Law and the Creative Mind

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INTRODUCTION ........................................................................................................152

I. THE JUDGE AND HIS WORK ..................................................................................161

II. THE CHARACTER OF THE JUDGE, 1800-1850 .............................................166
   A. The Antebellum Portrait .................................................................................170
   B. Literary Manifestations of Judicial Character ..............................................177

III. THE GENIUS OF THE JUDGE, 1850-1900 ....................................................187
   A. Remembering the Fathers of the Bench .......................................................195
   B. Reconstructions of the Judicial Ideal ..........................................................202
   C. Providence and the Law-Giver ....................................................................208

IV. THE SKEPTICISM OF THE JUDGE, 1900-1930 ............................................213
   A. The Creativity of the Craftsman ..................................................................216
   B. Creativity and Self-Restraint .......................................................................219
   C. Doing God's Work .........................................................................................223

CONCLUSION ............................................................................................................225

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INTRODUCTION

Man hopes. Genius creates. To create,—to create,—is the proof of a divine presence.
Whoever creates is God.

—Ralph Waldo Emerson

Justice depends on a creative judiciary. But the compulsion to make appearances deny the fact of judicial innovation and individualization means that the most important task of the judge must be done in a sneaking, hole-in-corner manner. The judicial genius must do his work on the sly . . . .

—Jerome Frank

To create, Jerome Frank pronounced in Law and the Modern Mind, was emphatically the province and duty of the judiciary. Setting himself in opposition to the nineteenth-century legal tradition, Frank exposed the discretionary, unpredictable nature of the judicial process. He derided previous generations for their idealizing tendencies, which had led them to posit the existence of a superhuman, passionless judge—one who mechanically applied a stationary and certain set of legal rules to the cases brought before him. This vision of adjudication was nothing more than an illusion, Frank maintained, and persisting belief in it was explicable in psychological terms. All grown men harbor a desire to “recapture, through a rediscovery of a father, a childish, completely controllable universe.” That desire manifested itself in the “partial, unconscious, anthropomorphizing of Law, in ascribing to the Law some of the characteristics of the child’s Father-Judge.” The first step towards maturity, Frank advised fellow members of his profession, was recognition of the fictive nature of legal rules and principles: “We must stop telling stork-fibs about how law is born and cease even hinting that perhaps there is still some truth in Peter Pan legends of a

3. See id. at 19.
4. Id.
5. Id.
juristic happy hunting ground in a land of legal absolutes.” American law had come of age, he concluded, and it was high time for members of the bench and bar to face the fact of judicial creativity.

Frank’s message has not gone unheeded. Contemporary legal scholars see the advent of Legal Realism as the end of an age of innocence in American legal history; in a post-Realist world, the fact of judicial creativity can no longer be denied. To accept this fact, however, is not to agree upon its implications for legal practice. Recent writing in the field of American jurisprudence reflects conflicting views of the relationship between law and the creative mind. Some regard judicial lawmaking as a suspect, anti-democratic enterprise, promoting interpretive norms and institutional changes designed to minimize judicial discretion. Others view the exercise of “deliberative imagination” as essential to the realization of justice and lament the bureaucratization of the judiciary, to the extent that it has reduced judges to the status of case managers. Finally, there are

6. Id. at 260.


Not all legal scholars have taken such a dim view of bureaucratization and managerial judging. The salutary effects of these developments are discussed in John H. Langbein, The
those who seek neither to cabin nor expand judicial discretion, choosing instead to analyze its concrete manifestations, whether in terms of efficiency\textsuperscript{9} or ideology.\textsuperscript{10} These various perspectives nonetheless share the common historical assumption that judicial creativity was a Realist revelation. In proceeding on such a basis, they have unwittingly perpetuated Realist myths about the nineteenth-century legal tradition.

This article views the judge from the perspective of nineteenth-century legal professionals. Drawing on the legal literature of the period (broadly construed to include a range of published sources, from after-dinner speeches to academic articles), it demonstrates that the creative power of the judge was not only acknowledged but celebrated well before the emergence of legal realism. Indeed, the "judicial genius" came to define the professional ideal in the so-called "Age of Formalism," when mechanical judging was supposed to have been the norm. This is taken as evidence of the influence of romanticism in the legal culture of the period—part of a wider tendency to reformulate sacred ideas, such as the notion of a Creator, in secular terms. But it is emphasized that the romantic judicial ideal was not wholly inconsistent with the premises of formalism. Instead, it reflected tensions at the core of American legal culture, with its commitments to both individuality and uniformity, spontaneity and certainty, mercy and justice. Placing Jerome Frank's revelations about the judge in historical context, it becomes possible to appreciate the romantic roots of legal realism, as well as the enduring tensions between law and the creative mind in American culture.

The account offered here diverges in important ways from the main lines of historiography on the American judicial tradition. One line, articulated most forcefully by G. Edward White, suggests an "oracular" theory of judging predominated throughout much of the nineteenth century, according to which judges were finders rather than creators of law.\textsuperscript{11} By the early decades of this century, however,

\begin{quote}
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9. See, e.g., RICHARD A. POSNER, THE FEDERAL COURTS: CHALLENGE AND REFORM (1996) (discussing the challenges of an increased federal caseload, the rise of the law clerk as a consequence, and incremental and fundamental reforms within the federal court system).
\end{quote}

\begin{quote}
10. See, e.g., DUNCAN KENNEDY, A CRITIQUE OF ADJUDICATION (1997) (addressing the ideological aspects of adjudication and legal work).
\end{quote}

\begin{quote}
11. See G. EDWARD WHITE, THE AMERICAN JUDICIAL TRADITION: PROFILES OF
White finds that this law-finding model could no longer be squared with "the discernible impact of judicial decisions on political affairs," so that members of the profession were at last forced to acknowledge the reality "that judges made law."12 A second group of historians see more dynamism in the nineteenth-century tradition, describing a movement from "instrumentalism" to "formalism" as the dominant mode of judicial reasoning.13 According to this account, antebellum judges moved away from the idea of law as a set of fixed principles and came to understand their role as innovative policy makers, shaping legal doctrine so as to facilitate economic development in the young Republic. Yet by mid-century, judicial opinions began to take on a more formalist cast, with greater emphasis placed on the "apolitical, deductive, and 'scientific' character of legal reasoning."14

The work of the judge was reconceived as the mechanical application of abstract doctrines to the cases at bar, without consideration of the social interests involved. But formalism ultimately proved vulnerable to Progressive and Realist attacks launched in the period from 1880 to 1920, exposing the discretionary, political character of all legal

LEADING AMERICAN JUDGES 2, 129-49 (expanded ed. 1988). White maintains that even the more "innovative" nineteenth-century judges who "modified legal doctrines to respond to altered economic and social conditions" (Lemuel Shaw and Roger Taney are offered as exemplars) still fit the description of "oracular." For they "believed that they were not making law but merely discovering its continual applicability to changing events." Id. at 148; see also G. Edward White, The American Law Institute and the Triumph of Modernist Jurisprudence, 15 LAW & HIST. REV. 1, 14-15 (1997) (Langdellian legal science recognized "the creative role of jurists in discovering, formulating, and applying legal principles" but held that principles themselves "were not of their own creation."); Lawrence Lessig, Understanding Changed Readings: Fidelity and Theory, 47 STAN. L. REV. 395, 426-32 (1995) (suggesting law-finding model reached its "maturity" in last decades of nineteenth century, just as dissenting views of common law "lawmaking" began to emerge).


14. TRANSFORMATION I, supra note 13, at 258.
judgments. The third and most recent line of historical scholarship questions the very utility of such labels as "instrumentalism," "formalism," and "realism," providing illustrations of their inadequacy as applied to a particular individual or historical era, and, in some cases, offering alternative terminology.  

This article extends the critique of these categories of analysis, demonstrating that judicial lawmaking was a constant from 1800 to 1930. What changed, it is contended, was the conception of the creative process entailed in the act of judging.  

At the turn of the nineteenth century, creative acts were still primarily associated with divine power. However, by mid-century, the power of creation was commonly attributed to human actors—"without necessary reference to a past divine event." This shift in usage can best be understood as a manifestation of the influence of romanticism in American culture.  


18. The ambiguity of the term "romanticism" in both historical and critical literature cannot be gainsaid. Problems of definition were already apparent by 1836, when Søren Kierkegaard attacked "the view that romanticism can be comprehended in one concept, for romanticism implies overflowing all boundaries." 4 Peter Gay, The Bourgeois Experience: Victoria to Freud (1995) (quoting Søren Kierkegaard, The Journals of Søren Kierkegaard 25 (Alexander Dru ed. & trans. 1938)). The most influential discussion of the problem in this century has been Arthur O. Lovejoy's 1923 address to the Modern Language Association, in which he concluded that "[t]he word 'romantic' has come to mean so many things that, by itself, it means nothing." Arthur O. Lovejoy, On the Discrimination of Romanticisms, in Essays in the History of Ideas 228, 232 (1948). Although Lovejoy cast doubt on the prospect of finding a "common denominator" among these "romanticisms," id. at 236, René Wellek rose to the challenge in a 1949 essay entitled The Concept of Romanticism in Literary History. See René Wellek, The Concept of
The term "romanticism" is used here to refer to a spiritual transformation in nineteenth-century America—a reconfiguration of the relationship between the sacred and the secular in a society buffeted by political revolution, religious awakenings, and industrial growth. In this unsettling environment, American romantics

Romanticism in Literary History, in CONCEPTS OF CRITICISM 128, 129 (Stephen G. Nichols, Jr., ed., 1963) (asserting there is "no basis" for Lovejoy's "extreme nominalism"; arguing that "the major romantic movements form a unity of theories, philosophies, and style" which "in turn, form a coherent group of ideas each of which implicates the other"); see also Henry H.H. Remak, West European Romanticism: Definition and Scope, in COMPARATIVE LITERATURE: METHOD AND PERSPECTIVE 223, 236 (Newton P. Stallknecht & Horst Frenz eds., 1961) (assembling proof of "the existence in Western Europe of a widespread, distinct and fairly simultaneous pattern of thoughts, attitudes and beliefs associated with the connotation 'Romanticism'"). Continuing in the spirit of Lovejoy (yet resisting the extremity of his nominalism), a number of scholars have suggested refinements in usage and documented historical variations. See, e.g., LILIAN R. FURST, THE CONTOURS OF EUROPEAN ROMANTICISM 2 (1979) (distinguishing between three main "countour lines" of European Romanticism: "the archetypal, the historical, and the aesthetic"); Introduction to ROMANTICISM IN NATIONAL CONTEXT 1, 2 (Roy Porter & Mikuláš Teich eds., 1988) (stressing importance of exploring how different "national Romanticisms coexisted in symbiotic relations to each other"). Others have declined Lovejoy's invitation to discriminate among "romanticisms," defending broad-gaged definitions of the term as both appropriate and workable in historical analysis. See, e.g., M.H. ABRAMS, NATURAL SUPERNATURALISM: TRADITION AND REVOLUTION IN ROMANTIC LITERATURE 11-12 (1971) ("economy of discussion" dictates the use of "Romantic" to denote "a comprehensive intellectual tendency" which manifested itself in philosophy and literature); ISAIAH BERLIN, THE ROOTS OF ROMANTICISM 20 (1999) (opining that "unless we do use some generalisation it is impossible to trace the course of human history" and insisting that "[t]here was a romantic movement; it did have something that was central to it; it did create a great revolution in consciousness; and it is important to discover what this is"); 4 GAY, supra, at 38 (acknowledging that "[a]ll attempts to reduce romanticism to an easy formula are mocked by the imp of the particular" and conceding that "far from being an army of zealots, or even a school, the romantics created a mood rather than a movement," but averring that "the mood made history"). As is explained further below, this article follows their lead, conceiving of romanticism as a determinate historical event, and finding that "romanticism" conveniently captures a set of themes, values, modes of expression, and ways of thinking and feeling that were manifest in nineteenth-century American legal literature.

19. Although the emergence of romanticism has been proclaimed "the real American revolution," Gordon S. Wood, Introduction to THE RISING GLORY OF AMERICA, 1760-1820, at 1, 9 (Gordon S. Wood ed., 1971) (describing the "move from classical republicanism to romantic democracy" as a "cultural crisis as severe as any in American history" and analyzing it in terms of political thought), the historiography on the subject remains relatively thin. See HENRY FARNHAM MAY, THE DIVIDED HEART: ESSAYS ON PROTESTANTISM AND THE ENLIGHTENMENT IN AMERICA 181 (1991) (surveying the literature). The most comprehensive treatment of the subject to date may be found in Anne C. Rose, VICTORIAN AMERICA AND THE CIVIL WAR (1992). This article builds upon Rose's work as well as a recent wave of historiography challenging received accounts of the process of secularization in America, demonstrating religion's persistence throughout the nineteenth century. See, e.g., ROBERT H. ABZUG, COSMOS CRUMBLING: AMERICAN REFORM AND THE RELIGIOUS IMAGINATION (1994); JON BUTLER, AWASH IN A SEA OF FAITH: CHRISTIANIZING THE AMERICAN PEOPLE (1990); NATHAN O. HATCH, THE DEMOCRATIZATION OF AMERICAN CHRISTIANITY (1989); RICHARD RABINOWITZ, THE SPIRITUAL SELF IN EVERYDAY LIFE: THE TRANSFORMATION OF PERSONAL RELIGIOUS EXPERIENCE IN NINETEENTH-CENTURY NEW ENGLAND (1989); JOHN STAUFFER, THE BLACK HEARTS OF MEN: RACE, RELIGION, AND RADICAL REFORM IN NINETEENTH-CENTURY AMERICA (forthcoming May 1999); Richard Wightman Fox, The Culture of Liberal Protestant Progressivism, 1875-1925, 23 J. INTERDISC. HIST. 639 (1993);
struggled to “save traditional concepts, schemes, and values which had been based on the relation of the Creator to his creature and creation, but to reformulate them within the prevailing two-term system of subject and object, ego and non-ego, the human mind or consciousness and its transactions with nature.” Consciousness was reconceived by romantics in organic rather than mechanical terms. Whereas empirical psychology portrayed the mind as a passive “reflector of the external world,” romantics envisioned the mind as both “projective and capable of receiving back the fused product of what it gives and what is given to it.”

According to the new romantic psychology, perception was itself a creative process; the perceiving mind recreated the world as it came in contact with it, assimilating and synthesizing its disparate elements into a new whole. The most exalted products of the human mind, those characterized by “a vitality which grows and evolves itself from within,” were said to be works of “genius.”

Historians have left the impression that nineteenth-century American legal culture was largely impervious to the influence of romanticism. Lawyers of the young Republic are said to have stationed “forces of the Head” at the borderlands of law, in order to secure them against the “anarchic impulses of the American Heart.” The success of this campaign was evident by mid-century, these historians suggest, in that the requisites of the legal profession had come to be defined in terms of talent, technical reason, and expertise.


20. ABRAMS, supra note 18, at 13; see also ROSE, supra note 19, at 9 (finding Abram’s account of English Romanticism applicable in the American context; observing that “American Victorianism of the mid-nineteenth century contained strong romantic elements of anxiety, striving, and indulgence in temporal opportunities, all set in motion by religious crisis”).


22. ABRAMS, supra note 17, at 176 (quoting SAMUEL TAYLOR COLERIDGE, COLERIDGE’S MISCELLANEOUS CRITICISM 44 n.2 (Thomas Middleton Raysor ed., 1936)).

rather than genius, imagination, and art. However as this article reveals, post-bellum legal professionals were not immune to the impulses of romanticism. Through an analysis of legal discourse about the judge between 1800 and 1930, it documents the emergence of a romantic judicial figure whose judgments were, at once, emanations of his own mind and expressions of the "rule of law." It draws particularly on judicial biographies, which were published in growing numbers over the course of the nineteenth century—a development itself indicative of a romantic sensibility. Typically written by and for members of the legal profession, these works communicated shared understandings of the judicial role. Antebellum judicial biographers tended to depict the judge as a neoclassical artisan, whose legal constructions were made from given precedents, in accordance with the traditions of his craft. However, the outlines of a new judicial ideal were discernible by mid-century—a romantic author who left his unique imprint on the law. Biographical tributes to the "judicial genius" reached a highwater mark during the "Age of Formalism," although the ultimate source of his inspiration remained obscure. With the rise of Legal Realism, references to the "creativity" of the judge—now denoting a strictly human faculty—became commonplace, and judicial lawmaking was dissociated from divine activity. Yet ironically the judge's creativity was attributed to the finitude of his mind; his opinions were inevitably creative because he could never see with eyes other than his own. Subjectivity, once understood as a divine attribute implanted in man, was gradually reconceived as a human limitation, inhibiting the judge's ability to realize the ideal of scientific objectivity. It now appeared that the judge was imprisoned in the cell of his own consciousness and had no choice but to be creative in his rulings. Necessity, after all, was the mother of invention.

With historical perspective, then, it will become clear that the existence of a "creative judiciary" was hardly a Realist revelation. This study is not, however, undertaken simply to explode Realist myths or to otherwise complicate received accounts of the American judicial tradition. Its larger aim is to situate legal discourse about the creative judge within a wider cultural inquiry into consciousness.

24. See Robert A. Ferguson, Law and Letters in American Culture 286-87 (1984); see also Maxwell Bloomfield, American Lawyers in a Changing Society, 1776-1876, at 136-90 (1976) (legal practitioners in Jacksonian America and the Civil War era increasingly came to embrace "a narrow vocational outlook toward their work and to insist upon a technical competence that set them apart from their fellow men," id. at 137).
demonstrating how new insights in the powers and limitations of the human mind forced reconsideration of the nature of the judicial role. Living in "the age of Introversion,"

25. EMMERSON, The American Scholar, supra note 1, at 66.

26. Although the implications of this development have been analyzed in the fields of art, literature, religion, and philosophy, see, e.g., BRYAN JAY WOLF, ROMANTIC RE-VISION: CULTURE AND CONSCIOUSNESS IN NINETEENTH-CENTURY AMERICAN PAINTING AND LITERATURE xiv (1982) (demonstrating that "consciousness was becoming a mode of self-consciousness" in nineteenth-century America and documenting the manifestations of this new mentality in both the visual arts and literature); LEON CHAI, THE ROMANTIC FOUNDATIONS OF THE AMERICAN RENAISSANCE 4 (1987) (noting new "primacy accorded to consciousness" in nineteenth-century American literature); JAMES HOOPES, CONSCIOUSNESS IN NEW ENGLAND: FROM PURITANISM AND IDEAS TO PSYCHOANALYSIS AND SEMIOTIC 95-286 (1989) (tracing impact of "new concept of consciousness," id. at 1, through nineteenth-century religious and philosophical discourse); CHARLES TAYLOR, SOURCES OF THE SELF: THE MAKING OF THE MODERN IDENTITY 390 (1989) (describing "fundamental" change in conception of human subject in late eighteenth-century culture), no comparable study has been undertaken in that of the law.

27. WOLF, supra note 26, at 4.

28. 4 GAY, supra note 18, at 152; see id. at 156-57.
law's rule in the image of the judge.

I. THE JUDGE AND HIS WORK

If it has grown into an unquestioned truth, that the poorest annals belong to those epochs which have been the richest in virtue and happiness, it may well be admitted that the best judge for the people, is he who imperceptibly maintains them in their rights, and leaves few striking events for biography.

—Horace Binney

The sentiments of Horace Binney were strangely echoed by Judge Richard Posner at a recent national conference on judicial biography. According to Judge Posner, aspiring judicial biographers must confront the difficult task of writing "empathetically and arrestingly about dullish people who are not introspective." Posner's discouraging characterization of the enterprise of judicial biography is not, however, simply grounded in his view of judges as relatively uninteresting subjects. Indeed, what he finds true of prominent judges also applies to most "brilliant, creative people": their lives are marked by "a disconnection of achievement from self." The only insight the biographer can provide regarding "the springs of genius," he insists, is "what should have been obvious all along: that highly successful people in any field tend to take their work very seriously, at least while they are doing it . . . and that outside their (often very narrow) area of achievement creative people are just like ordinary people." In underscoring this disconnection between self and work, Posner ultimately shows himself to be far removed from the assumptions and aims of Binney and other nineteenth-century judicial biographers. In recounting the life of a judge, these biographers expressed their belief that a man and his work were mutually defining and that there was much to be learned—about their profession and themselves—through studying the relation between the two.

