable indifference and brutality. Lawyers know too much to be completely trusting.

But a lawyer must not be cynical. The *Oxford English Dictionary* defines a cynic as “one who shows a disposition to disbelieve in the sincerity or goodness of human motives and actions, and is wont to express this by sneers and sarcasms.”²⁹ The cynic exhibits

VILLAINIZE, or in extreme cases even DEHUMANIZE our opponents.



contempt rather than compassion. Believing the worst of others serves as grounds for treating them with disregard.

To be skeptical is to doubt whether someone is telling the truth; to be cynical is to doubt whether there is such a thing as truth, or whether being truthful matters at all. To be skeptical is to be unsurprised by human selfishness; to be cynical is to maintain that there is no such thing as selflessness. To be skeptical is to realize that people sometimes behave in ways that are insincere or deliberately hurtful; to be cynical is to disbelieve in the human capacity for sincerity or goodness. To be skeptical is to recognize that we are each capable of evil; to be cynical is to believe only the worst about each other. To be skeptical is to recognize that matching means to ends can be difficult and controversial; to be cynical is to believe that one's ends always justify one's means. One can be doubtful, wary, and watchful without being contemptuous, sneering, and sarcastic.

A skillful, cynical legal technician is dangerous, the more dangerous for being the more skilled. In your practice as lawyers, there will be times when it will prove more difficult than you can possibly imagine to keep your skepticism from degenerating into cynicism. Especially at moments of extremity, it is useful to ask ourselves whether we have crossed the line from skepticism to cynicism. If we have, or if we cannot say for certain that we have not, we should be

alarmed—not only out of concern for the damage we may work but also out of concern for the welfare of our own souls.

© DOUBT THYSELF

A third way in which we can avoid some of the pitfalls of unwarranted assumptions lies in having a measured tentativeness about our own opinions, even those we hold strongly. In 1958, at age 87, Judge Hand delivered the Oliver Wendell Holmes Lectures at Harvard Law School. To the dismay of many in the audience, he expressed doubt about the correctness of the recent school desegregation cases. But, quoting Benjamin Franklin, Hand acknowledged his doubts about his own conclusions:

Having lived long, I have experienced many instances of being obliged by better information or fuller consideration to change opinions even on important subjects, which I once thought right, but found to be otherwise. It is therefore that the older I grow, the more apt I am to doubt my own judgment, and to pay more respect to the judgment of others.³⁰

Unfortunately, this attitude does not seem to be characteristic of most of us as we grow older. The more common tendency is to become more set in our ways, more committed to our previous viewpoints, and more unwilling to reassess honestly our prior conclusions. Charles Alan Wright suggests that “[i]n spite of being a modern Hamlet—or,

more likely, because of it—Learned Hand is firmly enshrined in the small group of judges who universally are regarded as great.”³¹ Simply being unsure or indecisive is not what made Hand great; rather, it was his open mind, his willingness to entertain opposing possibilities and to characterize each in its best possible light, and his capacity to understand and feel the independent force exerted by each side of an argument.

In cautioning us about the perils of passing judgment, I am not making a postmodernist observation about the impossibility of differentiating between good and evil. There is a difference between right and wrong, good and bad, light and dark, and we can know it.³² But most truths are partial, and all human perceptions are imperfect. Too often we draw a stark dichotomy between objectivity and subjectivity, when in reality our perceptions are objective, subjective, and relative—objective due to the character and traits of the thing being perceived, subjective due to the character and traits of the person doing the perceiving, and relative due to outside factors such as the color and frequency of light. For example, when I conclude that you acted courageously, it is partly based upon something you did, partly based upon my own values and perceptions, and partly based upon the contingencies of the situation.

VI | CONCLUSION

My purpose has not been to denounce all assumptions. To the contrary, I have suggested that our work as lawyers requires us to make assumptions. Rather, my purpose has been to highlight certain assumptions that pose particular peril for lawyers, not only because they can lead us astray, but because they engender a kind of professional arrogance and hubris for which lawyers are all too famous.