29. Horace Binney, Life of Chief Justice Tilghman, 1 AM. L. MAG. 1, 30 (1843).
31. Id. at 507, 508.
32. Id. at 508.
33. Arguably, he also diverges from his contemporaries in this respect. See Linda Przybyszewski, The Dilemma of Judicial Biography or Who Cares Who Is the Great Appellate Judge? Gerald Gunther on Learned Hand, 21 LAW & SOC. INQUIRY 135 (1996) (noting the predominant tendency among post-Realist judicial biographers to account for the "greatness" of a subject's achievements through analysis of his personal qualities and life circumstances).
34. For a typical expression of the importance of biography in nineteenth-century legal literature, see Biography, 1 AM. L.J. 121 (1808). The editor of this journal proclaims the
While it may be conceded that judicial biographies often lack dramatic appeal, they nonetheless constitute an important historical source, illuminating changing conceptions of the judicial role and the processes of ideological formation within the American legal profession.\textsuperscript{35} The genre of judicial biography took shape in the early Republic, with the publication of eulogies and pamphlets extolling the virtues of prominent members of the judiciary as well as those of the rank and file.\textsuperscript{36} These works were typically written by members of the legal profession—often family members or colleagues of the (usually deceased) subjects. The inclination to commit these “lives” to print was part of a more general “mania” for biography that gripped the country in this period.\textsuperscript{37} However, for purposes of this article, the “intrinsic importance” of biographical sketches, asserting that “[n]o pursuit is more worthy the attention of the liberal scholar than that which leads him into the interior recesses of the studious, and unfolds to his inquisitive research the restless operations of genius.” \textit{Id.} Such sketches are said to rouse the reader from “inactivity to exertion, and summon him to vindicate the honour of his nature.” \textit{Id.} Accordingly, the editor concludes that he “requires no apology” for devoting space to them and solicits memoirs of American lawyers and judges from his readers in order to show “an envious world that America is not less the nurse of liberty than the cradle of glory.” \textit{Id.}

35. It should be emphasized that this is not, properly speaking, a genre study. Judicial biography stands at the center of this article because it was perhaps the most common medium through which judges and lawyers in this period communicated their views about the judicial office and their expectations of its occupants. The approach taken here nonetheless follows those scholars who explored the “cultural work” performed by popular literary forms. Rather than assessing judicial biographies from a literary standpoint, this article seeks to understand the ways in which they were used to create and propagate meaning within the legal culture. For works employing a similar approach to “non-canonical” literature, see, e.g., SCOTT E. CASPER, CONSTRUCTING AMERICAN LIVES: BIOGRAPHY AND CULTURE IN NINETEENTH-CENTURY AMERICA (1999); DANIEL A. COHEN, PILLARS OF SALT, MONUMENTS OF GRACE: NEW ENGLAND CRIME LITERATURE AND THE ORIGINS OF AMERICAN POPULAR CULTURE, 1674-1860 (1993); CATHY N. DAVIDSON, REVOLUTION AND THE WORD: THE RISE OF THE NOVEL IN AMERICA (1986); MICHAEL DENNING, MECHANIC ACCENTS: DIME NOVELS AND WORKING-CLASS CULTURE IN AMERICA (1987); JUDY HILKEY, CHARACTER IS CAPITAL: SUCCESS MANUALS AND MANHOOD IN GILDED AGE AMERICA (1997); DAVID S. REYNOLDS, BENEATH THE AMERICAN RENAISSANCE: THE SUBVERSIVE IMAGINATION IN THE AGE OF EMERSON AND MELVILLE (1988); and JANE TOMPKINS, SENSATIONAL DESIGNS: THE CULTURAL WORK OF AMERICAN FICTION, 1790-1860 (1985).

36. The genre of biography is here understood to embrace not only full-length books treating a single subject but also collective biographies and a range of shorter character sketches, eulogies, and tributes published in pamphlet form or periodical literature. For studies adopting a similar approach, see CASPER, supra note 35; and Michael T. Gilmore, Eulogy as Symbolic Biography: The Iconography of Revolutionary Leadership, 1776-1826, in STUDIES IN BIOGRAPHY 131 (Daniel Aaron ed., 1978).

37. See CASPER, supra note 35, at 1-2; Joyce Appleby, New Cultural Heroes in the Early National Period, in THE CULTURE OF THE MARKET: HISTORICAL ESSAYS 163 (Thomas L. Haskell & Richard F. Teichgraeber III eds., 1993). In accounting for this widespread enthusiasm, historians have pointed to the political, economic, religious, and cultural transformations of the antebellum period. These transformations disrupted traditional patterns of life and “encouraged people to think of themselves as free agents, characters in the making (and on the make) on stages of their own devising.” CASPER, supra note 35, at 14; see also Appleby, supra, at 171-72. Moreover, the popular literature of the period—including novels as
biographies of judges are most usefully read against the backdrop of an emerging body of "man and his work criticism," reflecting new understandings of the artist’s mind and the creative process. To be sure, biographies of judges also shared much in common with the popular “lives” of statesmen, military officers, political candidates, merchants, and other “self-made” men that proliferated during the same period. Indeed, in a certain sense, these popular lives might also be viewed as studies of a man and his work. Yet the connections between judicial and literary biographies were especially close because both came to focus on the written work of their subjects and served not only as tools of instruction and amusement (the chief aims of popular biographies), but as vehicles of criticism as well.

The relationship between a man and his work had not been of primary concern to eighteenth-century literary critics. Drawing upon the empirical psychology of the day, they viewed the artist’s mind as a mechanism that reflected images of objects perceived. Because the artist himself was simply “an agent who holds a mirror up to nature,” critics found little “theoretical room for the intrusion of personal traits into his product.” They focused instead on the work itself and
its relation to the world it reflected and the audience it affected.\textsuperscript{41} This mechanical theory of the mind was subject to revision over the course of the century, however, as a growing number of critics affirmed the existence of active, innate powers of the mind—particularly the faculty of imagination. By the close of the century, a romantic view of the mind’s role in perception could be discerned in the critical literature, expressed most vividly through a new set of metaphors of mind: the lamp, fountain, and living plant. These various metaphors all served to emphasize that the content of perception was “the joint product of external data and of mind,” so that the “perceiving mind discovers what it has itself partly made.”\textsuperscript{42} In accordance with this view, critics increasingly focused upon the mental constitution of the artist and regarded his work as a revelation of personality. Indeed, critics came to speak of the artist as a “creator” of sorts—one who emulated God in the production of a “second nature.”\textsuperscript{43} And they tended to draw connections between the artist’s work and his biography, not unlike the manner in which theologians had traditionally approached “the book of nature,” seeking to find therein “marks of the divine author’s personality.”\textsuperscript{44}

As the theory of mind shifted in the critical discourse, so too did the model of literary production. As Martha Woodmansee explains, a “neoclassical” model reigned through much of the eighteenth century, although it was a rather “unstable marriage” between two distinct concepts.\textsuperscript{45} First and foremost, the neoclassical artist was a craftsman who manipulated the ideas obtained through sensory perception according to a “body of rules, preserved and handed down to him in rhetoric and poetics . . . in order to achieve the effects prescribed by the cultivated audience of the court.”\textsuperscript{46} Yet there were “rare moments” when this artist “managed to rise above the requirements of the occasion to achieve something higher.” In such cases, he was said to be “inspired—by some muse, or even by God.”\textsuperscript{47} Over the course of the century, Woodmansee observes, critics gradually minimized the element of craftsmanship and internalized the source of inspiration, so that it was regarded as “emanating not from outside

\textsuperscript{41} See id. at 226.  
\textsuperscript{42} Id. at 62, 58.  
\textsuperscript{43} See id. at 272-85.  
\textsuperscript{44} ROSE, supra note 38, at 121.  
\textsuperscript{45} See Woodmansee, supra note 38, at 425, 426.  
\textsuperscript{46} Id. at 426.  
\textsuperscript{47} Id. at 426-27.
or above, but from within the writer himself." 48 The outlines of a new, romantic model of authorship began to appear: The artist was now conceived of as an "original genius" whose work was a spontaneous production emanating from his own mind under the impulse of feeling. 49 This romantic author was a creative actor, guided by laws of his own origination. And he was considered "distinctly and personally responsible for his creation." 50

In his cultural analysis of the "fundamental unit of the author and the work," Michel Foucault notes that the kinds of texts requiring attribution to an author have not remained constant over time. 51 Prior to the eighteenth century, he contends, literary texts "were accepted, put into circulation, and valorized without any question about the identity of their author," while those of a more scientific character were "accepted as 'true,' only when marked with the name of their author." 52 Yet over the course of the eighteenth century, a reversal occurred. Literary anonymity was no longer tolerable, whereas scientific discourses "began to be received for themselves, in the anonymity of an established or always redemonstrable truth; their membership in a systematic ensemble, and not the reference to the individual who produced them, stood as their guarantee." 53 However accurate as a general historical matter, 54 Foucault's discussion provides a useful and suggestive framework within which to consider conceptions of the authorship in American legal culture. 55 For what is striking about legal discourse from 1800 to 1930 is the extent to which

48. Id. at 427; see also ABRAMS, supra note 17, at 275 (noting how eighteenth-century critics "took the creative act indoors and delegated it to the faculty of imagination").

49. See Woodmansee, supra note 38, at 427.

50. Id.

51. See FOUCAULT, supra note 38, at 109.

52. Id.

53. Id.

54. For criticisms on historical grounds, see, e.g., Roger Chartier, Figures of the Author, in OF AUTHORS AND ORIGINS: ESSAYS ON COPYRIGHT LAW 7, 21-22 (Brad Sherman & Alain Strowel eds., 1994) (questioning whether there was such a reversal as between literary and scientific discourses in the eighteenth century); and Carla Hesse, Enlightenment Epistemology and the Laws of Authorship in Revolutionary France, 1777-1793, 30 REPRESENTATIONS 109, 117 (1990) (suggesting that ideas about authorship were more various and conflicted than Foucault's account suggests, uncovering tension in eighteenth-century France between idea of author as "original creator and hence inviolable proprietor of his works" and that of author as "passive midwife to the disclosure of objective knowledge").

55. Foucault's work on authorship is discussed as part of a general examination of the conceptual commitments entailed in the ideal of the rule of law in PAUL W. KAHN, THE REIGN OF LAW: MARBURY V. MADISON AND THE CONSTRUCTION OF AMERICA 103-33 (1997) (arguing "[t]here is no formal place under the rule of law for giving simultaneous recognition to authority and authorship," id. at 107).
it vacillates between the two orientations toward authorship identified by Foucault—sometimes tolerating anonymity, other times requiring an individual author. But to the extent an author is required, it is the judge who comes to fill the role. The evolution of the genre of judicial biography reflects this development; characterizations of the work of the judge shift from a model of neoclassical craftsmanship to one of romantic authorship. The American Republic is said to be ruled by laws and not men, yet the "rule of law" is increasingly embodied in the figure of the individual judge.  

II. THE CHARACTER OF THE JUDGE, 1800-1850

Having thus traced his progress down to the acceptance of his last office, I proceed to some selections from his published opinions, for the purpose of illustrating his judicial character. I am aware of the hazard of such an attempt. It is like undertaking to exhibit the genius of a sculptor, by means of an arm separated from its trunk, or of a painter, by a handful snatched from the canvass.

—William Porter

Above all else, the nineteenth-century judicial biography was a testament to the subject's exemplary character. The didactic tone of these publications was especially pronounced in the antebellum period. "I have set forth an example, to be followed by parents in training their children, by young men in the course of their education, and by all in public life," advised the author of The Life of Hon. Nathaniel Chipman (1846). Written in the mold of Plutarch's

56. As Robert A. Ferguson has observed, "the American judge is by definition a compromise of contending considerations that is easier to describe than to order." The judge is expected to embody all at once "the prince, the olympian, the communal elder, and the historian-philosopher-prophet." Ferguson does not, however, consider the extent to which the composition of the "judicial figure" has changed over time in American culture, beyond noting that skepticism about the objectivity of the judge has grown in this century. See Robert A. Ferguson, Holmes and the Judicial Figure, 55 U. CHI. L. REV. 506, 511 (1988).


58. This was in line with the development of the genre as a whole. See CASPER, supra note 35, at 87 ("[D]idacticism was unquestionably the most common purpose of biography between 1820 and 1860.").

59. DANIEL CHIPMAN, THE LIFE OF HON. NATHANIEL CHIPMAN, LL.D.: FORMERLY MEMBER OF THE UNITED STATES SENATE, AND CHIEF JUSTICE OF THE STATE OF VERMONT iv (Boston, Charles C. Little & James Brown 1846). As was typical of biographers in the didactic mode, he offered prefatory remarks about the utility of his work and of biography in general:

To write a panegyric would, in this case, savor of vanity, and is in no case very useful, without setting forth the early training and early acquired habits which contributed to form the character of the person eulogized, as an example to be followed by the rising
Parallel Lives of the Noble Grecians and Romans, they were encomiums designed "to encourage virtue and discourage vice in public life," often reading like "homilies" or "biographical Sunday school lessons." However, by mid-century, judicial biographies began to assume a more "romantic" form, providing "the full-bodied story of a life"—a more intimate portrait of the person in all his "idiosyncrasy." In these works, the individual judge's "constructive" role in the development of the Republic's jurisprudence figured more prominently. This can, in large part, be attributed to improvements in the reporting system and the growth of legal literature, which made judicial opinions more accessible. Increasingly, biographers turned to published reports as the primary illustration of "judicial character." As a result, the image of the ideal judge as a writer came to hold a central place in legal discourse. "After all," said Chief Justice Lemuel Shaw of his colleague Isaac Parker, "his judicial character must stand upon the published reports of his judicial decisions, which now form so large a portion of our legal learning."

The importance of "character" in nineteenth-century American culture can hardly be overstated. "By 1800," Warren Susman has observed, "the concept of character had come to define that particular modal type felt to be essential for the maintenance of the social order." Americans perceived a vacuum of authority in the early Republic, as "the hierarchical social institutions of seventeenth-and eighteenth-century America" were giving way to "the more tenuous authority possible within the egalitarian social organizations of the nineteenth century." Clerics, educators, and public moralists generation. Such is, undoubtedly, the legitimate purpose of biography.

Id. at iv-v. For an illuminating analysis of nineteenth-century biographies written in a didactic vein, see CASPER, supra note 35, at 19-124.

60. DANIEL J. BOORSTIN, THE CREATORS 585, 586 (1992); see also CASPER, supra note 35, at 32 (noting didactic and nationalistic aims of antebellum biographies and tracing their origins to Plutarch's Lives).

61. BOORSTIN, supra note 60, at 586; see also CASPER, supra note 35, at 203-20 (describing critical redefinition of genre at mid-century as new emphasis is placed on qualities of mind and action which made each individual unique).


64. KAREN HALTTUNEN, CONFIDENCE MEN AND PAINTED WOMEN: A STUDY OF MIDDLE-CLASS CULTURE IN AMERICA, 1830-1870, at 23 (1982); see also CASPER, supra note 35, at 88-89 (describing disruptions of traditional patterns of life occasioned by political revolution, religious revivalism, and spread of market economy); Appleby, supra note 37, at 170-71 (same).
articulated their fears within a declension framework: "We have fallen on a period of social disorders, agitations, and excitements. There are signs of a spirit of anarchy in the very midst of us, which makes us sometimes tremble for the weal of our institutions." In the midst of this crisis of authority, Karen Halttunen explains, "Americans came to believe that the republic's only chance for survival lay in the character of the rising generation." It is thus not surprising that one finds a burgeoning literature of "character studies providing examples for emulation" and advice manuals "promising a way to character development and worldly success," particularly in the antebellum period. These publications presented a "method for both mastery and development of the self." They also supplied a "method of presenting the self to society, offering a standard of conduct that assured interrelationship between the 'social' and the 'moral.'" But the writers' concept of character was itself ultimately "founded on an inner contradiction," according to Susman. For they "argued that the highest development of self ended in a version of self-control or self-mastery, which often meant fulfillment through sacrifice in the name of a higher law, ideals of duty, honor, integrity. One came to selfhood through obedience to laws and ideals."

The biographies extolling the "judicial character" of their subjects were, in a sense, a species of this advice literature. Indeed,

66. HALTTUNEN, supra note 64, at 10.
68. Susman, supra note 63, at 214.
69. Id.
70. Id. at 220.
71. Peter Gay has suggested such a link in his discussion of the "anxious didacticism" manifest in nineteenth-century popular literature:
I have called the Victorian age an age of advice, and biographies had their part to play in a vast literature of printed sermons, medical treatises, handbooks on conduct, rags-to-riches novels, counsel to the lonely, the young, the masturbator, the aspiring merchant. Indeed, biographies resembled both the novels and the exhortations, but, unlike the first, they claimed to be true and, unlike the second, they enforced their message not with sweeping precepts but with concrete instances... [B]iographies were at heart supreme success stories. Victorian lives were many things, but a sizable
these works were clearly intended to serve a useful social function—providing models and methods of self-development likely to enhance one’s reputation before both man and God. And they relied upon the same contradictory formulation of character, so that the ideal judge was portrayed as one who achieved self-mastery through submission to the rule of the law. But the promotion of “judicial character” was also a particular response of lawyers to the problem of order in antebellum America. The legitimacy of the legal profession and judicial authority was hardly secure in post-Revolutionary America. Of primary concern was “[t]he problem of fitting the common law into an emerging system of popular sovereignty.”

The position of the judiciary was especially precarious. Due to the low salaries and the hardships of riding circuit, the bench did not attract the most capable members of the profession, and was populated with a substantial number of laymen.

Lawyers and judges in the early Republic mounted an impressive and largely successful campaign to establish their status as a learned profession. And they succeeded in expanding the province of the judge at the expense of the jury through institutional and procedural reforms. But these measures did not receive universal applause from legal professionals or the public at large; they were subject to a considerable amount of resistance and

contingent among them were advice proffered through examples. . . . Varied though their menu, these guides to a better life were as one in this: they aimed to mold character.

4 GAY, supra note 18, at 160; see also CASPER, supra note 35, at 88 (viewing popular lives and collective biographies of merchants, mechanics, and “self-taught” men as part and parcel of a “cultural mission” to shape individual and national character, reflecting rising social concern about “moral free agents”).

72. TRANSFORMATION I, supra note 13, at 20. According to Horwitz, American jurists displaced the revolutionary generation’s understanding of common law doctrines as derived from “natural principles of justice” in the period from 1780 to 1820, promoting a more “instrumental” conception of law. Beginning in the late eighteenth century, he finds the powers of the judge expanded at the expense of the jury, and contends that by 1820 judges had come to conceive of the common law as “equally responsible with legislation for governing society and promoting socially desirable conduct. The emphasis on law as an instrument of policy encouraged innovation and allowed judges to formulate legal doctrine with the self-conscious goal of bringing about social change.” Id. at 30. As will be seen below, this instrumentalist judge contrasts rather sharply with the judges figured in biographies of the same period.


75. The major institutional innovation of the period was the establishment of a trial and appellate system which “increased the law’s predictability [and] also gave judges more power over juries.” Lettow, supra note 73, at 519. Judges also utilized the procedural mechanism of ordering new trials for verdicts against the law or evidence as a means of exerting authority over the jury in an ideologically acceptable fashion. See id. at 506, 521-26; see also AMERICANIZATION OF THE COMMON LAW, supra note 13.
hostility on the part of those who promoted (successfully) the election of judges and urged simplification of the law.\textsuperscript{76} The biographies extolling the "judicial character" of their subjects answered these attacks, suggesting that the judge exemplified and preserved legal order. Thus they may be read not only as manuals of instruction, but also as acts of self-justification on the part of the bench and bar.

This Part explores the significance of "judicial character" in antebellum legal culture. It begins by reconstructing the image of the exemplary judge as it was projected in the biographical literature. The judge was predominantly figured as a craftsman of the law or a medium through which the law was expressed. According to this neoclassical model of adjudication, the rendering of a judgment entailed the self-abnegation of the judge. By the middle of the century, however, a more romantic conception of authorship was discernable in some biographical works. This romantic vision constituted a fundamental threat to the notion of judicial character elaborated by antebellum legal biographers. For if the judge was the author of the law, was he not acting rather imperiously—rendering judgments according to his own dictates? How were the romantic judge's legal judgments to be distinguished from expressions of prejudice or raw egotism? The ways in which judicial biographers answered—or evaded—these questions are examined in Part III.

A. The Antebellum Portrait

The lives and times of antebellum American judges were remarkably uniform, if the judicial biographies of the period are any indication. There is, indeed, a formulaic quality to these works. They begin by tracing the ancestry of the judge, making note of patriotic relatives.\textsuperscript{77} Next we learn of the educational background of the judge,


\textsuperscript{77} Judge Samuel Putnam was especially well-connected to the Revolution. He was both "distantly related to the celebrated General Israel Putnam," and a contributor to the war effort in his own right: "He saw the soldiers under Arnold as they were going down to attack Quebec ... [and] even at his tender age ... could play the fife for them as they marched by." CYRUS AUGUSTUS BARTOL, A DISCOURSE ON THE LIFE AND CHARACTER OF SAMUEL PUTNAM LL.D., A.A.S., LATE JUDGE OF THE SUPREME JUDICIAL COURT OF MASSACHUSETTS 5 (Boston, Crosby, Nichols, & Co. 1853). In a similar fashion, we are told that Judge Jonas Platt was a son of Zephania Platt of Poughkeepsie
which usually involved some exposure to the classics from an early age, and often included formal collegiate studies. Very soon thereafter, we find him studying law in the office of a distinguished judge or lawyer, having displayed little or no anxiety about his choice of vocation. Admission to the bar (and, usually, marriage) likewise follow as a matter of course. It would appear that some men are simply "bred to the law." Invariably, the judge's "talents and industry soon acquired for him a rank in that profession, and an amount of practice, which are rarely attained until after a long period of patient exertion and laborious study.

The biographer is more measured in his praise of the judges' arguments before the court, which are referred to as respectable, if not compelling displays of forensic skill. In any event, we are told, it was not long before the judge was "pressed" into public life, performing a variety of roles, from legislator, to marshal, to brigadier general of the cavalry. "The several offices of trust and responsibility which he was soon called to fill by executive appointment, and by the suffrages of the people," the biographer observes, "attested the confidence which was universally placed in his judgment, fidelity, and capacity in the transaction of business."

All of this, of course, is but prologue to the moment when he is called to assume the seat of judgment. At this point in the narrative, the biographer considers his subject's judicial character at some

one of the revered and intrepid patriots of the Revolution ... who was a member of the New York Convention of 1776, and of the Council of Safety in 1777, and a delegate to Congress under the old Confederation. He was also first judge of the Court of Common Pleas for Dutchess county ... down to the year 1795.


The socioeconomic background of the judges is difficult to reduce to a generalization from the biographies. Some judges were said to come from "ancient and respectable" families, others from more "humble" origins. Compare OLIVER SPENCER HALSTED, ADDRESS UPON THE CHARACTER OF THE LATE THE HON. ISAAC H. WILLIAMSON 7 (Newark, Aaron Guest 1844) with Shaw, supra note 62, at 6.

78. Obituary Notice of the Hon. Bushrod Washington, Late One of the Justices of the Supreme Court of the United States, 3 AM. JURIST & L. MAG. 156, 156 (1830) [hereinafter Obituary Notice of the Hon. Bushrod Washington].


80. As Horace Binney recalls Chief Justice Tilghman:

He was concise, simple, occasionally nervous, and uniformly faithful to the court, as he was to the client. But the force of his intellect resided in his judgment; and even higher faculties than his as an advocate, would have been thrown comparatively into the shade, by the more striking light which surrounded his path as a judge.

Binney, supra note 29, at 5.

81. See Memoir of Judge Trimble, 1 AM. JURIST & L. MAG. 149, 154 (1829); see also Judge Platt, supra note 77, at 489.

82. Shaw, supra note 62, at 7.
length, delineating the exemplary qualities of his heart and mind. "But the life of a judge, however active, laborious, and useful, is filled with little incident,"83 the biographer reminds us, as he draws his account to a close. During his entire term of office, we are assured, the judge served with distinction and his "integrity as an officer and a man was never called in question."84 Christianity always figures somewhere in the background—never directly informing the judge's decisions but providing a helpful source of "fundamental truths."85 In detailing the final days of the judge, the biographer notes that the dying man remained lucid to his last breath. Biography then shades into hagiography:

We may well rejoice, therefore, that a life, so long and so useful, should have come to its close without any exhibition of human infirmity.... His setting sun loomed out in cloudless splendour, as it sunk below the horizon. The last lights shot up with a soft and balmy transparency, as if the beams, while yet reflected back on this world, were but ushering in the morn of his own immortality.86

The image of the ideal judge that emerges from this literature suggests the twin influences of neoclassicism and liberal Protestantism. Consider Joseph Story's commendation of Chief Justice Parker (1831): "[I]t is difficult to combine so many valuable qualities in a single character ... as a judge, he was eminent for sagacity, acuteness, wisdom, impartiality, and dignity; as a citizen, for public spirit, and elevated consistency of conduct; as a man, for generosity, gentleness, and moral purity."87 There is in this idealization of Parker evidence of a neoclassical sensibility, in that Shaw expresses faith in an ordered rationalism, confirms the congruency between the moral and the legal, and validates social conformity over and above natural impulse and imagination.88 Yet this portrait of the

83. Id. at 12.
84. Memoir of Judge Trimble, supra note 81, at 155.
85. Of Judge Platt it was said: "Before he had entered into public life his mind had been led to the study and contemplation of those great and fundamental truths of Christianity which relate to our future destiny, and are undoubtedly the most momentous that can engage the attention or command the reverence of mankind." Judge Platt, supra note 77, at 491; see also Binney, supra note 29, at 30 ("[I]t was to no poetical deity, nor to the counsels of his own mind, but to that 'grace' which his supplications invoked, that he owed his protection from most of the lapses to which fallible man is subject.").
88. This formulation of neoclassicism draws on the following studies: WALTER JACKSON BATE, FROM CLASSIC TO ROMANTIC: PREMISES OF TASTE IN EIGHTEENTH-CENTURY ENGLAND (1946); LAWRENCE BUELL, NEW ENGLAND LITERARY CULTURE FROM REVOLUTION THROUGH RENAISSANCE 84-102 (1986); FERGUSON, supra note 24, at 72-78;
judge also mirrors liberal theologians' characterizations of God in the nineteenth century. In contradistinction to the juristic tradition, in which God was imagined "as feeling both love and wrath as he rewarded the righteous and punished the guilty," these theologians simplified and unified God's feelings into a "more emotionally singular characterization" of "love above all else." They adopted an anti-anthropomorphic, theistic conception of God—one which emphasized his lack of "inner conflict or complexity." Interestingly, just as liberal theologians were replacing images of God as a judge with those of Him as a loving Father, legal biographers seemed to be figuring the ideal judge in His benevolent image. This is not to say that judicial biographers were raising the judge up to some sort of godlike station. No one thought that antebellum judges were anything other than human—the judge always comported himself modestly, displaying all due reverence and deference to the Judge. Idealization, after all, is not the same thing as deification. The similarity in the characterization of God and the judge has more to do with the fact that these theologians and lawyers shared a common conception of human nature—one which called for the benevolence of the judge, no less than the Judge.

A closer examination of the concept of "judicial character" in antebellum legal literature provides further clarification of this ideal. As used by legal biographers, the term was usually meant to be both descriptive and prescriptive. Over the course of the antebellum period, a broad consensus may be detected among legal biographers of the period as to the constituent elements of judicial character. For purposes of this discussion, they will be reduced to four: (1) impartiality, (2) benevolence, (3) sagacity, and (4) artless simplicity. In speaking of judicial character, biographers referred primarily to the qualities the judge displayed when acting publicly, in his official capacity. The judge's character off the bench received far less attention from antebellum biographers. Yet their readers could rest


89. Jenkins, supra note 67, at 26.

90. Id. at 39. For an interesting reflection on the character of the judge written by a cleric, see Bartol, supra note 77, at 8.

91. More generally, these characterizations enjoyed intellectual and social support from enlightenment science and humanitarian morality, which pervaded cosmopolitan American culture in this period. See Jenkins, supra note 67, at 7-8, 50, 138-39.

92. On occasion, "judicial character" was used to refer to the individual judge himself, as well as to the set of qualities possessed by the same.
assured "that there was no contrariety between his judgments and his life,—that there was a perfect consent between his public and his private manners." Much like the liberal theologian's God, the biographer's judge was marked by the serenity and consistency of his character. This neoclassical figure seemed to transcend the strife of the marketplace and the rancor of the political arena, embodying a shared set of virtues and holding out the promise that "capitalism and democracy would not atomize society into a war of all against all." Impartiality referred to the ability of a judge to distance himself from party politics as well as the passions of litigants. *The Life of Hon. Nathaniel Chipman* provides a typical illustration of this attribute, though examples could certainly be multiplied. Chapter IX described his assumption of the post of Chief Justice of the Vermont Supreme Court in 1813. Of course, his popular election "arose from, and followed, the performance of his judicial duties." In support of this proposition, Chipman's biographer cited the testimony of an unidentified but "eminent jurist":

I was in considerable practice during the different times that Nathaniel Chipman was chief justice, and I can truly say, that in times of the greatest party excitement, I never heard an intimation, nor even a whisper, expressing a doubt as to the talents, independence, and impartiality of Judge Chipman.... Every one, both counsel and parties, had the fullest confidence that every case would be decided according to law and the justice of the case, and his decisions seldom failed of giving entire satisfaction to all concerned.

This posture of neutrality was sharply distinguished from the "manner of the advocate." From the moment Chipman left his practice to take a seat upon the bench, he "never argued the case in charging the jury... from his habitual regard for truth, he did it in such manner as to satisfy all who heard him... it was done with perfect impartiality." Interestingly, Justice Chipman's own explanation of his behavior (as recalled by his biographer) was more

94. JENKINS, supra note 67, at 8. For illustrations of the tension between republican and liberal ideals in early republican and antebellum literature, see CASPER, supra note 35, at 77-124 (observing the ways biographers "combined, often uneasily, the virtues associated with civic life and with self-made success," id. at 77).
95. CHIPMAN, supra note 59, at 195.
96. Id. at 196. A similar conception of impartiality is expressed in an editorial criticizing a "Judge Barbour," who delivered public speeches regarding the constitutionality of the Alien and Sedition Acts and displayed behavior "less befitting a judge than a political leader." Judge P.P. Barbour's Valedictory to his Constituents, 5 AM. JURIST & L. MAG. 223 (1831).
97. CHIPMAN, supra note 59, at 197.
strategic: "He used to remark, that . . . if he did [argue the case], the jury would undertake to argue it also, and in their view, their own arguments would outweigh his." 98

Impartiality, however, did not imply indifference. The sympathies of the judge were bound to be awakened by the cases at the bar, and he was not expected to suppress them completely. The benevolence of the judge was vividly conveyed in Horace Binney's sketch of Chief Justice Tilghman:

His own exemption from moral infirmity, might be supposed to have made him severe in his reckonings with the guilty; but it is the quality of minds as pure as his, to look with compassion upon those who have fallen from virtue. He could not but pronounce the sentence of the law upon such as were condemned to hear it; but the calmness, the dignity, the impartiality, with which he ordered their trials, the deep attention which he gave to such as involved life, and the touching manner of his last office to the convicted, demonstrated his sense of the peculiar responsibility which belonged to this part of his functions. . . . [I]n criminal cases, there was a constant reference to the wretched persons whose fate was suspended before him; and in the very celerity with which he endeavoured to dispose of the accusation, he evinced his sympathy. . . . He never pronounced the sentence of death without severe pain; in the first instance it was the occasion of anguish. 99

Justice Chipman also blended compassion with composure as he presided over the court. He was "at all times, and under all circumstances, equally cool, deliberate and patient," so that even when confronted with the machinations of the "cunning" lawyer, he never responded with anything approaching "severity." 100 And however removed he remained from the passions and perversities of the litigants and their counsel, he attended to the feelings of all affected parties. Moreover, he had "a happy talent of adapting the law to the justice of the case, so that it was seldom necessary to apply to the equity side of the court." 101

The judge's "happy talent" was not inborn—it was the product of a cultivated intellect. Brilliance and erudition were not prerequisites for the office of the judge, but a "sagacity" developed through mental

98. Id.
100. CHIPMAN, supra note 59, at 198, 199.
101. Id. at 197; see also BARTOL, supra note 77, at 7 ("[E]ngaged as he had been in politics, with his whole heart espousing one side, on his becoming judge he put the politics entirely off, and, in his place, knew no distinction of fellow or foe."). Though remaining outside the present bounds of this paper, potentially fruitful connections might be drawn between the law/equity distinction in legal thought and the justice/grace distinction in theology.
discipline was a crucial component of judicial character. Others "may have had more learning at immediate command," Binney allowed, but "none have had their learning under better discipline" than Justice Tilghman.\textsuperscript{102} Likewise, Chipman's capacity for judgment was clearly an acquired trait. Indeed, his exemplary "mental qualities and habits" were chiefly attributed to his intensive exposure to "dead languages."\textsuperscript{103} His biographer once again referred to another (unidentified) authority, who confirmed that this course of study "'cultivates a habit of patience, of attention, of acuteness and discrimination.'"\textsuperscript{104} With such a disciplined mind, the judge was "shielded against prejudice in making his decisions . . . . He so clearly discerned a difference between the right and wrong side of a cause . . . that he seemed to lose sight of the parties, and everything extraneous."\textsuperscript{105} Chipman's biographer admitted that "a man of ordinary powers of mind, if he be undisturbed by his passions" might also function as a "useful and respectable judge" without succumbing to such a regimen, but "he can never be a Mansfield or a Marshall."\textsuperscript{106} Chipman's omission from this class of judges is, however, conspicuous. And one is left wondering what precisely constitutes the source of Mansfield's or Marshall's greatness.\textsuperscript{107}

It would seem that Judge Chipman has been upstaged by Mansfield and Marshall in his own biography. Yet Chipman's tendency to blend in with the typeface is consistent with another aspect of judicial character—artless simplicity. His biographer noted that the young Chipman aspired to "become the oracle of law to the state of Vermont" when he grew up—a vocation requiring no small measure of selflessness.\textsuperscript{108} Indeed, the judges were rendered virtually

\textsuperscript{102.} Binney, supra note 29, at 21; see also BARTOL, supra note 77, at 6-7 ("I do not demand for him the credit of that gigantic force and weight of faculties by which, in some men, we are amazed and overpowered . . . .").

\textsuperscript{103.} CHIPMAN, supra note 59, at 199

\textsuperscript{104.} Id.

\textsuperscript{105.} Id. at 199-200.

\textsuperscript{106.} Id. at 200.

\textsuperscript{107.} While a few biographers spoke of a more untutored faculty of judgment, it was almost always one shaped and directed by learning. For more on the role of the mind in legal judgment, from the perspective of antebellum lawyers, see MILLER, supra note 23, at 117-55 (discussing lawyers' conception of "intellectual elegance"). I focus here primarily on rank-and-file rather than exceptional American judges (in antebellum period this means Marshall; from time to time this category expands to include Story and Kent). These exceptional judges will be considered in greater depth in the Part III of this paper. My reason for deferring discussion of such judicial greats is that the main biographical treatments of them were published in the post-bellum period.

\textsuperscript{108.} CHIPMAN, supra note 59, at 195.
faceless in the biographers' portraits; they were uniformly "simple," "guileless," "child-like," and "unpretentious." And nowhere was the judge's impersonality more noticeable than in his judgments. Of Chief Justice Tilghman, Binney had this to say:

He asked... for submission to no authority so rarely as to his own.
You may search his opinions in vain, for any thing like personal assertion.... He spoke and wrote as the minister of reason, claiming obedience to her, and selecting with scrupulous modesty such language as, while it sustained the dignity of his office, kept down from the relief, in which he might well have appeared, the individual who filled it.... [T]here is not to be found one arrogant, one supercilious expression, turned against the opinions of other judges, one vain-glorious regard toward himself. He does not write as if it occurred to him, that his writings would be examined to fix his measure, when compared with the standard of great men, but as if their exclusive use was to assist in fixing a standard of the law.109

But as Binney's comments themselves suggest (and Shaw's statement above confirms110), written opinions were becoming the primary basis for establishing judicial character. And, as the writings of a judge were examined to "fix his measure," there was a growing appreciation of individual style—as expressed through the written word.

B. Literary Manifestations of Judicial Character

The practice of committing judicial opinions to writing was not common in the early national period. Only a few legislatures imposed such requirements upon judges. Moreover, legal reporting systems were relatively informal, in that courts typically had no salaried, "official" reporters. Those volumes of decided cases that did become available (their publication was often delayed) were expensive and were marked by inaccuracies and omissions.111 The reporter, who was sometimes a judge himself, played a large role in the process: he selected the cases that would be reported, stated the facts,

110. See supra text accompanying note 62.

Some of the volumes are hardly written in English. I am looking now at two of them in my library... which I will present to any one who can show me one page of correct English from the hand of the reporter in the entire two volumes. From such reporting, it is as impossible to obtain an intelligible statement of a case, as to procure it from a chapter of the Koran... A good judicial effort may be caricatured by a reporter, just as a gentleman may be made a harlequin by his tailor.

PORTER, supra note 57, at 63.
reconstructed arguments of counsel and opinions of judges (chiefly from his own notes and recollections of the proceedings), and provided annotations. In some cases, the collaboration between reporter and judge was quite close. James Kent’s working relationship with William Johnson provides a prominent and especially striking example of a judge’s reliance on his reporter. Writing to Johnson in 1815, Kent admitted: “I am only afraid of reporting too much, and I shall stand in need of your judgment on that point, seeing I am alone in my Court and have no other aid, and I shall place more reliance on your judgment than my own.” And upon retirement in 1823, he wrote to Johnson: “If my name is to live in judicial annals, it will be in association with yours.”

Over the course of the antebellum period, written judicial opinions became the norm in appellate courts, and official law reporters gradually replaced private entrepreneurs. As early as 1839, the American Jurist could proudly announce:

In almost all the United States, the decisions of the higher courts are required by law to be reported, either by the judges . . . or by a reporter officially appointed and paid in part at least by the government; they are distributed at the public expense, in the same manner as the statute laws, besides being sold by the reporter on his own account; and the opinions of the judges are for the most part drawn up in writing. The reported cases are a series of elaborate legal essays, on the various subjects to which they happen to relate, drawn up with the knowledge and expectation that they are to be published, and to become an authoritative exposition of the law and its application. The decisions of our higher tribunals, therefore, which are reported and published in pursuance of some legislative provision, seem to be thereby invested with a sanction and authority, which the English reports have never enjoyed since the days of the year-books.

112. See Langbein, supra note 74, at 576-77. According to Joyce, some reporters even relied on the notes of other counsel when they could not be present for portions of the trial (and they often took great liberties with these notes). On occasion, they were provided with the notes of the judge himself. See Joyce, supra note 111, at 1296, 1304-06. Friedman has also emphasized the individual reporters’ role in determining the content of these volumes, insisting that they were not simply “slavish accounts” of the judges’ rulings: “Like the great English reports, they were guidebooks for the practitioner. Some reporters added little essays on the law to the oral and written courtroom materials they collected.” Friedman, supra note 111, at 324; see id. at 322-33.


114. Letter from James Kent to William Johnson (Apr. 29, 1823), in 5 THE PAPERS OF JAMES KENT, supra note 113, quoted in Langbein, supra note 74, at 583.

Gradually, legal reporting became so standardized that George Caines (an officially appointed reporter for the New York Supreme Court) could speak of his “exertions” as “reduced to little more than arranging the materials received, and giving, in a summary manner, the arguments adduced.” The reporter was relegated to a subsidiary role in the production process, and written opinions were increasingly ascribed to individual judges. The status of a legal report as an authoritative statement of the law came to depend, in large part, upon the accuracy with which the reporter reproduced the words of the judge. Thus, while the legislature may have invested these legal reports with “a sanction and authority,” the judges themselves were increasingly regarded as legal authorities in their own right—albeit of various degrees of stature and reliability.

It is important to note, however, that judicial writers were not openly lauded for creativity in their compositions. After all, they were effectively compelled by law to commit their judgments to words, and one of the motivations behind the law was to cabin judicial discretion. Moreover, the conventions of opinion writing dictated that the judge speak for “the court”—which may have

116. FRIEDMAN, supra note 111, at 325. From Kent’s perspective, however, Caines was simply incompetent. See Langbein, supra note 74, at 575. Additional evidence of the constraints upon official reporters can be found in a review of William Rice’s South Carolina Reporter in the American Jurist: “The reporter explains the duties of his office, as prescribed by law, very fully in his preface. He is required to publish the decisions only, and not the arguments of counsel; and the decisions are to be selected by the judges.” Critical Notice, 22 AM. JURIST & L. MAG. 488, 489 (1840) (reviewing 1 WILLIAM RICE, REPORTS OF CASES AT LAW, ARGUED AND DETERMINED IN THE COURT OF APPEALS AND COURT OF ERRORS OF SOUTH CAROLINA (Charleston, Burges & James 1839)).

117. Arguments of counsel were now often excluded from the reports—largely due to space considerations. In Ohio, there was legislation prohibiting publication of arguments “unless specially directed by the Court.” The editors of the American Jurist viewed it as problematic to exclude such arguments in all cases, because it “secures the court from responsibility, a privilege of which judges, by the inherent indolence of human nature, may be too strongly tempted to avail themselves, by throwing difficulties and objections into the shade instead of overcoming them, and slurring over arguments instead of answering them.” Ohio Condensed Reports, 10 AM. JURIST & L. MAG. 468, 469-70 (1833) (book review).

118. It should be noted that throughout this period there continued to be official reporters who were judges themselves (reporting their own as well as their colleagues’ opinions). But even when not reporting themselves, judges exercised increasing control over which cases were published. See FRIEDMAN, supra note 111, at 136.

119. Indeed, as Friedman observes: “Big states and famous judges were considered more authoritative, and were cited more frequently than small states and small judges.” FRIEDMAN, supra note 111, at 325.

120. For a comparative perspective—pointing to the very different attitudes toward statutes and the written output of judges in the legal cultures of nineteenth-century France and Germany—see JOHN P. DAWSON, THE ORACLES OF THE LAW 374-502 (1968).

121. See FRIEDMAN, supra note 111, at 324 (publication of law reports viewed as essential to a “government of laws,” tending to limit judicial discretion) (quoting William Cranch).
consisted of a panel of judges—thus obscuring the identity of the individual writer.122 Ample documentation of the legal profession’s ambivalence towards the judicial writer may be found in antebellum legal journals.123 Judges were rarely referred to as “authors”; this appellation was typically used only in connection with their extra-judicial commentaries and treatises. And even as attention was directed towards the stylistic features of an opinion, they were considered largely ornamental—dressing up the “reasons and grounds” upon which the judgment was based.124 The writing of an opinion was conceived as an act of interpretation or construction rather than one of creation. According to Frances Lieber, a leading expositor of legal hermeneutics, the judge was to divine the “true sense” of the law—refraining from “bringing a sense into the words . . . acknowledging, as [his] sole legitimate office, that of bringing the sense out of them.”125

Antebellum legal professionals were nonetheless inclined to draw connections between a judge and his work. For instance, Professor Simon Greenleaf instructed his students to attend to “[t]he manner of the decision” as well as “the reasons on which it is professedly founded.”126 The decision, he explained, “may receive some coloring and impress, from the position of the judges, their political principles, and their habits of life, their physical temperament, their intellectual, moral and religious character.”127

122. Of course, dissenting opinions did not obscure the identity of the author and were offered from a first-person perspective. And even judges who professed to be giving the opinion of “the court” sometimes spoke in the first person—often to distinguish their personal views from the ruling itself.

123. Initially, these periodicals devoted significant space to case reports and digests of statutes. However the growth of legal reporting put most periodicals out of business; surviving journals tended to reprint only “key decisions and other primary sources of law.” FRIEDMAN, supra note 111, at 329.


125. FRANCIS LIEBER, LEGAL AND POLITICAL HERMENEUTICS, OR PRINCIPLES OF INTERPRETATION AND CONSTRUCTION IN LAW AND POLITICS, WITH REMARKS ON PRECEDE NTS AND AUTHORITIES 87 (Boston, Charles C. Little & James Brown 1839). Legal and political interpretation were distinguished from “theological hermeneutics” in that the Bible was amenable to “typical, allegorical, parabolical, analogical, moral and accommodatory senses, and of corresponding modes of interpretation.” By contrast, “[i]n politics and law we have to deal with plain words and human use of them only.” LIEBER, supra, at 76. See generally James Farr, The Americanization of Hermeneutics: Francis Lieber’s Legal and Political Hermeneutics, in LEGAL HERMENEUTICS: HISTORY, THEORY, AND PRACTICE 83 (Gregory Leyh ed., 1992) (demonstrating widespread influence of Lieber’s work in nineteenth-century America). For a discussion of biblical criticism in nineteenth century America, see JERRY WAYNE BROWN, THE RISE OF BIBLICAL CRITICISM IN AMERICA, 1800-1870 (1969).