Whereas the adversarial system drives us to think of ourselves as the good guy, if we try to keep an open mind and strive to develop empathy, if we remain willing to alter our preconceptions when facts are contrary to our suppositions, then we will be more open to the possibility that we may not be completely in the right. Whereas the necessity of making snap judgments and our increasing capacity to recognize patterns creates a strong tendency for us to assume

that we understand the other guy, if we subject our stereotypes to verification, if we temper our skepticism before it degenerates into cynicism, if we genuinely strive to develop empathy, then we may retain the capacity for reassessment and correction. And whereas we may get better at exercising judgment as we grow in expertise and even wisdom over years of deliberate practice, if, like 87-year-old Judge Learned Hand, we can retain a healthy measure of self-doubt, then our judgments may be tempered by a measure of humility and open-mindedness that may enable us to transcend our natural inclinations and limitations, in life as well as in the law.

Especially at moments of **EXTREMITY**,
it is useful to ask ourselves whether we have



CROSSED THE LINE

from skepticism to cynicism.

NOTES

- ① Professor of Law, J. Reuben Clark Law School, Brigham Young University. BSBA, MA Georgetown University; BPhil Oxford University; JD Yale Law School. I am grateful to Danny Walker and the Spirit of the Law Board for the invitation to speak today. I wish to thank Marjorie Fannesbeck Layne for her kind and capable research assistance. This article is dedicated to the richly wrathful Richard Wrathall, my wonderful Uncle Dick. I love you. Copyright © 2005 Brett G. Scharffs.
- ② There are numerous related definitions of the term “assumption” that illustrate additional dimensions of the phenomena, including pretending to possess, as to “assume a virtue, if you have it not”; or taking something as one’s own, to appropriate, or usurp, as in to “assume an honor.” Synonyms include, to “put on, counterfeit, sham, affect, pretend, simulate, feign.” Making assumptions is more related to appearance than to reality. See MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 70 (10th ed. 1994).
- ③ An example of a formal assumption in the law is the policy of inferring that someone who is engaged in obfuscation is trying to hide something. For example, the law assumes that someone who pays child support is hiding something when he resists discovery of detailed financial information. See Philip G. Seastrom & Michelle L. Kusmider, *Family Law Corner: Child Support and the High Income Earner*, 41 ORANGE COUNTY LAWYER 40, 41 (1999).
- ④ I once heard a lawyer brag that when he gave a validity opinion in connection with a securities offering, it was so filled with qualifications and disclaimers that a careful reading would reveal that he had actually said nothing that was not either based upon a stated assumption or a declaration in an officers certificate upon which he explicitly relied.
- ⑤ One of the most problematic examples of informal assumptions in the law is racial profiling. See Frank Rudy



Cooper, *The Un-balanced Fourth Amendment: Cultural Study of the Drug War, Racial Profiling and Arvizu*, 47 VILL. L. REV. 851 (2002). Cooper explains:

Racial profiling does not provide information; it collapses all potential information around the assumption about behavior derived from the stereotype about one characteristic. Whereas a description of a suspect simplifies merely for purposes of proper identification, a racial profile takes very broadly defined characteristics and associates any individual owning those characteristics with bad behavior.

Id. at 872.

- ⑥ To gain advantages for their clients, attorneys often exploit the suspected prejudices of jury members. In an attempt to combat the effect of jury prejudice in a case involving an altercation between a black student and a white student in Anchorage, Alaska, the defense lawyers for the black student proposed a jury instruction that required the jury to engage in a “race-switching exercise” to assure they were not relying on racial-stereotype thinking. See James McComas & Cynthia Strout, *Combating the Effects of Racial Stereotyping in Criminal Cases*, 23 CHAMPION 22 (1999). A portion of the proposed jury instructions describing the “race-switching exercise” is as follows:

To ensure that you have not made any unfair assessments based on racial stereotypes, you should apply a race-switching exercise to test whether stereotypes have affected your evaluation of the case. “Race-switching” involves imagining the same events, the same circumstances, the same people, but switching the races of the parties and witnesses. For example, if the accused is African American and the accuser is white, you should imagine a white accused and an African-American accuser. If your evaluation of the case is different after engaging in race-switching, this suggests a subconscious reliance on stereotypes. You must then re-evaluate the case from a neutral, unbiased perspective.