126. LIEBER, supra note 125, at 230 (quoting Simon Greenleaf).

127. Id.
This was not to say that "the decision will depend on these; but only that they are considerations not to be wholly disregarded in perusing and weighing the judgment delivered." Thus, he concluded,

we should hardly expect to find any gratuitous presumption in favor of innocence, or any leanings in mitiori censu, in the blood thirsty and infamous Jeffries; nor could we, while reading and considering their legal opinions, forget either the low breeding and meanness of Saunders, the ardent temperament of Buller, the dissolute habits, ferocity and profaneness of Thurlow; or the intellectual greatness and integrity of Hobart, the sublimated piety and enlightened conscience of Hale, the originality and genius of Holt, the elegant manners and varied learning of Mansfield, or the conservative principles, the lofty tone of morals, and vast comprehension of Marshall.

Similarly, Lieber stressed the importance of assessing the "moral, mental and political character" of the judge "who is claimed as having established the authority." In order to determine the weight of judicial opinion, Lieber argued, it was necessary to take a full measure of the judge's knowledge of the subject, the time in which he lived, his motivations, and the authorities he brought to bear on the litigated matter.

Articles in legal periodicals also drew connections between judicial character and legal authority in their analyses of the judges' literary output. For instance, an 1834 piece in the American Jurist, entitled Characters of Law Books and Judges, evaluated individual judges as well as legal publications. Alongside abbreviated reviews of various treatises, reports and digests, we find entries such as this:

Hardwicke, Lord Chancellor. 'The present wise and rational system of English equity jurisprudence, owes more to him than perhaps to any of his predecessors. There is no judge in the juridical annals of England, whose judicial character has received greater and more constant homage. His knowledge of the law, said Lord Kenyon, (7 Term. R. 416) was most extraordinary and he was a consummate master of the profession. His decisions at this day, and in our courts, do undoubtedly carry with them a more commanding weight of authority than those of any other judge.' 1 Kent Com. 494.

and this:

[128. Id. 129. Id. 130. Id. at 229. 131. See id. 132. See Characters of Law Books and Judges, 12 AM. JURIST & L. MAG. 5 (1834). 133. Id. at 37.]
Jeffries, Lord Chancellor. 'No sentiment of integrity, no feeling of mercy ever found a place in his bosom. He had a brutal levity of conduct, strangely unbecoming the judicial character. His acquirements as a lawyer were of a mean order; and it is not dealing too harshly with him to adopt the censure of Mr. Justice Foster, and to pronounce him the very worst judge that ever disgraced Westminster Hall.' Roscoe's Lives, 134.134

And there were even a few American entries, such as this:

Mckean, Chief Justice. 'He was the most learned and distinguished lawyer of his time, and who, in the language of his successor, could not be supposed to have favored constructions unfriendly to true liberty or unwarranted by the genuine sense of the constitution.' Per Meredith, arguendo, Judge Peck's Trial, 338.

'A learned lawyer of the old school.' 1 Kent Com. 512.135

and this:

Story, Justice. 'This eminent judge never handles a question on any part of the science of law, without examining it in all its relations, with equal candor and freedom and fervor and force, and leaving it completely exhausted.' 4 Kent Com. 489.136

Thus it can be seen that the critical analysis of judicial opinions was implicitly premised upon a view of the judge as author. In evaluating the authority of a judicial opinion, antebellum legal professionals clearly took the identity of its author into consideration. But what was it that authorized the judicial author? The source of his authority had initially been derived from his "judicial character." Yet as discussions of "judicial character" came to incorporate the written work of the judge, attention was drawn to the ways in which the text of an opinion reflected his temperament and biases as well. Increasingly, "judicial character" came to refer to the peculiar qualities of an individual judge instead of an abstract set of attributes possessed by the exemplary judge. By what standard, then, was the work of the judicial author to be judged? The resulting tension between authorship and authority necessitated a revision of the relationship between a judge and his work.

134. Id. at 39.
135. Id. at 45.
136. Id. at 59. Immediately following this entry, there is another one, considering the character of Story's treatise:

Story's Bailments. 'This excellent treatise is the most learned and most complete of any that we have on the doctrine of bailment. It aims to lay down all the principles appertaining to the subject, both in the civil, the foreign, the English, and the American law, with entire accuracy; and I beg leave to say, after a thorough examination of the work, that, in my humble judgment, it has succeeded to an eminent degree.' 2 Kent. Com. 611.

Id.
This revisionary process can be traced through the biographical literature of the antebellum period. Initial constructions of the judicial author tended to downplay the degree of literary invention involved. For instance, the biographer of Judge Trimble emphasized the labored quality of judgments: "[N]o man could bestow more thought, more caution, more candor, or more research upon any legal investigation than he did."¹³⁷ His judgments were admired for their "clearness, strength, vigor of reasoning, and exactness of conclusion. Without being eloquent in manner, they had the full effect of the best eloquence. They were persuasive and overwhelming in their influence."¹³⁸ The convincing opinion was crafted with common sense, as exemplified in the works of Bushrod Washington:

He indulged not the rash desire to fashion the law to his own views; but to follow out its precepts with a sincere good faith and simplicity. Hence he possessed the happy faculty of yielding just the proper weight to authority, neither on the one hand surrendering himself blindfold to the dictates of other judges, nor on the other hand overruling settled doctrines upon his own private notion of policy or justice.¹³⁹

In its initial form, the ideal judge-writer was figured as one who allowed the law to speak through him. What was said of William Tilghman was typical: "[T]he character of his mind ... shines forth in his judgments ...."¹⁴⁰ This was not, however, to imply that Judge Tilghman's judgments were impositions of his personal views of the law. To the contrary:

The first great property which they disclose, is his veneration of the law, and above all, of the fundamental Common Law. There is not a line from his pen, that trifles with the sacred deposit in his hands, by claiming to fashion it according to a private opinion of what it ought to be. Judicial legislation he abhorred, I should rather say, dreaded, as an implication of his conscience.¹⁴¹

Here was the epitome of the neoclassical craftsman: "he was master of a body of rules, preserved and handed down to him ... for manipulating traditional materials in order to achieve the effects prescribed by the cultivated audience ... to which he owed both his livelihood and social status."¹⁴²

¹³⁷. Memoir of Judge Trimble, supra note 81, at 156.
¹³⁸. Id.
¹⁴¹. Id. at 33-34.
¹⁴². Woodmansee, supra note 38, at 426.
Toward mid-century, however, one may detect hints of a more romantic conception of judging in the biographical literature. That is, the creativity of the judge is praised—albeit cautiously—and his opinions are more likely to be regarded as emanations from his own mind, described through use of organic metaphors. William Porter’s “extended tribute” to the “genius” of John Bannister Gibson (Tilghman’s successor as Chief Justice of the Pennsylvania Supreme Court) provides an especially striking example of this development. While the formal features of this work, entitled *An Essay on the Life, Character and Writings of John B. Gibson, LL.D.* (1855), do not distinguish it from the preceding publications, two other characteristics set it apart. First, the biographer expressly differentiates his task from that of the eulogists, who paid their respects on the occasion of Gibson’s death. Sufficient time has passed, he avers, to “enable us to pronounce with less partiality on the qualities which have challenged our applause.” And second, Porter refers to Gibson as the “author” of his opinions, and devotes over half of the biography to a discussion of these writings “for the purpose of illustrating his judicial character.” Porter acknowledges the “hazard of such an attempt,” viewing it as similar to “undertaking to exhibit the genius of a sculptor, by means of an arm separated from its trunk, or of a painter, by a handful snatched from the canvass.” With this apology, he proceeds in his analysis of Gibson’s work, commenting on those cases notable for “the nature of the subject, the mode of its discussion, or the peculiarities of the writer which they display.”

This presentation of Gibson’s written “productions” is designed to illustrate “[t]he gradual and uniform progress of his mind.” Porter contrasts the judge’s early opinions, which were “natural and pure,” with his later, more mature ones, marked by “conciseness and

143. This observation is not meant to imply that the shift to a romantic mentality was a sharp or decisive one. For as Peter Gay observes, “[t]he notion that romanticism might be defined by pitting it against classicism was born in the romantic era . . . .” GAY, supra note 18, at 41. Throughout the nineteenth century one finds evidence of the continuing influence of the classical ideal—sometimes voiced by those most readily identified with “the Romantic School.” For instance, Gay notes, “Goethe, of all people, once famously defined the romantic as sick and the classical as healthy, but for much of the time, he wrote like a romantic and served German romantics as a much admired exemplar.” Id. As will be seen below, the romantic does not completely displace the neoclassical judicial ideal in the latter half of the century.

144. PORTER, supra note 57, at 9.
145. Id. at 62.
146. Id.
147. Id. at 63.
148. Id. at 51.
force." 149 The volatility of Gibson's judicial temperament can be inferred from these texts; early cases suggest the "impulsiveness" of the young judge, and even later ones show that Gibson might still be roused to "indignation" in the face of procedural improprieties. 150 As Porter surveys the body of Gibson's judicial opinions, he is struck by the "power of his pen" and his "legal ingenuity." 151 He cites numerous decisions in which the judge "boldly" establishes new and influential doctrines and "foreshadows" changes in popular sentiment. 152 And even when opinions seem to defy popular will (not to mention legal precedent), they can be admired as acts of heroism. The judge was especially impressive in a suit involving controversial questions of land law: "Stung by the action of the legislature, and roused by this new onset, he deals the blows about him, on all sides, with a force so irresistible, and bears himself throughout with a bravery so admirable...." 153 His judicial deportment was most impressive, however, during the turbulent 1830s and 1840s, when Philadelphia became the "city of riots." 154 Faced with conflicting legal claims in the aftermath of this disturbance, Gibson pursued a "manly and patriotic course," effectively replacing the "dominion of violence" with the "dominion of law." 155

In addition to this chronicle of noteworthy cases, Porter also provides a glimpse into the judge's "manner of reaching his conclusions, and writing his opinions." 156 Generally speaking, Gibson exhibited a "disinclination to be guided even by the lights which his own Court had set up, and... a predisposition to illuminate his path by the sparks struck out for the occasion by his own understanding." 157 He avoided extensive consultations with other members of the bench, "communicating his views... in short detached sentences, sometimes not at all, but when he did, hitting the exact point, and diffusing additional light on the principles in question." 158 When appointed to deliver the opinion of the court, he

149. Id. at 64, 98. Porter vividly depicts this contrast as "like the sinews of a growing lad compared to the well-knit muscles of a man." Id. at 51.
150. See id. at 47, 72-73.
151. Id. at 74, 75.
152. See id. at 65-96.
153. Id. at 75.
154. Id. at 89.
155. Id. at 91.
156. Id. at 107.
157. Id. at 99.
158. Id. at 107.
conducted a cursory examination of the authorities, tending to "think chiefly without the aid of his pen, and out of the reach of books."\textsuperscript{159} He might have been found "in his chamber, on the street, at the table, sometimes, it is feared, on the bench during the progress of other causes" as he deliberated, and "[p]ersons who approached him on these occasions, were struck with, and sometimes offended at, his abstracted and careless air."\textsuperscript{160} Unlike the neoclassical judges discussed above, Gibson's "rich, powerful, and even graceful"\textsuperscript{161} opinions were not the product of labored craftsmanship. They were written only after "the very sentences were formed in his mind, and when he assumed the pen, he rarely laid it aside until the opinion had been completed."\textsuperscript{162} No mere manipulator of traditional materials, Gibson "breathed out his great thoughts with the conscious freedom of a man who is master of the very ground which he occupies."\textsuperscript{163} Yet even though these organic metaphors dominate Porter's narrative, he does not embrace the ideal of the romantic judge completely; he also finds occasion to speak of the mind of the judge as a great "machine."\textsuperscript{164} All the same, it would seem that Porter's Judge Gibson was transgressing the boundaries of judicial character, displaying the unmistakable signs of genius.

\begin{thebibliography}{100}
\bibitem{159} Id.
\bibitem{160} Id. at 107-08.
\bibitem{161} Id. at 110.
\bibitem{162} Id. at 108.
\bibitem{163} Id. at 100.
\bibitem{164} Id. at 99, 136.
\end{thebibliography}
III. THE GENIUS OF THE JUDGE, 1850-1900

A speculative, inventive, imaginative judge is a paradox. No one can reasonably ask what a judge has invented or devised, or even discovered. His duty and his praise are in the faithful administration of a system created to his hands; a system of principles, the just development of which affords sufficient scope for genius, without destroying what is established, or innovating in the spirit of a law giver. If ever his labours approach the merit of discovery, it is when he reforms or brings to light what had a previous existence, but had been perverted or obscured.

—Horace Binney

The vast and intricate system of common-law jurisprudence, with its comprehensive doctrines, its nice shades, subtle distinctions, and unlimited application, has been from time immemorial a fertile field of fame. . . . It is there that ambition may revel among the most gorgeous pictures of glory; where genius can find an unlimited scope for the exercise of its utmost powers . . . where so many footprints lead to the summit . . . Nor are these confined to the steps of the Inner Temple, or to England's soil, but up the same pathway, and to a no less degree of eminence, ascend our Marshalls, Storys, Taneys, Kents, Hemphills, Robertses . . .

—James D. Lynch

The "genius" of the judge was celebrated by legal biographers throughout the nineteenth century. Even Horace Binney, who strenuously denied the creativity of the judge, acknowledged the role of genius in the administration of the common law. And the first chapter of James D. Lynch's The Bench and Bar of Texas is entirely concerned with the source and manifestations of genius within as well as outside the field of law. The use of this word, it is submitted, is not trivial, and it suggests that the influence of romanticism penetrated farther into nineteenth-century American legal culture than has been appreciated. Perry Miller long ago contended that the antebellum "legal mentality" evolved in opposition to a romantic temperament; lawyers "stood for the Head against the Heart." He read the legal literature of the period as consciously aiming to oppose "the cold circumspection of legal rationality to the fantastic exercises of

166. JAMES D. LYNCH, THE BENCH AND BAR OF TEXAS 18 (St. Louis, Nixon-Jones Printing Co. 1885).
167. MILLER, supra note 23, at 120-21.
romantic genius," and maintained that "in neither their theoretical statements or their eulogies of each other are the lawyers disposed to salute 'genius' in the law."\textsuperscript{168} Robert Ferguson reaches similar conclusions in his more recent examination of the impact of romanticism on the American "legal mind."\textsuperscript{169} A crucial aspect of the transition from neoclassicism to romanticism, he explains, was the emergence of a new way of regarding the self. Whereas neoclassicism "assumed an identity that reached through civic action toward the presumed identity of other men and women," romanticism was "concerned more with ego and self-expression" and it required "a prior discovery and assertion of personal identity."\textsuperscript{170} Ferguson maintains that antebellum lawyers generally perceived romanticism as a threat to their craft and retreated into a narrow professionalism.\textsuperscript{171} Accordingly, by mid-century, "the attorney's skill and the writer's creativity appeared a contradiction in terms."\textsuperscript{172} Such historical accounts leave no place for the biographies of Judge Gibson and his colleagues on the bench.

What then, should be made of the recurrent references to the "genius" of the judge—particularly by mid-century—in American legal literature? As an initial matter, it is important to attend to changes in connotations of the word itself over time. While in its original Latin sense "genius" meant "a guardian spirit," by the sixteenth century it had come to refer to the "characteristic disposition or quality" of an individual man.\textsuperscript{173} The appearance of the modern meaning of "extraordinary ability" dates from the mid-

\textsuperscript{168} Id. at 138, 149. Miller incorrectly states that Justice Story never used the word "genius" in connection with Marshall. In fact, in the very eulogy he cites in The Life of the Mind, Story referred to Marshall's "transcendent genius." See Joseph Story, Eulogy on Chief Justice Marshall, 14 AM. JURIST & L. MAG. 448, 454 (1835). Story also paid tribute to Marshall's "genius" (as well as his learning and virtues) in a speech at the opening of the Supreme Court. See 2 WILLIAM W. STORY, LIFE AND LETTERS OF JOSEPH STORY 203 (Boston, Charles C. Little & James Brown 1851) [hereinafter LIFE AND LETTERS OF STORY].

\textsuperscript{169} See FERGUSON, supra note 24, at 30.

\textsuperscript{170} Id. at 248-49.

\textsuperscript{171} Id. at 287. Karsten comes to a different conclusion in Heart Versus Head: Judge-Made Law in Nineteenth-Century America, arguing that Judeo-Christian values sometimes led nineteenth-century judges to practice a "Jurisprudence of the Heart." Curiously, however, he does not consider the influence of romanticism in his discussion. See KARSTEN, supra note 15, at 4-8, 147-291, 312-24.

\textsuperscript{172} Id. at 236. Miller incorrectly states that Justice Story never used the word "genius" in connection with Marshall. In fact, in the very eulogy he cites in The Life of the Mind, Story referred to Marshall's "transcendent genius." See Joseph Story, Eulogy on Chief Justice Marshall, 14 AM. JURIST & L. MAG. 448, 454 (1835). Story also paid tribute to Marshall's "genius" (as well as his learning and virtues) in a speech at the opening of the Supreme Court. See 2 WILLIAM W. STORY, LIFE AND LETTERS OF JOSEPH STORY 203 (Boston, Charles C. Little & James Brown 1851) [hereinafter LIFE AND LETTERS OF STORY].

\textsuperscript{173} WILLIAMS, supra note 17, at 143.
eighteenth century, and it was "originally connected with the idea of 'spirit' through the notion of 'inspiration.'" However in the nineteenth century, it was increasingly associated with "creative" power, in the sense of "human making and innovation." Literary critics of this period distinguished works of genius from those of "talent." Works of the latter sort were viewed as mechanical productions of the "lower faculties of fancy, 'understanding,' and empirical 'choice.'" By contrast, works of genius were described in organic terms and were understood to originate in the "higher faculties of imagination, 'reason,' and the 'will.'" As M.H. Abrams summarizes: "[T]alent has 'the faculty of appropriating and applying the knowledge of others,' but not 'the creative, and self-sufficing power of absolute Genius.'" It should be emphasized that "genius" could be used to describe not only a characteristic of a work, but also a capacity and the personification of that capacity. Indeed, Coleridge uses all three in the space of a single paragraph, defining a work of "genius" as one in which the power of "genius"—"acting creatively under laws of its own origination"—is manifest. He then offers up Shakespeare, "himself a nature humanized," as the embodiment of genius, insofar as he constitutes "a genial understanding directing self-consciously a power and an implicit wisdom deeper than consciousness."

Given the meanings attached to "genius" within this critical tradition, its presence in nineteenth-century legal discourse requires explanation. Did the legal writer mean to imply the judge was "acting creatively under laws of his own origination"? Determining the import of "genius" in this context is difficult, because judicial biographers were not particularly self-conscious in their use of the word. Moreover, the orientation of biographers towards "genius" changed over the course of the century. The "genius" Horace Binney describes in 1827 is not precisely the one James Lynch celebrates in 1885. For Binney, the judicial office unquestionably requires individuals with "the noblest faculties of the mind." He insists that

174. Id.
175. See id. at 82-84.
176. ABRAMS, supra note 17, at 176.
177. Id.
178. Id. (quoting S.T. COLERIDGE, BIOGRAPHIA LITERARIA: OR BIOGRAPHICAL SKETCHES OF MY LITERARY LIFE AND OPINIONS 31 (London, Rest Fenner 1817)).
179. Id. at 225 (quoting Samuel Taylor Coleridge).
180. Id. (quoting Coleridge).
few of the judges' duties are "mechanical... There is no routine by which their business is performed without the expenditure of thought."182 Indeed, his judicial ideal requires men of extraordinary ability: "For them are reserved those gordian knots which, although others may cut, they must at least appear to untie."183 Yet the genius of Binney's judge is manifest chiefly in acts of reformation or recovery of that which has been "perverted or obscured."184 Other sciences—such as mathematics, physics, and politics—allow such "freedom and expansiveness... that even imagination may be invited to attend upon genius as it explores them... [so] that the personal character of the individual becomes the pervading soul of the work, and looks out from every part of it."185 But the science of the common law was not one "in which the mind of a judge might speculate without impediment," nor would it be appropriate to inquire as to "what new principles he has added to the code, or what new combinations he had made to increase its vigour."186

By contrast, Lynch maintains that it is in law more than any of the other "schools of science" that genius finds "an unlimited scope for the exercise of its utmost powers."187 He calls to mind the names of Coke, Harwicke, Mansfield, Eldon, and joins with them the names of Marshall, Story, Taney, Kent, Hemphill, and Roberts, proclaiming that such men have "erected their monuments of eternal glory" in the form of "comprehensive doctrines" and "brilliant precedents of eminence... which have afforded marks and models for the aspiration of every country."188 In his biographical sketch of John Hemphill, Lynch provides the most explicit formulation of his notion of the judge as genius. He begins by observing that "[t]he professional minds of judges and lawyers may be divided into two separate and distinct classes, which may be aptly designated, respectively, the perceptive and the memorative."189 Those in the latter class "depend upon memory, and are subservient to a vague medley of general precedents and authorities which must be invoked on all occasions when it becomes necessary to grapple with great and important

182. Id.
183. Id.
184. Id. at 14.
185. Id.
186. Id. at 13.
187. LYNCH, supra note 166, at 16, 18.
188. Id. at 18.
189. Id. at 69.
questions.” Their “powers of perception have never been whetted by close and continued application” and they “are deficient in the organs of analysis and abstraction.” By contrast, the “perceptive” class “comprises those who depend chiefly upon their own conscious resources, who combine and embody the principles of law with their own perceptions, and mingle them with the elements of their own judgment.” While the “judgment and discernment” of the first class “are habitual plagiarisms,” Lynch observes, those of the second class “are the emanation of their own minds, and they speak as authorities themselves.”

The ascriptions of “genius” to the judge in the biographies published from 1850 to 1900 must be considered in light of more general developments in the genre. Works published in the second half of the century were less didactic in tone, evincing a more critical, historical orientation. Their authors tended to focus their investigations inward, seeking to uncover “the private springs” of the judge’s public actions. Though they endeavored to portray a person rather than a “Statue,” these biographers still tended to idealize their subjects. The exemplary judicial figure of the mid-nineteenth century embodied the tension between “the attorney’s skill and the writer’s creativity.” However, post-bellum biographies more openly

190. Id.
191. Id.
192. Id.
193. Id. Lynch goes on to describe Hemphill in glowing terms, comparing him favorably with the likes of Marshall, Hardwicke, and Mansfield. Hemphill was effectively the John Marshall of Texas: “His long career upon the bench is characterized by an untiring and successful effort to harmonize the excerpted elements of Texas jurisprudence and endow it with an efficiency that could traverse the scope of justice.” Id. Moreover, he shared with Hardwicke “an intuitive perception of the law.” Id. at 70. And, although he displayed a generous nature to his friends and family, “so eminent was his judicial character” that he, like Mansfield, would be “remembered only with the impression of the awful form and figure of justice.”” Id. at 72 (quoting Erskine speaking of Lord Mansfield).

194. See PHILIP SLAUGHTER, A BRIEF SKETCH OF THE LIFE OF WILLIAM GREEN, LL.D.: JURIST AND SCHOLAR, WITH SOME PERSONAL REMINISCENCES OF HIM 9 (Richmond, Wm. Ellis Jones 1883). For example, the author of a biography of Roger Minott Sherman acknowledges in a prefatory note the existence of a “very able sketch” of the jurist from 1846 and explains that his own work has been occasioned by the unearthing of new documents (mostly private letters) bearing on the subject’s life—documents which shed light on the “individuality of the great Connecticut lawyer.” WILLIAM A. BEERS, A BIOGRAPHICAL SKETCH OF ROGER MINOTT SHERMAN, THE EMINENT CONNECTICUT JURIST, 1773-1845, at 2 (Bridgeport, J.J. Coggswell 1882). For a general discussion of these developments in the genre of biography as a whole, see CASPER, supra note 35, at 202-56.

195. SLAUGHTER, supra note 194, at 7. It is important to add, however, that not all biographers were so reverential in tone. See, e.g., JOSEPH G. BALDWIN, THE FLUSH TIMES OF ALABAMA AND MISSISSIPPI: A SERIES OF SKETCHES (New York, D. Appleton & Co. 1853).

196. FERGUSON, supra note 24, at 287.
acknowledged the creative role of the judge in the formation and reformation of the law. The "genius" of the judge was, nonetheless, tempered by the strength of his "character"—now meant to refer to the internal consistency of the self rather than the submission of the self to an external standard. By the end of the century, a new judicial ideal had crystallized in the literature: the independent judge. Neither egoist nor iconoclast, this judicial hero was the human incarnation of the rule of law the people had given to themselves.

The reconception of character in judicial biography was in line with a more general shift in attitudes towards the self in post-bellum American culture. As noted above, the antebellum character ideal had stressed self-control and self-sacrifice for the sake of higher ideals of duty, honor, and integrity, aiming to contain the centrifugal forces unleashed by political revolution, religious revivalism, and market expansion. This vision of the self was, however, less serviceable by the last quarter of the nineteenth century, as Americans grew increasingly conscious of living within the confines of a routinized, industrial culture. The "overriding threat" in this period was not an "unbridled individualism of the spirit" but rather a "dessicated formalism that banished feeling and emotion." Cultural historians have suggested that this sense of constriction led to the formulation of an alternative "personality ideal"—one which "preached the development of a higher self ... [which] became its own higher law"—a vision of selfhood which was dynamic and open-ended. Ultimately, this romantic ideal worked to subtly transform rather than wholly displace the character ideal, reflecting the growing conviction that "character could be sustained in the modern era only by the cultivation and spread of personality."
The emergence of a romantic judicial ideal might, nonetheless, seem curious in a period commonly associated with the “rise of legal formalism.” According to Karl Llewellyn, post-bellum judges were deeply influenced by Langdellian legal “science,” and their work conformed to a “Formal Style.” Members of the judiciary, he argues, shared a common outlook: “[R]ules of law are to decide the cases; policy is for the legislature, not for the courts, and so is change even in pure common law.” Moreover, their opinions were marked by a rigid, deductive mode of reasoning from “Principle”; judgments were rendered “with an air or expression of single-line inevitability.” This judicial style, Llewellyn observes, tended to “drive conscious creation all but underground, make change and growth things to be ignored in opinions, and to be concealed not only from a public but from a self.” To be sure, his description must be taken as something of a caricature; more recent scholarship has shown that judicial decisions in this era were “suffused with the rhetoric of arguments from convenience and policy.” Yet even if the Llewellyn’s discussion of the “Formal Style” overstates the point, it is nonetheless clear that Langdell and his fellows exerted a strong influence over post-bellum legal thought and practice. How, then, can their characterization of the act of judging as a “discovery” of principles immanent in decided cases be squared with the biographers’ portraits of judicial genius? What accounts for the contemporaneous appearance of the Langdellian scientific explorer and the romantic judge—at least at the...
level of legal discourse?

While a complete answer would require a fuller examination of the relationship between romanticism and legal formalism, several observations may be made here. First, it should be noted that the romantic judges portrayed in legal literature were generally those of previous generations. And their biographies were penned at a time when the typical judge faced a large number of “cut-and-dried” cases, often finding himself relegated to an administrative role—monitoring a system of “assembly-line justice.” In a sense, then, the images of the romantic judge may be viewed as expressions of nostalgia for a “golden age” before the law was settled and the judicial process became a matter of routine. But there was also a considerable amount of judicial activism on the public law front, especially towards the end of the century, with courts subjecting state regulatory statutes to a heightened level of scrutiny. Legal professionals anxious to legitimate these decisions may have been inclined to present them as the products of legal science or romantic vision.

In the final analysis, these conflicting images may simply reflect the competing demands placed upon the post-bellum judge. In an era of unprecedented

206. This tendency to celebrate judges of a bygone age might also be linked to the Victorian practice of “hero-worship.” As Walter Houghton has observed, the heroic figure proved consoling in an era “when the Bible and the Church were no longer able to satisfy the religious instinct of many Victorians” and attractive to those plagued with “the sense of being small and inconsequential, caught in the iron grip of huge social or physical forces, with one’s potential greatness thwarted and dammed up.” WALTER E. HOUGHTON, THE VICTORIAN FRAME OF MIND, 1830-1870, at 316, 336 (1957).

207. FRIEDMAN, supra note 111, at 389, 390. On the consequences of the increase in the caseload of courts in this period, see id. at 384-90 (“The great volume of cases could only be handled through radical routinization.” Id. at 389).

208. See FRIEDMAN, supra note 111, at 381. In using this phrase, Friedman implies such an era actually existed. He goes on to consider what it was about the “golden age” that made it golden: “The great judges—Lemuel Shaw, John Bannister Gibson, John Marshall—were builders of institutions and molders of doctrine; moreover, they had style.” Id. Those were the days, he maintains, when judges “invented whole areas of law in a few majestic brush-strokes.” Id. at 384. As has been shown above, see supra text accompanying notes 77-110, ante-bellum biographers did not speak of these judges in this way. It was only with the post-bellum biographers that one finds such characterizations of their careers. It should also be noted that Friedman seems to echo Progressive critics in speaking of the formalism of post-bellum judges as “a way of disguising thought.” FRIEDMAN, supra note 111, at 341.


210. That is, they might both be seen as examples of the “fresh myths and disguises” legal professionals in this period “invented . . . to protect their roles.” FRIEDMAN, supra note 111, at 341.

211. The dual tendencies towards romanticism and bureaucratization in this period have been well-documented. See, e.g., RABINOWITZ, supra note 19, at 238 (arguing that “technical” and “subjective” impulses coexisted in nineteenth-century culture, both of which were “products of the progressive closing of the distance between a person’s mind and his ultimate
economic growth and social strain, he was expected to be a creator and conservator of law—merging the roles of law-giver and savior of the Republic.212

A. Remembering the Fathers of the Bench

The legal profession's appetite for biography grew more voracious in the second half of the nineteenth century. But unlike the relatively uniform and formulaic character sketches of the antebellum period, it is difficult to generalize about these works. Memoirs tend to be more voluminous, with sizeable appendices frequently accompanying them. For instance, the Memoir of Theophilus Parsons (1859)—which is itself 356 pages long—also contains an appendix with obituary notices and letters from the likes of Fisher Ames, Rufus King, John Jay, and John Adams, as well as an "Essay on Parallel Lines: Remarks on the Twenty-Ninth Theorem in the First Book of

212. There are rather striking similarities between characterizations of the judge and Jesus in the biographies of the period (interest in the life story of the latter had been growing since mid-century, with the appearance of scholarly works as well as imaginative reconstructions). Like the judge, the figure of Jesus underwent something of a metamorphosis from a "gentle" "sweet" man to one who was "more robust, muscular, and active." Susan Curtis, The Son of Man and God the Father: The Social Gospel and Victorian Masculinity, in MEANINGS FOR MANHOOD: CONSTRUCTIONS OF MASCULINITY IN VICTORIAN AMERICA 67, 73 (Mark C. Carnes & Clyde Griffen eds., 1990). Moreover, the romantic judge, like Jesus, constituted a bridge between the realm of ideals and that of worldly practice.

213. THEOPHILUS PARSONS, MEMOIR OF THEOPHILUS PARSONS, CHIEF JUSTICE OF THE SUPREME JUDICIAL COURT OF MASSACHUSETTS; WITH NOTICES OF SOME OF HIS CONTEMPORARIES (Boston, Ticknor & Fields 1859).
Euclid’s Elements of Geometry” composed by the judge. Other works, presenting the “life and letters” of the judge, effectively allow the subject to speak for himself. One such example is the Life and Letters of Joseph Story (1851), a two-volume production, running over one thousand pages in length. Most of Story’s writings (including private correspondence, poetry, opinions, and orations) are integrated into the narrative, to the point of almost displacing it, while the appendix contains memorials and eulogies written in honor of the judge and an assortment of “opinions” of his writings. This period also saw the publication of shorter, more standardized judicial biographies, such as those collected in Bench and Bar volumes and the Great American Lawyers series. The former, written by individual lawyers in their leisure hours, contain sketches of the judges and lawyers of a particular state. In some volumes, these sketches are simply organized alphabetically, while others provide more elaborate narratives, combining institutional history with biography.

214. LIFE AND LETTERS OF STORY, supra note 168.

215. GREAT AMERICAN LAWYERS: THE LIVES AND INFLUENCE OF JUDGES AND LAWYERS WHO HAVE ACQUIRED PERMANENT NATIONAL REPUTATION, AND HAVE DEVELOPED THE JURISPRUDENCE OF THE UNITED STATES (William Draper Lewis ed., 1908). Also of note is WILLIAM L. SNYDER, GREAT OPINIONS BY GREAT JUDGES: A COLLECTION OF IMPORTANT JUDICIAL OPINIONS BY EMINENT JUDGES (New York, Baker, Voorhis & Co. 1885), which collected opinions written by English and American judges with biographical introductions. Opinions were selected on the basis of the “vigor, ability, and learning shown,” aiming to provide in a single volume “judgments pronounced by distinguished men, suitable to illustrate elementary principles in both civil and criminal branches of jurisprudence.”

216. For David Paul Brown, the project was “not a profession, but an enjoyment; not an aspiration after immortality, but a recreation and solace in . . . hours of abstraction from the most severe conflicts of the mind.” 1 DAVID PAUL BROWN, THE FORUM; OR FORTY YEARS FULL PRACTICE AT THE PHILADELPHIA BAR lviii (Philadelphia, Robert. H. Small 1856). W.V.N. Bay advises his readers that The Bench and Bar of Missouri was “written within the last eight months, and while the author was daily engaged in the discharge of his professional duties.” W.V.N. BAY, REMINISCENCES OF THE BENCH AND BAR OF MISSOURI ix (St. Louis, F.H. Thomas & Co. 1878). And John Belton O’Neill prefaces his Biographical Sketches of the Bench and Bar of South Carolina by noting they “have been the work of the author for the last twelve months, or more; every moment of leisure time having been devoted to them.” 1 JOHN BELTON O’NEALL, BIOGRAPHICAL SKETCHES OF THE BENCH AND BAR OF SOUTH CAROLINA v (Charleston, S.G. Courtenay & Co. 1859).

217. For examples of the former type, see STEPHEN F. MILLER, THE BENCH AND BAR OF GEORGIA: MEMOIRS AND SKETCHES (Philadelphia, J.B. Lippincott & Co. 1858); and O’NEALL, supra note 216. For some of the latter type, see WILLIAM T. DAVIS, BENCH AND BAR OF THE COMMONWEALTH OF MASSACHUSETTS (Boston, Boston History Co. 1895); JAMES D. LYNCH, THE BENCH AND BAR OF MISSISSIPPI (New York, E.J. Hale & Son 1881); and EMORY WASHBURN, SKETCHES OF THE JUDICIAL HISTORY OF MASSACHUSETTS FROM 1630 TO THE REVOLUTION IN 1775 (Boston, Charles C. Little & James Brown 1840). Brown chose to organize his volumes in such a way as to reflect the sectional crisis: “As TIME reconciles or controls conflicting DIGNITIES, we have, instead of entering upon the question of precedence between the judges of the Federal and State courts, thought proper to present them in the order of their appointments, leaving their relative or comparative official merits, to the judgment of
construction of a national pantheon, recounting "The Lives and Influence of Judges and Lawyers Who Have Acquired Permanent National Reputation, and Have Developed the Jurisprudence of the United States." 218 Those solicited to write for the series were law professors, judges, or lawyers—many of them prominent in their own right.

For the most part, then, judicial biographies in this period were composed by legal professionals, although they displayed varying degrees of sympathy with their subjects. Memoirs of individual judges tended to be prepared by (legally-trained) relatives or close associates, who invariably introduced themselves at the outset of their narrative. "This is an attempt by a son to record the life of his father," begins the preface of Story's *Life and Letters*, "I wish, on its very threshold, to avow this relation, and to ask every one to bear it in mind as he reads these pages." 219 Just to be sure, the son refers to "my father" throughout the work. An entire chapter of Theophilus Parsons's memoir—also penned by his son—explains "The Motives and the Means of the Author for Writing this Memoir." 220 In it, the younger Parsons apologizes for "the egotistic appearance imparted to this Memoir, and to this prefatory chapter, and to this very paragraph, by the circumstance that I write it in the first person, and speak of the subject of it as 'my father.'" 221 But he is loathe to follow the convention of avoiding "the capital 'I,'" because "it compels the reader to remember that he who is perpetually laboring to avoid speaking of himself, can never, by any possibility, forget himself." 222

The authors of standardized biographies relied heavily on second-hand knowledge, and adopted a more impersonal tone. 223
Assuming the posture of advocates before the bar of history, they called witnesses familiar with the character and eminence of the judicial subject. Previous biographers, they claimed, had overlooked judicial figures, preferring “actors in the events of . . . political, ecclesiastical and military history” as their subjects. 224 “Surely the rich mine of American biography cannot be nearly exhausted when such treasures as the lives of Rutledge, Ellsworth, and Marshall, lie still undeveloped and comparatively neglected,” George Van Santvoord wrote in the preface of his Sketches of the Lives, Times and Judicial Services of the Chief Justices of the Supreme Court of the United States (1854). 225 “The object of the work,” explained John Belton O’Neall in his Biographical Sketches of the Bench and Bar of South Carolina (1859), “has been to rescue the memory of the good and great from oblivion, and to place their actions before their young countrymen, as marks by the way-side for their journey of life.” 226 “The fame of a great jurist, becomes the common property of the profession,” averred William Porter, “If they do not protect and cherish it, who

(“In the composition of this work the author has occupied a neutral ground of observation. Save in two or three instances, he was neither the professional nor social contemporary of its subjects, and had no prejudices to subserve or predilections to gratify. Lord Coke says that ‘a juror should stand indifferent as he stands unsworn’; and this has been the exact position of the author.”). Like the authors of the memoirs, they also seemed to believe it important to tell readers a bit about themselves. David Paul Brown’s The Forum begins with a “Proem” in which he observes that “AUTO-BIOGRAPHY, though sometimes necessary, is rarely agreeable, either to the Author or the reader. Even when written, as Caesar wrote his Commentaries, in the third person, the first person is always reflected in the third, and imparts an egotism to the work that cannot be disguised.” 1 BROWN, supra note 216, at xxv. But because he believes “the public has a right to know what opportunities or advantages were enjoyed by the Author, calculated to qualify him to speak of these occurrences which he professes to describe,” Brown offers a “Sketch of the Life of the Author, chiefly taken from ‘Livingston’s Biographies’” (written in the third person). Id. Similarly, at the beginning of O’Neall’s Biographical Sketches of the Bench and Bar of South Carolina, there is an anonymous sketch of O’Neall (probably written by him), which begins thus: “As part of the introduction, it may not be amiss that something should be known of the author.” 1 O’NEALL, supra note 216, at xiii.

224. WASHBURN, supra note 217, at 5; see also BAY, supra note 216, at ix-x (“It seems strange that no one has heretofore made an effort to keep alive the memory of those early judges and lawyers who did so much for the welfare of our state, and who gave their time, talents, and labor to the formation of a constitution and code of laws which have so largely contributed to the preservation of our lives, our property, and our liberty.”).

225. GEORGE VAN SANTVOORD, SKETCHES OF THE LIVES, TIMES AND JUDICIAL SERVICES OF THE CHIEF JUSTICES OF THE SUPREME COURT OF THE UNITED STATES iii (William M. Scott ed., Albany, Weare C. Little & Co. 1882) (1854). Van Santvoord also indicates another factor motivating biographers in this period—a desire to publicize the unique virtues of American law. He complains of those who refer to John Marshall as “the American Mansfield”: “[T]o Marshall, the compliment, though just, cannot be deemed flattering. It is suggestive, at least, of an imitative greatness . . . and can add no new dignity to a character like his, of native, innate strength, and original independent greatness.” Id. at 337.

226. 1 O’NEALL, supra note 216, at vi.
will?"  

As can be discerned from these prefatory remarks, mid-century biographers presented their subjects less as models for imitation than as sources of inspiration. Moreover, they evinced general curiosity about their ancestors-in-law, and a concern with preserving their memories. Changes over time in legal institutions and practices were given more extensive consideration in these works, as their authors struggled to make sense of the relationship between generations of legal actors. Biographers exhibited a complex set of attitudes toward the "Fathers of the Bench."228 They spoke of many of the achievements of their forefathers as impressive and even daunting. But they also exposed the failings and shortcomings of previous

227. PORTER, supra note 57, at viii.

228. As George Forgie has noted, the generation that came of age at mid-century witnessed the death of the Founders and confronted uncertain prospects in a society where actual fathers "ceased to provide more or less automatic models of roles their sons would grow up to play." GEORGE B. FORGIE, PATRICIDE IN THE HOUSE DIVIDED: A PSYCHOLOGICAL INTERPRETATION OF LINCOLN AND HIS AGE 28 (1979). "At a time when expanding economic opportunity meant that boys were beginning to need a wider range of models than their surroundings were likely to provide," Forgie explains, "history stepped in to supply them in the form of founding heroes." Id. at 28-29. "That there was not a close fit of model to need—it was not, after all, for their commercial exploits that Americans celebrated the fathers—was a realization that came later when it came at all." Id. at 29. Indeed, the death of the founding fathers was just the beginning of their immortal rule:

As the physical ties to the beginning grew weaker, the psychological ties to the same period grew ever stronger, until some people began to fear that the danger facing the Republic was not that these cords would snap, but that they would be used by the dead to strangle the living.

Id. at 53; see also HIGHAM, supra note 211, at 18 (finding that a "disturbing sense of remoteness from the heroic age of the Revolution infiltrated American minds in the middle of the nineteenth century" and reading attempts to conserve a "national heritage" as "symptoms of a loss of youthfulness in American culture"). The sense of alienation from one's actual father became more pronounced as the century drew to a close. As Susan Curtis explains: "For many children of the middle class, fathers played a diminishing role in the nineteenth century. The separation of work from home meant that fathers were gone much of the day." Curtis, supra note 212, at 69. These children were "left with powerful boyish memories of successful fathers up to whose standards they should try to measure." Id. But they were primarily raised by their mothers, so that they "experienced an intense complement of ideals—the rugged individualism of their fathers and the nurture and self-sacrifice of their mothers." Id. at 70. And they came of age in an economy that "made them think it impossible to attain the individualistic success they longed for as youths." Id. The rise of a consumer culture, with entertainment institutions designed to provide relief from the "monotony and degradation of work" combined to undermine the "Victorian verities of hard work, self-reliance, delayed gratification, and self-control" which had been the ideals of their fathers' generation. Id. The generation who came of age near the turn of the century turned to Civil War heroes as role models (or at least sources of inspiration). See, e.g., David Brion Davis, Stress-Seeking and the Self-Made Man in American Literature: 1894-1914, in WHY MAN TAKES CHANCES: STUDIES IN STRESS-SEEKING 105, 114 (Samuel Z. Klausner ed., 1968) ("As Americans of the 1890's pondered the meaning of success in a world transformed by industrialization, economic consolidation, and Darwinian notions of struggle and natural selection, they often looked back to the great Civil War of their fathers' generation as a key to their national identity.").
generations, and expressed confidence about their own capacity to further "the progress of judicial history."\textsuperscript{229} For instance, in his \textit{Memoirs of the Rhode-Island Bar} (1842), Wilkins Updike spoke admiringly of the "natural geniuses," who were in greater supply in the early years of the profession. And he lamented the fact that, in more recent times, "[t]he labor of thinking, and of mental origination, is greatly diminished by the rich productions emanating from learned brethren, emulous of fame."\textsuperscript{230} Yet he viewed the legal proceedings of his ancestors as comparatively crude affairs; trials were dramatic performances in which advocates appealed to the passion of jurors while judges remained passive, considering themselves "fortunate, if, by their silence, they escaped unwounded in the conflict."\textsuperscript{231} Noting recent procedural reforms, he assured his readers that "[t]his ameliorating progress is onward."\textsuperscript{232}

By the late 1850s, however, this optimism waned and a shriller tone surfaced. Biographers increasingly looked to the profession's past to allay their fears about the future. David Paul Brown, author of \textit{The Forum; or Forty Years Full Practice at the Philadelphia Bar} (1856), decried his brethren's ignorance of the traditions of their "professional family."\textsuperscript{233} Although he recognized that "[e]very man forms for himself his own horizon," he suggested that

\begin{quote}
if that which is seen or known by those of one age, were transferred to those of succeeding ages, the scope of man's mental vision would be incalculably enlarged, and thus by avoiding the errors and faults, or emulating the wisdom and virtues of the \textit{past}; the \textit{present}, instead of being an age of experiment, would be an age of comparative certainty and security.\textsuperscript{234}
\end{quote}

But even Brown thought the "emulous" son capable "not only of sharing, but rivalling or even improving the glory of his father."\textsuperscript{235}

Paging beyond these prefaces and introductions, the reader encounters a rather motley bunch of judicial figures—drawn to convey "life-like" and "true" impressions of them. One can get better acquainted with the wig-donning lay judges of the colonial period, including Thomas Danforth, who "satisfactorily" dispensed justice...