Id. at 24.

- ⑦ Geoffrey J. Orr, *Toward a Workable Civil Presumptions Rule in Louisiana*, 53 LA. L. REV. 1625, 1629 (1993).
- ⑧ The Uniform Probate Code provides that an individual is presumed dead if he or she is “absent for a continuous period of 5 years, during which he (or she) has not been heard from, and whose absence is not satisfactorily explained after diligent search or inquiry.” U.P.C. § 1-107(5) (1990).
- ⑨ See Cathy Lynne Bosworth, *Pretrial Detainment: The Fruitless Search for the Presumption of Innocence*, 47 OHIO ST. L.J. 277 (1986) (documenting the history of the presumption of innocence and how the presumption has evolved in recent times).
- ⑩ See Matthew Jones, *Overcoming the Myth of Free Will in Criminal Law: The True Impact of the Genetic Revolution*, 52 DUKE L.J. 1031 (2003). Jones asserts that the theoretical justification for criminal punishment in the American criminal justice system is based on the idea that “offenders have made a voluntary choice to break the law, thus validating the imposition of a societal sanction.” *Id.* at 1031.

- ⑪ See Andrew Walkover, *The Infancy Defense in the New Juvenile Court*, 31 UCLA L. REV. 503 (1984). Walkover explains:

The common law’s resolution of this basic tension between culpability and juvenile status was lodged in the infancy defense. This defense constituted a series of presumptions that embodied largely intuitive judgments concerning a child’s capacity to take responsibility for individual acts. These presumptions had the effect of screening out the non-culpable from treatment as adult offenders. Children under the age of seven were conclusively presumed to be incapable of taking responsibility for their acts and thus were precluded from criminal adjudication. Children over the age of fourteen were regarded as adults and thus were presumed capable of committing crimes. Between these two ages the common law created a rebuttable presumption of incapacity.

Id. at 511. The U.S. Supreme Court created a strong presumption when it recently held in *Roper v. Simmons*, decided March 1, 2005, that it is cruel and unusual punishment to execute an individual who was under the age of 18 at the time he committed the crime.

- ⑫ Consider the following classics: “It doesn’t matter.” “No one will find out.” “No one will be hurt.” “I’m sure this case is still good law.” “These partners will be friends forever.” “I can handle this matter.” “I’ve still got time.” The list is virtually endless.

- ⑬ No gender implication is intended by the use of the informal term “guy,” and hopefully none will be inferred.

- ⑭ See John M. Kang, *Deconstructing the Ideology of White Aesthetics*, 2 MICH. J. RACE & L. 283 (1997). Kang reports that during World War II, when American sentiment toward the Japanese was strongly negative, the *Los Angeles Times* published the following: “A viper is nonetheless a viper wherever the egg is hatched—so a Japanese American, born of Japanese parents—grows up to be Japanese, not an American.” *Id.* at 329. In addition, U.S. World War II propaganda often depicted Japanese soldiers with “buck teeth, slanted eyes and with thick glasses.” *Id.*

- ⑮ ISAIAH BERLIN, *THE CROOKED TIMBER OF HUMANITY* xi (Henry Hardy ed., 1991) (quoting Immanuel Kant, *Idee zu Einer Allgemeinen Geschichte in Weltbürgerlicher Absicht* [1784]).

- ⑯ ANTHONY T. KRONMAN, *THE LOST LAWYER* 159 (1993).