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\textsuperscript{229} WILKINS UPDIKE, MEMOIRS OF THE RHODE-ISLAND BAR xi (Boston, Thomas H. Webb & Co. 1842).
\textsuperscript{230} Id. at x.
\textsuperscript{231} Id. at xi.
\textsuperscript{232} Id.
\textsuperscript{233} 1 BROWN, supra note 216, at cxxvii.
\textsuperscript{234} Id. at cxxvi-cxxvii.
\textsuperscript{235} Id. at cxxvii.
\end{flushleft}
without "judicial learning" and Samuel Sewall, who brought order to Massachusetts's "chaotic . . . system of legal practice," though he is chiefly remembered for "[h]is connexion with the trials at Salem in 1692." For the historical record, Sewall's biographer added:

He acted with entire honesty of conviction while pursuing the horrid though fancied crime of witchcraft, but when convinced . . . that it was all a delusion, with equal honesty and ingenuousness he confessed his errors, and . . . asked forgiveness of God and his fellow men for the part he took in those trials.

Biographers found quite a bit more to admire in the pioneering judges of the post-Revolutionary period. All the same, it had to be admitted that these men retained a rather unseemly attachment to their "mother country" and were relatively unsophisticated in their tastes. Thomas McKean, "although theoretically attached to the democracy of the time," had a somewhat "supercilious mode of discharging his official duty"; and Bushrod Washington's reading "was so limited that it was questionable whether he even knew who was the author of Macbeth." Biographers duly noted the increased learning and independence of the succeeding generations of American judges, but candor required the full disclosure of their faults and foibles (Judge Gibson was actually doodling and writing poetry on the bench rather than taking copious notes of the proceedings) as well as their virtues. In surveying this gallery of judicial figures, it is nevertheless possible to identify one thing that they all shared in common: they were crucially shaped by their ancestral inheritance and deeply influenced by the natural and social

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236. WASHBURN, supra note 217, at 251.
237. Id. at 260.
238. Id. Writing sixteen years later, Brown was less condescending in his estimation of these judges. "[T]he bench of the republic in our own day," he observed, is less "revered or respected" than that of the colonial judiciary, whose members were more likely to possess "good principles, good habits, and good manners." 1 BROWN, supra note 216, at 255.
239. 1 BROWN, supra note 216, at 327-30, 357.
240. As Brown notes in his sketch of Gibson:

[H]e was not a good Nisi Prius Judge. In the conflicts of a jury trial, he was not a good listener; he would not unfrequently be employed in writing poetry or drawing some fancy sketch, when the bar supposed he was closely engaged in noting the course of the evidence, or preparing his opinion. And in a rather merry way, he once remarked, that he had reached at last the object of his highest ambition, which was to keep his eye fixed upon a dull speaker, while his thoughts were employed with more agreeable objects. 'This,' he added, 'is certainly a great judicial triumph.'

Id. at 429; see also BEERS, supra note 194, at 6, 17 (It was "whispered by tradition" that Sherman had once "so far yielded to prevailing custom as to chew tobacco—a habit he soon renounced and forever after eschewed" and it was said by many that he "lacked a certain personal attraction—a magnetic warmth which has only to brush against its kind to kindle a responsive heart-beat.").
environments in which they lived.

The frank, historical approach of these judicial biographers should not, however, obscure the ideological nature of their work. As was the case with antebellum writers, their sketches and memoirs were shaped by the exigencies of their profession. And, as they wrote, they were reconstructing ideals of judicial behavior in response to a new set of circumstances: the low repute of the judiciary in the wake of the Civil War, nationalization, Darwinism, economic consolidation, industrial disorder, and the exposure of corruption in high places. These were circumstances that called for the genius of the heroic judge.

B. Reconstructions of the Judicial Ideal

Difficult as it is to generalize about judicial biographies in the second half of the nineteenth century, it is nevertheless possible to discern the outlines of a new judicial ideal in this period. Given the influence of romanticism within American legal culture, this might seem surprising. For, as we have seen, judicial biographers tended to emphasize the idiosyncrasies and distinctive qualities of their subjects. To reduce their celebrations of the genius of the judge to a single ideal would thus seem to be an exercise in contradiction. But in many respects, that is what biographers themselves were attempting to do throughout the second half of the nineteenth century. That is, they were struggling to construct a model of adjudication which acknowledged the judge's genius without reducing his decisions to expressions of personal bias. The romantic judge that emerged from their works possessed three key attributes: (1) creative power, (2) strength of intellect, and (3) courageous independence. It should be noted, however, that the neoclassical model was not wholly displaced in this period. The craftsman continued to be a valued member of the bench, because those possessing true genius were few and far between.

The romantic judge was a creative figure, bringing order out of chaos, and giving law to his countrymen. The individuals most often associated with this quality were John Marshall, James Kent, and

241. See Stephen Botein, "What We Shall Meet Afterward in Heaven": Judgeship as a Symbol for Modern American Lawyers, in PROFESSIONS AND PROFESSIONAL IDEOLOGIES IN AMERICA, supra note 15, at 49 (noting that the reputation of the judiciary "eroded" in the decades following the Civil War); see also HABER, supra note 19, at 206-39.
Joseph Story. Antebellum eulogies had acknowledged Chief Justice Marshall as the “strenuous defender and expounder of the Constitution,” who “mould[ed] his own genius into its elements,” but post-bellum biographers attributed even greater formative powers to Marshall. “He was not the commentator upon American constitutional law; he was not the expounder of it;” insisted Edward J. Phelps in 1879, “he was the author, the creator of it.” Biographers took James Kent at his word when he modestly claimed “I had nothing to guide me, and was left at liberty to assume all such English Chancery powers and jurisdiction as I thought applicable under our Constitution.” Indeed, in the homeland of the Yankee, ingenuity was required of the judge. “Novel” questions were raised about human inventions and improvements in the young country, explained William Story, and his father “was destined to be in great measure” the “creator” of patent law. But creative acts were not performed by this triumvirate alone, and biographers recognized that the need for ingenious judges did not decline as the nation matured. It should

242. Biographers treated these three judges as standards by which others could be judged. Thus Henry William DeSaussure was “to South Carolina what Kent was to New York” and John Hemphill was hailed as the John Marshall of Texas. See 1 O’NEALL, supra note 216, at 245; LYNCH, supra note 166, at 69.

243. HORACE BINNEY, EULOGY ON JOHN MARSHALL (1835), reprinted in 3 JOHN MARSHALL: LIFE, CHARACTER AND JUDICIAL SERVICES 281, 305 (John F. Dillon ed., 1903) [hereinafter JOHN MARSHALL].

244. JOSEPH STORY, LIFE, CHARACTER AND SERVICES OF CHIEF JUSTICE MARSHALL (1835), reprinted in 3 JOHN MARSHALL, supra note 243, at 327, 377.


246. KENT, supra note 222, at 158; see also CHARLES B. ELLIOT, AN AMERICAN CHANCELLOR (1903).

247. 1 LIFE AND LETTERS OF STORY, supra note 168, at 234.

248. The younger Theophilus figures his father as a law-giver, of sorts:

“I had prepared a large number of extracts, to show how frequently he declared important rules, sometimes only on the authority of his personal knowledge ... simply declaring that this rule or that was the law.... [U]pon the whole, so far as I have been able to learn, the great body of his law stands unquestioned.

PARSONS, supra note 213, at 238 (emphasis added).

249. In particular, conditions in the Western regions of the country called for judges of this stripe. Oral Milo Roberts, an “ambitious and aspiring youth,” was one of the judges who rose to the occasion:

He was the first judge of the district under the judiciary system of the [Texas] State government, and the task devolved upon him of establishing a course of procedure in conformity with the new order of things.... [F]ew questions of importance had been settled by the Supreme Court of the Republic, and the untamed elements of its jurisprudence mingled with the unexplored streams of the new system.... But his ability and industry met all the requirements of the situation; and, gathering up the legal fragments of the revolution and annexation, he blended them into a harmonious machinery, and made a lasting impression upon the jurisprudence of the State.

LYNCH, supra note 166, at 277.
also be noted that the virtues of creativity were not universally acclaimed. For instance, some post-bellum biographers (particularly those with Southern sympathies) presented dissenting views of Marshall’s judicial performance, suggesting he took too many liberties with the Constitution.250

The creative faculty was inborn and closely related to another characteristic of the romantic judge—his “strong native intellect.”251 No amount of mental discipline could train a judge to do what came naturally to Judge Parsons: “‘As light and spongy articles are reduced to portable size by hydraulic pressure, so the verbose readings of the law were, by the force of his great mind, reduced to clear, practical rules.’”252 Although the romantic judge’s mind was “too comprehensive to admit of ready concentration,” when he “brought the lens of his mind to a focus, its power was resistless, and every man seemed to perceive and to feel it, but himself.”253 Yet the duties of the bench taxed the strength of even the strongest of minds. Robert Raymond Reid heroically struggled to maintain his composure on the bench, though his private journal revealed the mental anguish his office

250. William Mikell, a professor of law, expresses an especially interesting perspective on Marshall in his biographical sketch of Taney:

Marshall, the first great builder of our national jurisprudence, was given the constitutional plan of the new edifice, and proceeded to erect a stately structure. As it grew under his master-hand the desire to build strongly overcame his sense of proportion, and he departed more and more from the original plan, using the stones intended for the wings to buttress more firmly the central building, until the whole, however wonderful it was, differed greatly from that planned by the architects. It was well that Marshall was succeeded as chief builder by another master builder who set himself patriotically to work to bring the structure he was commissioned to build into greater harmony with the original plan. The time for a change was opportune. If the structure was ever to be brought into harmony with the ideas of those who originally planned it, it was best that it be done while it was still possible to remodel it without actually tearing it down.

William E. Mickell, Roger Brooke Taney, in 4 GREAT AMERICAN LAWYERS, supra note 215, at 75, 105-06.


Mr. Marshall’s physique was admirably adapted to sustain and second his most vigorous mental efforts. Six feet, one and one-half inches in height, fleshy even to corpulence, a perfect digestion, and the muscles of an athlete; pain and sickness were strangers to him.... His head was massive and peculiar in shape. When face to face you would, at the first glance, pronounce him defective in frontal development, the forehead being low and narrow, but viewed in profile you would be astonished to find such an immense “dome of thought” in the rear of this narrow portico.


252. PARSONS, supra note 213, at 207 (quoting Judge Putnam in Deblois v. Ocean Ins. Co., 33 Mass. (16 Pick.) 303, 310 (1835)).

253. 1 BROWN, supra note 216, at 429 (referring to John Bannister Gibson).
caused him: "The court almost over, and I exhausted and harassed... My health and constitution are impaired. I must adopt a course different from that I have pursued in order to preserve SANITY of mind and body!" Ultimately, however, the mental citadel of the romantic judge remained impregnable—resisting even the incursions of his own body: "his bodily tenement showing that, though age had come upon the outward man, the mind within was still bright and burning."

Before this inevitable physical decline, the outward appearance of the romantic judge suggested a "robust and rugged manhood."

254. 2 MILLER, supra note 217, at 204. Lucius Lamar was not so fortunate: "Aiming to extend the conquests of his profound intellect to the verge of human possibility, he overtasked his nervous system" and took his own life. The biographer first attributes this "deplorable act" to somatic causes, concluding that it resulted from "accidental derangement of the cerebral organism." Id. at 139. However several paragraphs later he describes the "secret canker in his mind" in non-physiological terms: "[H]e was unhappy." Id. at 144. The practice of law (if David Brown's "biography" of himself can be taken as a reliable indicator) could be equally strenuous:

A lawyer's life, it may be said, without intending any play upon words, is emphatically a life of trials. He has scarcely any domestic existence... He neither rises nor falls with political dynasties... and has his being almost solely amidst the crowds and clamors of diversified litigation. ... One day is like another in this—that all are busy—all are anxious—all are made up of hopes and fears, clouds and sunshine; and so continuous and unvaried is this truth, that this uninterrupted variety actually becomes monotony, still running as it were, in a circle, travelling over the same ground, and knowing no end.

1 BROWN, supra note 216, at cxxiii-cxiv. This is actually the concluding paragraph of the biography—a depressing yet strangely heroic vision of the profession. For further evidence of the mental trials legal professionals endured (or, in some cases, relieved through other activities), see BEERS, supra note 194, at 10 (the "hard-worked" Roger Minott Sherman sought to "soften the dull prose of his professional duties" through literary pursuit); and see generally Rotundo, supra note 199, at 29, 32 (noting general anxiety about mental breakdown among middle-class men in second half of nineteenth century because they were increasingly engaged in nonmanual labor or "brain work" which involved reading, studying, and office tasks).

255. 1 O'NEALL, supra note 216, at 162. This was said in reference to Judge John Smith Richardson, who was the subject of a legislative investigation regarding his allegedly permanent "bodily and mental infirmity." Richardson (who was seventy years of age) presented an elaborate defense of his mental fitness—recorded in the biographical sketch. He reminded legislators that Chancellor Kent “at more than eighty years of age” still retained “his vigorous mind” and Chief Justice Marshall, “who died at the age of eighty-one, still stood the pride and glory of the Federal Bench.” See id. at 167. The resolution calling for his removal failed. In a similar vein, we are shown that age was the least of the Taney Court’s problems during the term in which the Dred Scott case was decided. The biographer of Benjamin Robbins Curtis quotes from a letter dated February 27, 1857: “Our aged Chief Justice, who will be eighty years old in a few days, and who grows more feeble in body... retains his alacrity and force of mind wonderfully...” But “[p]oor Judge Daniel ha[d] been prostrated for months by what was a sufficient cause; for his young and interesting wife was burned to death by her clothes accidentally taking fire, almost in his presence.” 1 A MEMOIR OF BENJAMIN ROBBINS CURTIS, LL.D. WITH SOME OF HIS PROFESSIONAL AND MISCELLANEOUS WRITINGS 193-94 (Benjamin R. Curtis ed., Boston, Little, Brown, & Co. 1879).

256. VAN SANTVOORD, supra note 225, at 296 (referring to John Marshall). For a general discussion of ideas about manhood in the second half of the century, see HILKEY, supra note 35, at 142-43 (“The preoccupation with manhood in the second half of the nineteenth century in part reflected the fact that ideas about what it meant to be a man were in flux. Changes in the
Appearances, in this case, did not lie, for he acted with courageous independence in the performance of his judicial services. Although exhibiting a "due reverence for established precedent, he took care to test it in the retort of his own logic, and to pass it through the crucible of his own judgment." The "impartiality" so highly regarded in antebellum sketches was here subtly transformed into a more virile form of detachment, requiring "self-possession" and an "iron will." Consider, for example, the rendering of Bushrod Washington in David Paul Brown's "Gallery of Portraits." Washington was still praised for "[h]is learning, his patient hearing, his clear and discriminating sagacity," but what now distinguished him "above all" was "his unhesitating fearlessness." Brown called him "the greatest Nisi Prius judge that the world has known," citing a prize case in which "State-right's men affected to hold the power of the general government in contempt" in support of his claim. When popular agitation mounted, "[i]t was publicly proclaimed, that Judge Washington would never dare to charge against the defendants; or to pronounce sentence against them, if they were convicted." But they did not know the man: "He was too intrepid to be bullied—and he DID charge decidedly against the defendants; they WERE convicted, and he SENTENCED them." The judge did this in full view of the public, proclaiming the importance of affording citizens the opportunity "to witness the administration of the justice of the country; to which, ALL MEN, GREAT AND SMALL, ARE ALIKE Bound TO SUBMIT." When faced with a choice between principle and

relations of work, home, and family brought about by industrialization and urbanization narrowed and redefined men's roles as well as women's.

257. LYNCH, supra note 166, at 89 (referring to Abner Smith Lipscomb).


259. E.g., LYNCH, supra note 166, at 95 (referring to Royal T. Wheeler); THOMAS J. SEMMES, ADDRESS ON THE PERSONAL CHARACTERISTICS OF THE CHIEF JUSTICES 9 (New Orleans, L. Graham & Son 1890) (referring to Roger Taney).

260. 1 BROWN, supra note 216, at 377.

261. Id. at 356, 377.

262. Id. at 377-78.

263. Id. at 378.

264. Id. Even in Brown's portrait of William Tilghman, which is almost a complete plagiarism of Binney's eulogy (openly acknowledged as such), he concludes "[t]hat he was a man of courage no man can doubt," id. at 394, though there is no evidence of this quality in the sketch itself.
expediency, the romantic judge’s “unswerving rectitude” always decided the case, and he never suffered from the “love of applause.” Yet as his biographer considered the judge’s “peculiar independence,” he nervously acknowledged potential shortcomings of his hero: “too great a disregard of the opinions of his fellowmen,” and “too great reliance on himself.”

The figure of the romantic judge was well-constructed to provide encouragement to a legal profession “struggling to span the abyss between its high-sounding ideals and its dull, trivial and even sordid quotidian practices, to express an idea of law as a calling that could lead a man to honor, social usefulness and self-respect.” Yet the source of the judge’s inspiration remained obscure in these portraits. Some biographers saw the hand of God in the creations of the judge. Others suggested a confluence of biological and spiritual influences. Philip Slaughter, starting from the premise that “all human beings inherit the nature of our fallen forefathers,” sought by the process of “induction” to demonstrate the transmission of “hereditary genius.” It was no accident, he implied, that many of Judge William Green’s forebears displayed a “fondness and a fitness

265. Id. at 373.
266. 1 A MEMOIR OF BENJAMIN ROBBINS CURTIS, supra note 255, at 453.
267. Id. at 451, 452.
268. 1 MILLER, supra note 217, at 189 (referring to Augustin S. Clayton)
269. Robert Gordon, Law as a Vocation: Holmes and the Lawyer’s Path, in THE PATH OF THE LAW IN THE TWENTIETH CENTURY 1, 8 (forthcoming 1999). For more on the crisis of the bar in post-bellum America, see Robert W. Gordon, “The Ideal and the Actual in the Law”: Fantasies and Practices of New York City Lawyers, 1870-1910, in THE NEW HIGH PRIESTS: LAWYERS IN POST-CIVIL WAR AMERICA 51, 58-62 (Gerald W. Gawalt ed., 1984) (attributing disintegration of legal elite’s ideal vision of legal order in period from 1885 through 1910 to new legal constructions of the corporate form, intellectual critiques of idea of neutral legal science, and shift of locus of legal practice from courtroom to law office and conference room); Grossberg, supra note 256, at 143-45 (describing crisis of professional ideals occasioned by rise of corporate legal practice and growing specialization and stratification, resulting in decline of “conviviality” among practitioners and contentious quest for new professional standards); and HABER, supra note 19, at 236 (noting most common lament in last decades of nineteenth century was that “law was falling from its honored position in society as a profession and had become an ordinary trade”).
270. SLAUGHTER, supra note 194, at 61, 64. Slaughter explains that he undertook this study before coming across FRANCIS GALTON, HEREDITARY GENIUS: AN INQUIRY INTO ITS LAWS AND CONSEQUENCES (London, MacMillan & Co. 1869) which contains a section devoted to English judges. See SLAUGHTER, supra note 194, at 70. (The reference in the pamphlet is to “Dalton” which I assume to be a printing error or misspelling on the part of Slaughter.) Although providing an “enumeration” of Galton’s findings, Slaughter does so with some reserve and commends to his readers a set of lectures on heredity by a Joseph Cook, who “has discussed it from the Christian stand-point, with a combination of learning, logic and eloquence, rarely surpassed.” Id. at 71. For a discussion of Galton’s work and its significance within the history of psychology, see ROBINSON, supra note 21, at 241, 336-37.
for the law." This was not meant to imply, however, that man was
the prisoner of his heritage: "by the power of his own will, especially
if aided by help from on high" he could "modify, and even . . .
conquer these tendencies, if ill, and strengthen those which are
good." Others refrained from speculating on the matter, exalting
the manifestations of genius without analyzing its nature. To search
for the source of the "subtle quality of the mind . . . we call genius"
was an exercise in futility, from James Lynch's perspective. "[F]or
the mind to attempt to fathom itself," he insisted, "is the mad butt of
thought against the inconceivable—the push of airy nothing against
infinity." Lynch was quite certain, nonetheless, that "the true course
of genius is upward," though "often perverted and prostituted to
unhallowed purposes by the wayward passions that flourish in its
train." While genius "glowed in the natural laws of Kepler and the
civil code of Justinian, flashed through the glasses of Galileo, and
illuminated the hallowed visions of Luther," he observed, "it also
glittered in the crown of Alexander, burnished the helmet of Caesar,
and flamed in the sword of Bonaparte." Despite this lack of
definition, however, there is one point on which all biographers are
clear: genius accounts for man's greatest accomplishments, but is not
responsible for the destructive acts committed by man.

C. Providence and the Law-Giver

The celebration of the romantic judge reached its high-water
mark on February 1, 1901. On that day, members of the bench and
bar joined statesmen and citizens in observing "John Marshall Day,"

271. SLAUGHTER, supra note 194, at 63.
272. Id. at 73 n. These qualifications are stated in a long footnote after the list of Galton's
results. In the footnote, Slaughter suggests a comparable American family of lawyers and other
eminent men: the Randolphs of Virginia. His qualifying remarks come in a final paragraph,
worth reproducing in full:
The transmission of physical tendencies by descent is a fact well-known, so that every
one comes into the world with intellectual, physical, and, to some extent, moral
heritage from all his ancestors, which it would be as impossible to count as it would be
to discriminate the countless drops of rain which compose a river. It should not,
however, be forgotten, that every man, by the power of his own will, especially if aided
from on high, can modify, and even so conquer these tendencies, if ill, and strengthen
those which are good, as to establish, as it were, an improved stock, &c. To expand the
whole subject, even if the writer were capable of doing it, would demand a separate
treatise.

Id.
273. See LYNCH, supra note 166, at 13.
274. Id. at 5.
275. Id. at 14.
276. Id. at 14-15.
marking the centennial anniversary of Marshall’s ascension to the Supreme Court. The story behind this celebration was movingly told by John Dillon in his introduction to a three-volume collection of the addresses delivered in honor of the occasion. The mere suggestion of Aldoph Moses (of the Chicago Bar Association) that such an event be staged “struck a sympathetic chord which vibrated throughout the land.” Bar associations and law schools joined forces in planning this “truly national event” (which was somehow celebrated in a “voluntary, spontaneous” fashion). The event itself, Dillon proudly added, exceeded all expectations. Commemorative exercises were held at the national capital and in thirty-seven states and territories of the union (in those states where there was no observance, “the omission was due to accidental causes”). Orations were delivered by “leaders of the bar, by members of the highest Federal and State courts, and by eminent statesmen and scholars.” Dillon was particularly pleased to report “the estimation in which Marshall is held in the parts of the Union that clung longest to the doctrine of State’s Rights and strict construction, and that made these the legal justification of the Civil War.” He saw this as irrefutable evidence that “the results of the Civil War are everywhere loyally accepted, and that all sections and all parties rejoice in a re-united country.” To the eminent Chief Justice thanks were due, for his valiant defense of the “principle of nationality” against the “heresies of nullification and secession.” The Confederacy “surrendered not more truly to Grant in the field than to Marshall’s great judgments expounding the Constitution.”

Of course, Dillon’s story must be read more as wishful thinking than an accurate report of John Marshall Day. Not only does he misrepresent the general political climate of the period (which was

277. See John F. Dillon, Introduction, in 1 JOHN MARSHALL, supra note 243, at vii-xi. The concept of publishing a volume was first suggested by Justice Shiras who thought that “[a] collection of the addresses . . . if put in a permanent form, would . . . be very interesting as showing a consensus of opinion concerning Marshall on the part of eminent lawyers in all parts of the country.” Id. at viii.
278. Id. at xi.
279. Id. at ix.
280. Id.
281. Id. at xvi.
282. Id. Therefore, he continues in a conciliatory tone, “we are not sorry to hear, in one or two of the addresses, a soldier or a judge of the Confederacy heave a natural sigh or utter a tender lament over the ‘Lost Cause.’” Id.
283. Id. at xiii.
284. Id.
when "Judge Lynch" was at the height of his activity\textsuperscript{285}, but he overstates public confidence in the courts. Moreover, he masks splits within the legal profession—especially concerning the status of the judiciary. As Stephen Botein has observed, "By 1900, on the threshold of the Progressive era, the courts faced severe criticism not only from labor leaders, populists, and socialists, but also from some respectable members of the legal profession, which was at long last \textit{beginning} to develop a formal apparatus for collective deliberation and policymaking."\textsuperscript{286} The "symbolism of judgeship," he explains, was deployed by professional ideologues to deflect attention from internal divisions and to promote their own vision of an independent bar.\textsuperscript{287} In such a climate, John Marshall Day could not have been the expression of national or professional unity Dillon made it out to be. It is better seen as an effort on the part of legal elites to shore up the status of a beleaguered profession. In paying their respects to the memory of "the great John Marshall," participants were offering "a refutation of the notion sometimes expressed, that the lawyers as a profession have lost their high ideals."\textsuperscript{288}

Yet wherein lay Marshall's greatness? Many speakers assumed the question without further reflection. Those who did address it converged on a common answer, expressed most succinctly by Massachusetts Attorney General Knowlton: "The hour of fate had come; and he was the man of the hour."\textsuperscript{289} That is, the Chief Justice was great because he, a simple lawyer of humble origins, rose to the occasion provided by "an overruling Providence."\textsuperscript{290} His appointed function in the genesis of the American Republic was to give law to

\begin{itemize}
\item \textsuperscript{285} See Friedman, supra note 111, at 506-07.
\item \textsuperscript{286} Botein, supra note 241, at 55 (emphasis added).
\item \textsuperscript{287} See id. at 63.
\item \textsuperscript{288} Henry D. Ashley, Remarks, in 2 John Marshall, supra note 243, at 548, 548 (exercises in Kansas City). Gardiner Lathrop's address exemplifies this effort:
\begin{quote}
It is in this age of greed a very gratifying thing that the American people, and especially the American Bar, can turn from the pursuit of the ordinary vocations of life and do honor to one of their greatest representatives, who reflected credit upon them all. It goes to show that honest merit, that great ability, that unswerving integrity, still have a place in the world, superior to the mere acquisition of wealth; and that the man who does his duty well and faithfully will live in the grateful memory of those who come after him.
\end{quote}

\item \textsuperscript{289} Attorney-General Knowlton, Address, in 1 John Marshall, supra note 243, at 197, 201 (exercises in the Supreme Judicial Court of Massachusetts).
\item \textsuperscript{290} Id. Similarly, E.H. Stiles observed that Marshall "belongs to the class of men who are born great, and also to the class of men who achieve greatness by their own exertions." E.H. Stiles, Remarks, in 2 John Marshall, supra note 243, at 548, 549 (exercises in Kansas City).
\end{itemize}
the people. Just as Moses was "at the birth of the ten commandments," so too was Marshall "at the birth of constitutional law." Though he was not the "maker" of the Constitution, Marshall was rightly called its "first and greatest expounder" and, indeed, its savior. For the Constitution was but a "skeleton"—a mere "agreement between conflicting States" when Marshall was called to the bench. He delivered his country through a crucial passage in its history, performing "an original work of the most transcendent importance": the creation of a legal edifice on the foundation of the Constitution. And he ensured the preservation of constitutional government through the maintenance of an independent judiciary. During his service as Chief Justice, then, Marshall combined roles of creator and conservator of law: "His genius pierced [the Constitution's] innermost recesses; ... discovered its powers, and the 'form' was metamorphosed into a 'governmental organism,' and then, pervaded by Marshall's soul, it vivified, lived, lives, and will never die." Ultimately, Marshall's greatness lay in his ability to act creatively under laws of his own origination. In doing so, he bore a striking resemblance to his Maker.

Before passing from the scene of John Marshall Day, however, a dissenting voice should be heard—one which called into question the very possibility of judicial independence. "A great man represents a great ganglion in the nerves of society," Oliver Wendell Holmes declared in his commemorative address, "and part of his greatness

292. John F. Dillon, Address, in 1 JOHN MARSHALL, supra note 243, at 345, 357 (exercises in New York). William B. Hornblower's address provides an especially compelling image of Marshall as savior:

[H]ad he not assumed his office at the precise period when he did and delivered the magnificent series of opinions which came from his lips and from his pen, which welded together the sovereign and independent States of the Union and which armed the Federal Government with the power necessary to preserve our institutions while guarding the reserved rights of the States and the citizens thereof, the fair fabric which had been constructed by the Constitutional Convention of 1787 and which had been so unwillingly adopted by many of the States ... would have fallen to pieces under the strain of the conflicting interest of its various constituents.

293. William Warner, Remarks, in 2 JOHN MARSHALL, supra note 243, at 544, 545, 546 (exercises at Kansas City).
294. Dillon, supra note 292, at 358.
consists in his being there." Observers of this performance, such as President Roosevelt, may have been justified in finding this orator's deflationary words a bit "unworthy" of the occasion. But in putting Marshall in his historical place, Holmes was well within the conventions of nineteenth-century judicial portraiture. For the speaker who preceded Holmes emphasized the fortuitous circumstances surrounding Marshall's appointment. And the one who followed him reflected upon the extent to which "we seem to be living in a different world from Marshall's," facing questions of far greater variety and complexity. When considered in the context of these and other addresses, what seems to set Holmes's remarks apart is not his historical consciousness. Rather, it is his uncanny appreciation of the finitude of human consciousness. "We live by symbols," he observed,

and what shall be symbolized by any image of the sight depends upon the mind of him who sees it. The setting aside of this day in honor of a great judge may stand to a Virginian for the glory of his glorious State; to a patriot for the fact that time has been on Marshall's side, and that the theory for which Hamilton argued, and he decided, and Webster spoke, and Grant fought, and Lincoln died, is now our cornerstone. To the more abstract but farther-reaching contemplation of the lawyer, it stands for the rise of a new body of jurisprudence, by which guiding principles are raised above the reach of statute and State, and judges are entrusted with a solemn and hitherto unheardof authority and duty.

But "[t]o one who lives in what may seem to him a solitude of thought"—presumably Holmes himself—

this day marks the fact that all thought is social, is on its way to action; ... every idea tends to become first a catechism and then a code; and that according to its worth his unhelped meditation may one day mount a throne, and without armies, or even with them, may shoot across the world the electric despotism of an unresisted power.

In presenting such a sobering view of the way "we" think, Holmes foreshadowed the breakdown of the romantic ideal of judging and the
emergence of a new heroic figure: the skeptical judge. The symbol of Oliver Wendell Holmes was yet to have its day.

IV. THE SKEPTICISM OF THE JUDGE, 1900-1930

[W]e are in the universe, not it in us.

—Oliver Wendell Holmes

The celebrations of the “independent judiciary” intensified into a bona fide crusade in the early decades of the twentieth century, taking on almost “cultist” dimensions. As cries protesting “judicial oligarchy” rang out and the judicial recall movement gathered steam, the American Bar Association took up the cause of “judgeship, if not of judges.” Leaders of the Association launched a national campaign of public education, using the issue of judicial recall as an opportunity to elevate the image of the organization and the legal profession in general. The illustrious Rome G. Brown, who led the campaign, emphasized the “heresy” entailed in the very idea of judicial recall. “The question,” he observed, “which confronts us is, Shall our government remain a government of laws or shall it become merely a government of men?” He decried efforts to reduce judges to the “servile instruments” of the people, insisting that they remain servants only of the law ... free to heed the admonition given by Moses to the Judges of the Israelites: “Ye shall not respect persons

302. The ways romantic psychology informed Holmes’s writings are explored in Anne C. Dailey, Holmes and the Romantic Mind, 48 DUKE L.J. 429 (1998). For works suggesting that Holmes departed from the romanticism of his father’s generation, see FREDRICKSON, supra note 211, at 208 (Holmes sounded a new note among contemporaries, expressing a “realistic and stoical acceptance of the fact that no educated elite could really control the evolution of society” because men of law, like men of war, were “at the mercy of history.”); and Peter Gibian, Opening and Closing the Conversation: Style and Stance from Holmes Senior to Holmes Junior, in THE LEGACY OF OLIVER WENDELL HOLMES, JR., supra note 15, at 186, 199 (“While before the war Holmes Junior had seemed to be following in his father’s footsteps as a dreamy, Emerson-inspired student with that earlier period’s characteristic ‘problem of vocation,’ after the war he would ... quickly give up his dabbling in philosophy and poetry, applying himself with new martial spirit to specialized study of the law.”).

303. Letter from Oliver Wendell Holmes, Jr., to Dr. John C.H. Wu (May 5, 1926), in JUSTICE HOLMES TO DOCTOR WU: AN INTIMATE CORRESPONDENCE, 1921-1932, at 34, 35 (1935).

304. See Botein, supra note 241, at 63. This development coincides with the rise of a cult of the Constitution. See MICHAEL KAMMEN, A MACHINE THAT WOULD GO OF ITSELF: THE CONSTITUTION IN AMERICAN CULTURE 22-23 (1986).

305. Botein, supra note 241, at 55.

in judgment, but ye shall hear the small as well as the great; ye shall not be afraid of the face of man; for the judgment is God's."

William Howard Taft, who represented a more progressive, reformist branch of the bar, was nevertheless unrestrained in his expressions of "love" for judges and courts, intimating that "[t]hey are my ideals on earth of what we shall meet afterwards in Heaven under a just God." Equally impassioned addresses were delivered at bar association meetings throughout the nation, where speakers could be heard lamenting the deplorable condition of "the strangled judge" and warning that the judiciary is "the one brake yet remaining on the runaway engine of this republic." In their presentations of the case for an independent judiciary, however, one can detect more than a measure of self-doubt. What was once said of Browning may be also said of the ABA member: "The burly assurance in his voice had no counterpart in his inner being."

While leaders of the bar moved tirelessly from dinner speech to dinner speech, a number of young intellectuals within the profession were busily constructing a new ideal of judgeship in the image of Oliver Wendell Holmes. Influenced by progressivism, pragmatism, and developments in the social sciences, these thinkers—most of them legal academics—characterized the judiciary as a branch of government that had become too far removed from the social and economic realities of contemporary American life. Holmes's dissent in

Lochner v. New York

was a galvanizing force, inspiring the publication of articles in legal periodicals "decrying various features of jurisprudential orthodoxy, from syllogistic logic to substantive doctrines such as 'liberty of contract.'" Their critique was court centered, and it attacked the Langdellian vision of legal science; they lamented the "petrification" of the judicial process and the "mechanical" method of reasoning employed by judges. This

307. Id. at 4, 29 (quoting Deuteronomy 1:17 (King James)) (footnote omitted).
308. Botein, supra note 241, at 64 (quoting President Taft).
309. CARUTHERS EWING, THE SPIRIT OF THE TIMES 8 (1912); see generally Botein, supra note 241, at 55.
310. HOUGHTON, supra note 206, at 159.
311. 198 U.S. 45 (1905).
312. WHITE, supra note 297, at 360.
prevailing "jurisprudence of conceptions," they argued, sacrificed justice in the name of technicality (or "Spencer's Social Statics") and stood in the way of "social progress." Recalling the "great achievements of the youth of our case-law," Roscoe Pound concluded that "[o]ur judge-made law is losing its vitality." What was needed was a "sociological" jurisprudence adjusted to "human conditions," with logic relegated to its "true position as an instrument." Sociological jurists expressed nostalgia for the days of Kent and Mansfield, but they looked to enlightened legislators and lawyers rather than judges as the primary agents of legal reform. Living under the "new dispensation" of Holmes, judges were expected to legislate "interstitially," within the bounds of custom, precedent, and statute, guided by the "social sense" of utility and justice.

The emergence of sociological jurisprudence is commonly regarded by historians as a critical turning point in American legal history, signaling the moment when judges were first acknowledged as lawmakers rather than law-finders. Yet, as has been shown above, judicial lawmaking was a recognized feature of the nineteenth-century legal landscape. Indeed, the legislative nature of common law judging had been a source of "perennial conflict" from the time of the Revolution.

The legitimacy of judicial lawmaking and the underlying distinction between legal and political reasoning were contested periodically in the nineteenth century. Attempts were made to cabin judicial discretion and increase the public accountability of judges through such mechanisms as elections and codification. Legal

314. Mechanical Jurisprudence, supra note 313, at 610.
315. Id. at 615.
316. Id. at 609-10.
318. See WHITE, supra note 11, at 252 (linking the demise of the oracular theory of judging to the rise of "sociological jurisprudence"); see also G. Edward White, From Sociological Jurisprudence to Realism: Jurisprudence and Social Change in Early Twentieth-Century America, 58 VA. L. REV. 999, 1000-14 (1972); cf. NEIL DUXBURY, PATTERNS OF AMERICAN JURISPRUDENCE 49, 53 (1995) (crediting Holmes with initially broaching the theme of the judge as "an occasional creator of law" but viewing John Chipman Gray as the first to make this theme "explicit," even as he subscribed to an "Austinian-cum-Langdellian view of the judicial role").
319. See TRANSFORMATION II, supra note 13, at 118-19; see also Gordon S. Wood, Comment, in A MATTER OF INTERPRETATION, supra note 7, at 49, 58 (problems of judicial discretion and judicial lawmaking long recognized and "deeply rooted in our history").
professionals aiming to defend the common law system against such incursions first tended to describe the judge as an impartial craftsman. However by mid-century they were increasingly inclined to attribute creative powers to the judge, recognizing him as an author of the law. Thus, in speaking of the judge as a "legislator," sociological jurists were not presenting a radically new vision of adjudication. The sociological jurists of the early twentieth century were, in many respects, simply responding to a renewed attack on the common law system, in the form of the judicial recall movement. And the judicial ideal they presented in their writings was something of a synthesis of nineteenth-century versions of the ideal—now reconstituted in the form of the creative craftsman.

A. The Creativity of the Craftsman

Due to the critical orientation of most sociological jurists, their writings generally offer more in the way of negative impressions rather than idealized images of the judge. For instance, Roscoe Pound's influential article, Mechanical Jurisprudence, is full of examples of both ancient Roman and modern American judges imprisoned by precedent, endeavoring to make rules to fit cases—regardless of common sense or convenience.320 To the extent that Pound does offer a positive description of the judicial role, he speaks in relatively vague and modest terms:

[T]he task of a judge is to make a principle living, not by deducing from it rules, to be ... 'immortal for a great many years,' but by achieving thoroughly the less ambitious but more useful labor of giving a fresh illustration of the intelligent application of the principle to a concrete cause, producing a workable and a just result.321

The fullest portrait of the sociological jurists' ideal may be found in Benjamin Cardozo’s The Nature of the Judicial Process (1921)—a judicial autobiography of sorts.

"In moments of introspection," reflected Cardozo, "the troublesome problem will recur, and press for a solution. What is it that I do when I decide a case?"322 The Nature of the Judicial Process was Cardozo's extended answer to this question. Adopting a confessional tone, he admitted that the "strange compound which is

320. See Mechanical Jurisprudence, supra note 313, at 607, 614-21.
321. Id. at 622.
brewed daily in the caldron of the courts" was a product of judicial choice rather than "submission to the decree of Fate." Although he and his colleagues on the bench endeavored to take an objective view of the cases at bar, he acknowledged that "we can never see them with any eyes except our own.") Judges, like other mortals, were susceptible to subconscious influences; prejudices, predilections, instincts, emotions, habits, and convictions made the man, "whether he be litigant or judge." In his early years on the bench, Cardozo had anxiously sought the "solid land of fixed and settled rules, the paradise of a justice that would declare itself by tokens plainer and more commanding than its pale and glimmering reflections in my own vacillating mind and conscience." But certainty was not the repose of the more mature judge: "I have grown to see that the process in its highest reaches is not discovery, but creation." He concluded that all of the "doubts and misgivings, the hopes and fears, are part of the travail of mind, the pangs of death and the pangs of birth, in which principles that have served their day expire, and new principles are born."

Though creation was an inevitable aspect of the judicial process, Cardozo emphasized a number of "jural principles" serving to guide the judge in the common run of cases, thereby ensuring both the stability and social utility of the law. As he deliberated, the judge was to make use of four primary methods of analysis: philosophy, history, custom, and sociology. "We go forward with our logic . . . till we reach a certain point," Cardozo explained. Where logic could not decide the case, "[h]istory or custom or social utility or some compelling sentiment of justice or sometimes perhaps a semi-intuitive apprehension of the pervading spirit of our law, must come to the rescue of the anxious judge, and tell him where to go." Thus Cardozo's model judge was no "knight-errant, roaming at will in pursuit of his own ideal of beauty or of goodness," nor would he yield to "spasmodic sentiment" or "vague and unregulated benevolence." Rather, his discretionary acts were "informed by tradition, method-

323. *Id.* at 10, 11.
324. *Id.* at 13.
325. *Id.* at 167.
326. *Id.* at 166.
327. *Id.* at 166, 167.
328. See *id.* at 129-30.
329. *Id.* at 43.
330. *Id.*
331. *Id.* at 141.
ized by analogy, disciplined by system, and subordinated to ‘the
primordial necessity of order in the social life.’” 332 While it was
impossible for the judge to completely “transcend the limitations of
the ego,” Cardozo maintained that he should strive as far as humanly
possible to “objectify in law” the aspirations and convictions of his
contemporaries. 333 For the personal and general mind were, on his
account, “inseparably united”; though the judge’s perception of
“objective right” took the color of his subjective mind, his mind was
itself conditioned by “customary practices and objectified
beliefs.” 334 Despite his appreciation of the partiality of all human judgment,
Cardozo remained confident of “the inescapable relation between the
truth without us and the truth within.” 335 With proper training in the
“art” of decision making, and perhaps also “the aid of that inward
grace which comes now and again to the elect of any calling,” the
judge could emancipate himself from his personal prejudices and rule
from the perspective of the “man of normal intellect and
conscience.” 336

Such faith in the existence of a common good and the
correspondence between an individual and a collective mind
dissipated by the second decade of the century. The outbreak of
world war as well as the inequities and hardships engendered by
industrialization contributed to a general atmosphere of skepticism
about the “core values” of American culture. 337 Traditional symbols
of virtue and respectability were increasingly subject to attack and
former models of success became “figures of irony and pathos.” 338
One such casualty was the ideal of the romantic judge, who could
transcend his own personal predilections with a single bound of
thought, approximating social justice as near as was humanly possible
through his rulings. For as modern juristic thought turned inward
upon itself, a more “realistic” conception of the judge’s role emerged.
Operating from an explicitly interdisciplinary perspective, a new
generation of legal academics insisted that the private motives and
values of the judge, rather than the existence of rules or constitutions,

332. Id. (quoting 2 FRANÇOIS GENY, MÉTHODE D’INTERPRÉTATION ET SOURCES EN DROIT
PRIVÉ POSITIF 213 (1919)).
333. Id. at 106, 173.
334. Id. at 110-11.
335. Id. at 174.
336. Id. at 163, 89.
337. See WHITE, supra note 11, at 152. See generally HENRY FARNHAM MAY, THE END OF
338. WHITE, supra note 11, at 152.
provided "the key to understanding the law." Provided "the key to understanding the law." Judicial behavior was analyzed in psychological terms, and judicial decisions were read as the outcome of a judge's "entire life-history." The truth of the matter, Jerome Frank confirmed, was that "we can never get outside ourselves. . . . We are shut in our own personality as if in a perpetual prison." The judge was no more likely to escape from this cell of consciousness than any other mortal man.