- ⑰ ELKHONON GOLDBERG, *THE WISDOM PARADOX: HOW YOUR MIND CAN GROW STRONGER AS YOUR BRAIN GROWS OLDER* 9 (2005). Dr. Goldberg observes, “With age, the number of real-life cognitive tasks requiring a painfully effortful, deliberate creation of new mental constructs seems to be diminishing. Instead, problem-solving (in the broadest sense) takes increasingly the form of pattern recognition.” *Id.* at 20.

- ⑱ See, e.g., MALCOLM GLADWELL, *BLINK: THE POWER OF THINKING WITHOUT THINKING* 12 (2005).

- ⑲ *Id.* at 12–13.

- ⑳ *Id.* at 250. Gladwell adds, “What the classical musical world realized was that what they had thought

was a pure and powerful first impression—listening to someone play—was in fact hopelessly corrupted.” *Id.* at 250–51.

- ㉑ “Or how wilt thou say to thy brother, Let me pull out the mote out of thine eye; and, behold, a beam is in thine own eye? Thou hypocrite, first cast out the beam out of thine own eye; and then shalt thou see clearly to cast out the mote out of thy brother’s eye.” Matthew 7:4–5 (King James Version).

- ㉒ QUOTED IN BURTON STEVENSON, *HOME BOOK OF PROVERBS, MAXIMS AND FAMILIAR PHRASES* (1948).

- ㉓ Justice Frankfurter’s characterization of Judge Hand as the “modern Hamlet” can be found in a letter from Felix Frankfurter to Charles C. Burlington (Jan. 1933) (Burlington Papers, Harvard Law School). Gunther’s observation that Hand was uncertain about the proper result in most cases can be found in GERALD GUNTHER, *LEARNED HAND: THE MAN AND THE JUDGE* 136, 289 (1994).

- ㉔ Learned Hand, *The Bill of Rights*, in *THE OLIVER WENDELL HOLMES LECTURES* 1958, 75 (1962).

- ㉕ In volume III (D–E) of the 1933 edition of the *Oxford English Dictionary*, the word “empasma” is followed by the word “empatron.” 3E THE OXFORD ENGLISH DICTIONARY 125 (1st ed. 1933).

- ㉖ You will be relieved to learn that the 1978 supplement to the 1933 edition of the OED includes the following definition of “empathy”: “The power of entering into the experience of or understanding objects or emotions outside ourselves.” THE OXFORD ENGLISH DICTIONARY 329 (1st ed. Supp. 1978).

- ㉗ JESSAMYN WEST, *THE QUAKER READER* 2 (The Viking Press ed. 1962).

- ㉘ FRANCOIS DUC DE LA ROCHEFOUCAULD, *REFLECTIONS, OR SENTENCES AND MORAL MAXIMS* (1678).

- ㉙ THE OXFORD ENGLISH DICTIONARY 1304 (1st ed. 1933).

- ㉚ Learned Hand, *The Bill of Rights*, in *THE OLIVER WENDELL HOLMES LECTURES* 1958, 75 (1962).

- ㉛ Charles Alan Wright, *A Modern Hamlet in the Judicial Pantheon*, 93 MICH. L. REV. 1841, 1841 (1995).

- ㉜ And so can the postmodernist, as is evidenced all too frequently by her passionate devotion to the correctness of her own point of view. As a theoretical matter, it may be the case that all truth is relative and that objectivity is impossible, but one cannot coherently assert these propositions, since doing so involves what philosophers have called operational self-refutation—the making of the assertion belies one’s belief in its truth.

ART CREDITS

Pages 10–11: *Colonel Playing a Fool*, © Hulton-Deutsch Collection/CORBIS. Page 15: *Boys Pushing and Pulling Stubborn Mule*, © Bettmann/CORBIS. Page 16: *Bottom the Weaver*, © Hulton-Deutsch Collection/CORBIS. Page 18: © Photodisc/Getty images.