**B. Creativity and Self-Restraint**

With the rise of Legal Realism, one might have expected a decline in the tendency to celebrate the "Great Judge." Indeed, Frank suggested that the "artificial, orthodox tradition of 'the ideal judge'" was antithetical to the Realist enterprise, which was premised upon the idea that judges were "fallible human beings." Of course, Frank was speaking in exaggerated tones; as has been shown above, propagators of this "tradition" generally did not deny the fallibility or humanity of the judge. In any event, a survey of the legal literature of


340. FRANK, supra note 2, at 124. Frank's Law and the Modern Mind was part of a general expansion of literature on legal psychology in the early decades of this century, reflecting the influence of behaviorism, Freudianism, and abnormal psychology. For a sample of such works, see, e.g., EDWARD STEVENS ROBINSON, LAW AND THE LAWYERS (1935); Hutcheson, supra note 317, at 274-288; Harold D. Lasswell, Self-Analysis and Judicial Thinking, 40 INT'L J. ETHICS 354 (1930); Herman Oliphant, A Return to Stare Decisis (pt. 2), 14 A.B.A. J. 159, 159-61 (1928); Pound, The Theory of Judicial Decision, supra note 313; Max Radin, The Theory of the Judicial Decision: Or How Judges Think, 11 A.B.A. J. 357, 357-62 (1925); Theodore Schroeder, The Psychologic Study of Judicial Opinions, 6 CAL. L. REV. 89, 89 (1918) (applying modern analytic psychology to the study of opinions in recognition of the fact that "[h]uman motives and mental mechanisms are not altered when one assumes the judicial function"); Donald Slesinger & E. Marion Pilpel, Legal Psychology: A Bibliography and a Suggestion, 26 PSYCHOL. BULL. 677, 682 (1929); Karl Georg Wurzel, Methods of Juridical Thinking, in SCIENCE OF LEGAL METHOD 286 (Ernest Bruncken & Layton B. Register trans., 1917); and Hessel E. Yntema, The Hornbook Method and the Conflicts of Laws, 37 YALE L.J. 468, 480 (1928). See generally PURCELL, supra note 339, at 87. For an illuminating exploration of the theological and romantic roots of psychoanalytic theory, see SUZANNE R. KIRSCHNER, THE RELIGIOUS AND ROMANTIC ORIGINS OF PSYCHOANALYSIS: INDIVIDUATION AND INTEGRATION IN POST-FREUDIAN THEORY (1996).

341. FRANK, supra note 2, at 124 (quoting Anatole France).

342. Id. at 156.
the twenties and thirties indicates that legal professionals—many of whom were associated with Legal Realism—continued to articulate judicial ideals through the medium of the biography. What is particularly striking about this literature is the extent to which discussions about the ideal judge centered around Oliver Wendell Holmes, even when another judge was the formal subject of the piece. For example, Holmes was the standard against which Cardozo’s work was assessed in Felix Frankfurter’s essay: there was only “one judge of greater originality and deeper penetration into the intellectual presuppositions of the judicial process” than Cardozo—the “Master,” Mr. Justice Holmes. Holmes was also the central focus of a number of pieces appearing in legal periodicals as well as mainstream publications such as The New Republic. It would seem that Holmes had become a symbol in American legal culture, and, true to his own prediction, what was symbolized by his image depended upon the mind who saw it. To John Dewey, Holmes stood for the “liberal mind in operation”; to Pound, for the emergence of a functional point of view in the realm of adjudication; to Frankfurter, for a constitutional philosophy that struck a balance between state sovereignty and federal control, while remaining responsive to the needs of a “complex industrial civilization”; and to Llewellyn, for the survival of human virtue in a “dollar-ridden,” “machine-made age.” But underlying all of these admiring portraits of Holmes (and those like him) was a common sense of the ideal judge—a more skeptical version of the creative craftsman. That is, there was a decided emphasis upon judicial restraint as a virtue, a new appreciation of the aesthetics of judging, and an admiration for the judge who could fearlessly face life in “this great and awful Universe, where man is so little and fate so relentless.”

Biographers in this period were less likely to distinguish the judicial from the legislative role; they spoke of judicial lawmaking with a new candor and applauded the "statesmanship" of individual judges. Nevertheless, the judges they idealized exercised a chastened creativity as they legislated from the bench. For instance, Frankfurter placed Justice Louis Brandeis "in the tradition of Marshall" insofar as he recognized that the Constitution was not a "literary composition" but "a way of ordering society, adequate for imaginative statesmanship." Yet while Marshall "could draw with large and bold strokes the boundaries of state and national power," Brandeis was faced with the less sweeping task of applying "settled, general doctrines" to concrete cases. Moreover, the skeptical judge was no social engineer, immersed in contemporary affairs; "[s]ociological problems" did not preoccupy his mind and the "market place was not his milieu." Rather he studied the processes of government and industry from a distance, "walked humbly" in the domain of economic affairs, and deferred to legislative resolutions of social conflicts. In a complex, dynamic society, the skeptical judge proceeded in a cautious spirit, mindful of the fact that "the last acquisition of civilized man is forbearance in judgment."

Whereas men like Marshall and Kent laid the foundations of American law, the skeptical judge left a more modest mark behind—the particular style of his judicial opinions. Though "rules are compelling and cases come down in dull monotony," Walton Hamilton maintained, "the manner of the judge appears in the interstices of opinion." Biographers called attention to the literary quality of law reports, reminding readers that the work of the judge was "in essence the composition of human rivalries."

350. Felix Frankfurter, Mr. Justice Brandeis and the Constitution, in MR. JUSTICE BRANDEIS 47, 53 (Felix Frankfurter ed., 1932). As discussed below, see infra text accompanying notes 355-61, the judge's opinions might still be admired from an aesthetic point of view. For instance, Frankfurter introduces a passage from a Brandeis dissent on utility regulation with the following apology: "To detach part from a closely knit exposition in which each step is buttressed by proof is to mutilate. But even a torso conveys intimations of an artistic whole." Frankfurter, supra, at 76.

351. Frankfurter, supra note 350, at 96.

352. FRANKFURTER, supra note 343, at 92.

353. Id. at 96.

354. Learned Hand, Mr. Justice Holmes at Eighty-Five, in MR. JUSTICE HOLMES, supra note 345, at 119, 123.


356. FELIX FRANKFURTER, When Judge Cardozo Writes, in LAW AND POLITICS, supra note 343, at 103, 103 (emphasis added).
indeed one of the “mansions in the house of literature,” insisted Frankfurter.\textsuperscript{357} The opinions of Cardozo (read by the bar “for pleasure”) demonstrated that “law is stunted and undernourished by life, if it falls below the dignity of literature.”\textsuperscript{358} And those of Holmes deserved a place in “any adequate anthology of English prose.”\textsuperscript{359} But even more praiseworthy than the judge who could tell the “story of the law” with imagination and charm, was the one who deployed rhetorical devices to produce persuasive opinions. Brandeis’s skillful use of legal forms and conventions allowed him to “escape from the recent holdings predicated on ‘freedom of contract’ as ‘the rule.’”\textsuperscript{360} Yet his opinion was admired less as a triumph of social justice than as a feat of legal legerdemain: “It is all done with such legal verisimilitude . . . [and] attended with so little of a fanfare of judicial trumpets . . . [A]n argument which degrades ‘freedom of contract’ to a constitutional doctrine of the second magnitude is compressed into a single compelling paragraph.”\textsuperscript{361} The judge’s art could be appreciated for its own sake.

That was what the creative judge had come to by 1930: he was a self-conscious manipulator of legal devices to uncertain ends. His journey of “self-discovery” had led him to an unsettling conclusion: while his judgments had the look of law, they were essentially and necessarily self-revelations.\textsuperscript{362} A lesser man might have resigned his post upon such a realization, but the skeptical judge seemed almost to revel in the absurdity of his position. For he saw that, at bottom, the predicament of the judge was the human predicament: “Man’s upward course from the first amoeba which felt a conscious thrill, is no more than the effort to affirm the meanings of his own strange self, to divine his significance and to make it manifest in the little hour vouchsafed him.”\textsuperscript{363} The skeptical judge appeared to be a “puny” figure bravely striving to endure “in the midst of the appalling tragedy of existence.”\textsuperscript{364} While the common lot of men shrunk from the very freedom they claimed to champion, fearful of confronting

\begin{itemize}
\item \textsuperscript{357} Id. at 104.
\item \textsuperscript{358} Id. at 106.
\item \textsuperscript{359} Id. at 105. In particular, Frankfurter averred, Holmes’ “dissenting opinion in the Abrams case will live as long as English prose has power to thrill.” Frankfurter, supra note 347, at 72.
\item \textsuperscript{360} Hamilton, supra note 355, at 172.
\item \textsuperscript{361} Id. at 173.
\item \textsuperscript{362} See FRANK, supra note 2, at 114.
\item \textsuperscript{363} Hand, supra note 349, at 130-31.
\item \textsuperscript{364} Id. at 130.
\end{itemize}
the inanity of their lives, the skeptical judge stoically accepted his true calling as the creator of his world. He knew that there was no value outside of himself, that what he desired was the measure of right and wrong, that he was the ultimate judge. In his “keen” eyes, “opened-wide,” one could see that he had a fighting faith in nothing, absolutely.

C. Doing God’s Work

Jerome Frank titled a 1931 article with a question: Are Judges Human? The answer was implied in the asking, and the article continued his effort to cure lawyers and the laity of their need for a “Father-Authority” with a healthy dose of legal realism. Yet, upon reflection, it would appear that the Realists actually came far closer than their predecessors to deifying the judge. To appreciate this feature of the Realist portraits, it is helpful to consult Jack Miles’ God: A Biography, which provides a delineation of what it is that makes the God of the Bible “godlike.” According to Miles, the distinguishing feature of God’s character is that it is wholly prospective: “He has no history, no genealogy, no past that in the usual way of literature might be progressively introduced into his story to explain his behavior.” The literary character of God is defined in and through his creative acts; he has no identity distinct from or prior to his appearance in the opening scenes of the Book of Genesis as the creator of the world. He has no discernible subjective life or private desires and can only pursue an interest in himself through mankind. God can only be known—to himself and mankind—through his creative work. In a similar fashion, the Realists portrayed the judge’s life and his work as coextensive and mutually defining. They knew him only as “Mr. Justice”; all of his thoughts and actions were judicial in orientation and import. And his greatness was unaccountable to history:

It is indubitably inscribed in authentic documents that [Holmes] was born in 1841, and, being a legalistic person myself both by nature and practice, I must accept this for some purposes. But . . . secretly I believe that he has spent his time travelling about with inordinate velocity; at least I know that his head at any rate has

365. Id. at 133, 134.
366. See Jerome Frank, Are Judges Human?, 80 U. PA. L. REV. 17 (1931); see also FRANK, supra note 2, at 243.
368. See id. at 88.
often been in the stars, and I suppose the rest of him must have gone along. You know that if you can move fast enough, you will keep time back in some curious way that baffles the clocks. At any rate, while we have been working along at mere terrestrial velocities, he has certainly not been growing old.369

Ultimately, the most godlike portrait of the judge was to come from the most unrelenting Legal Realist: Jerome Frank. His rendering of "Mr. Justice Oliver Wendell Holmes, The Completely Adult Jurist" in the final chapter of Law and the Modern Mind also serves as a fitting conclusion to this historical analysis of the judge in American legal literature.

"One wise leader pointing the way we have had with us many years," began Frank.370 "The judicial opinions and other writings of Mr. Justice Holmes—practitioner, teacher, historian, philosopher, judge—are a treasury of adult counsels, of balanced judgments as to the relation of law to other social relations."371 Frank offered some choice selections from this treasury, and added a counsel of his own: "Holmes's adult illusionless surveys are an indispensable aid and an inspiration."372 Thus Holmes ascended to the throne of the "great judge." And this was apparently accomplished "without armies."373 For as Frank insisted toward the end of this chapter (the italics are his): "The great value of Holmes as a leader is that his leadership implicates no effort to enslave his followers."374 Historians have cast doubt on the extent to which Frank and other Progressive and Realist lawyers were truly following Holmes's lead, showing that they effectively converted Holmes to their own purposes.375 To be sure, Frank's portrait does bear a striking resemblance to its author. And one cannot help but read Frank's tribute to Holmes as an unconscious expression of his own yearning for a "Father-Judge." Yet perhaps the most ironic aspect of the "Completely Adult Jurist" was his ability to assume the very objective, omniscient perspective Frank derided throughout Law and the Modern Mind. Frank's Holmes could penetrate the false surfaces of the legal system, clearly perceiving the way the law really worked. And he recognized that his "essential attitudes towards the universe" were simply the product of "early

370. FRANK, supra note 2, at 270.
371. Id.
372. Id.
373. Holmes, supra note 296, at 208.
374. FRANK, supra note 2, at 276.
375. See WHITE, supra note 297, at 362-69.
associations and temperament, coupled with the desire to have an absolute guide."

How he acquired this "adult emotional status," however, is left to our imagination. Nowhere in his portrait of this jurist did Frank discuss Holmes's ancestry or his childhood. Nor did he reflect upon his subject's formative professional experiences. And there was certainly not even a whisper about Lady Clare Castleton. This last omission may simply be attributed to some lingering Victorian prudery. But the exclusion of all biographical detail is striking. The Justice thus appears as a disembodied intellect—the ultimate self-made man. In following his lead, Frank is not only showing us that growing up is hard to do. He is demonstrating—albeit unwittingly—that the pursuit of law involves no small measure of self-contradiction.

CONCLUSION

In Law and the Modern Mind, Frank brought to light what he saw as "peculiarly the modern sin": personification of the rule of law in the image of the "Father-Judge." The first step towards salvation, he admonished his colleagues, lay in recognizing law as the creation of fallible human beings. In presenting his ideas as revelations about the judicial process, however, Frank left a distorted impression of the legal tradition inherited by his generation. The truth of the matter is that judicial lawmaking was no news to the American legal profession in 1930. Indeed, when placed in historical perspective, Frank's exposure of the "creative judiciary" appears more like an indelicate breach of professional etiquette than a revolutionary insight into the true nature of law. For as this article has shown, the creativity of the judge was increasingly recognized and celebrated in the nineteenth century, reflecting the extent to which romanticism penetrated the legal culture and altered notions of the judicial mind. It was not the mechanical jurisprude but the judicial genius who embodied the professional ideal in the so-called "Age of Formalism." Thus, when

376. FRANK, supra note 2, at 276.
377. For an account of Holmes's relationship with Lady Clare Castleton (an Irish aristocrat with whom Holmes became acquainted in 1896), see TRANSFORMATION II, supra note 13, at 142 n.* (maintaining that Holmes was "smitten by the lady" and suggesting that she may have emboldened him to take the "intellectual leap" represented by The Path of Law).
378. Frank seems to have taken Holmes at his word when he insisted "Since 1865 there hasn't been any biographical detail." SILAS BENT, JUSTICE OLIVER WENDELL HOLMES ix (1932) (quoting Holmes).
379. FRANK, supra note 2, at 19.
Frank proclaimed that "the law is made by and for men," he was essentially restating the romantic view of adjudication.

All the same, there was something rather significant lost in the transition from the romantic to the realist perspective on judicial lawmaking. That something was a romantic conception of consciousness, which affirmed the human capacity for self-transcendence. The romantic judge was capable of combining his subjective understanding of the world with an objective view of that same world. His opinions were impartial without being impersonal. They were creative expressions, bearing his unique imprint, but they nonetheless constituted authoritative legal norms; he was the recognized author of these opinions, yet as he delivered them, he stood for the rule of law. This romantic figure, however, was not the judicial lawmaker Frank and other Realists placed at the center of their studies of adjudication. They began from the premise that a judge’s vision, like that of any other ordinary human being, was circumscribed by the fact that he could never get outside of himself. The "creativity" of the judge was reconceived as an expression of this constraint, rather than proof of a "divine presence." With this altered perspective on the human mind, Realists propagated a new judicial ideal—that of the skeptical judge, who was acutely aware of his confinement within the cell of his own consciousness. The skeptical judge appreciated the autobiographical quality of all judicial opinions (including his own), and recognized them as rationalizations of the author’s own biases and motives. The self-awareness and “intelligent doubt” he displayed, however, seemed at times to shade into self-contradiction. We are left to wonder how the skeptical judge came to know of these limitations on human cognition, without stepping outside of himself. As he offered his “illusionless” surveys of the law, he was effectively assuming an omniscient perspective, even though he had been denied the capacity to do so by his biographers. In portraying the judge in this fashion, the Realists thus betrayed a lingering romanticism. And they followed the tradition of their fathers in another important sense: they continued to envision law’s rule in the form of a judge.

Tracing the progression of judicial ideals through the history of American law from 1800 to 1930, we are led to a paradoxical conclusion. In a polity said to be ruled by laws, not men, there was a growing tendency to personify the “rule of law” in the image of the

380. Id. at 269.
judge. Indeed, the "anthropomorphizing of the Law" which Frank deplored (even as he committed this "modern sin" in his rendering of Holmes) continues to the present day. The identification of a judicial opinion as the work of an individual author does not necessarily undermine its authority as a matter of law. Indeed, the opinions of certain great judges—such as John Marshall or Oliver Wendell Holmes, Jr.—are regarded as especially persuasive legal authorities. Moreover, the integrity of the judicial system is widely thought to depend on the preservation of the "personalized judicial role"; judges are expected to be personally involved in the decision-making process, through listening to oral arguments, reading legal briefs, and crafting reasoned opinions which bear their signatures. However, judicial opinions are not simply treated as the personal views of judges. And the legal authority of a judicial opinion does not derive from the personality of its author. Although the American concept of the "rule of law" may entail the suppression of judicial subjectivity,

381 See, e.g., Patricia M. Wald, Bureaucracy and the Courts, 92 YALE L.J. 1478, 1483-84 (1983) ("Our task is to manage the courts to preserve the personalized judicial role. The external accountability of courts depends vitally on judges' personal involvement, including providing reasoned decisions, identifying the authors of our opinions by name, and listening to oral argument."); see also Edwards, supra note 8, at 888, 889 (noting that the involvement of law clerks in the opinion-drafting process does not necessarily undermine the "authoritative nature of judicial declarations of law," because careful judges will control the creation of each opinion, each "until the words . . . precisely reflect their views on the proper disposition of the case"). Assertions that judges are not, and should not be reduced to, automatons can be found in great abundance in case law, especially in the context of discussions about the Sentencing Guidelines and where courts are asked to review the decisions of lower courts or administrative agencies. See, e.g., United States v. Margiotti, 85 F.3d 100, 103 (2d Cir. 1996) ("Sentencing is rigid and mechanistic enough as it is without the creation of rules that treat district judges as automatons."); United States v. Jackson, 30 F.3d 199, 205-06 (1st Cir. 1994) ("Judge Boyle acted as a judge, drawing upon his life experience and his judicial experiences, making his decision not simply by working the grid provided by the guidelines, but by balancing the impact of the law upon an individual human being, given that human being's particularized circumstances, against the protection of society. He recognized the face behind the law. He declined to function merely as an automaton."); United States v. Wise, 976 F.2d 393, 402 (8th Cir. 1992) (maintaining that "the Guidelines do not reduce district court judges to mere automatons, passive compilers of ciphers, or credulous naifs"); United States v. Polito, 856 F.2d 412, 418 (1st Cir. 1988) ("Though we expect a trial judge to be sensitive to the judicial role and to exercise restraint in the face of admitted provocation, we have no right to anticipate that he will function as some bloodless automaton."); Allen v. Alabama, 276 So. 2d 583, 586 (Ala. 1973) ("The trial judge is a human being, not an automaton or a robot. He is not required to be a Great Stone Face which shows no reaction to anything that happens in his courtroom. . . . We have not, and hopefully never will reach the stage . . . at which a stone-cold computer is draped in a black robe, set up behind the bench, and plugged in to begin service as Circuit Judge.")). The essential role of human emotions in adjudication has also been emphasized by legal scholars. See, e.g., Martha C. Nussbaum, Emotion in the Language of Judging, 70 ST. JOHN'S L. REV. 23, 30 (1996); Samuel H. Pillsbury, Emotional Justice: Moralizing the Passions of Criminal Punishment, 74 CORNELL L. REV. 655, 655-56 (1989); Benjamin Zipursky, Deshaney and the Jurisprudence of Compassion, 65 N.Y.U. L. REV. 1101, 1146 (1990).

382 See KAHN, supra note 55, at 103-33.
it seems also to require an exponent in the form of a human judge. The fact that we continue to entrust this finite figure with a task of such magnitude suggests that he cannot simply be viewed as a romantic survival. He expresses what is perhaps a more fundamental and unyielding human impulse to see beyond ourselves.