Looking Backward, Looking Forward

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Looking Backward, Looking Forward

Past and Future Lives of “The Oven Bird’s Song”

DAVID M. ENGEL

ORIGINS AND INFLUENCES

Out walking in the frozen swamp one gray day,
I paused and said, “I will turn back from here.
No, I will go on farther – and we shall see.”

Robert Frost, “The Wood Pile”

Looking back at an article written some years ago by a younger version of oneself, it becomes possible to see more clearly the influences that shaped both the text and the author. As we conduct our scholarly work, we tend to imagine that we are freely choosing the ideas we pursue and the methods we employ. We are the agents of our own destiny – or so we tell ourselves as we move forward in time. But, viewed retrospectively, there is ample evidence to support a much more contingent, even deterministic, view. The author as auteur seems less plausible. The text is also – perhaps more significantly – written by its intellectual environment, by contemporaneous minds and scholarly works, by the events of the day, and by the quirks and happenstance of life. That is how it now appears when I reflect on the origins and influences of “The Oven Bird’s Song” more than thirty years later.

In the late 1970s, I found myself driving through the streets of what I called “Sander County,” a small, predominantly agricultural community in Illinois.

My profound thanks to Mary Nell Trautner for her tireless work in editing this collection of essays. Thanks for their comments on this chapter go as well to Fred Konefsky and Lynn Mather. Indeed, the concept for the conference itself was Fred’s, one of the countless acts of generosity and friendship for which he is so well known and appreciated by his colleagues. Thanks to Samantha Barbas and Anya Bernstein for working with Mary Nell, Fred, and Lynn to make the event unforgettable. And my profound thanks to all the contributors to this volume for their thoughtful and provocative observations.

I had begun to understand that Sander County was undergoing major social and economic changes, largely as the result of a new factory that had opened the county to global flows of people, capital, and economic influence. In the course of my fieldwork, I identified former litigants who had been involved in different types of civil cases. I knocked on their doors and tried to learn from them how they had traveled the path to litigation in the local court and what the results had been. Later, I also identified and interviewed dozens of “community observers” — ministers, youth leaders, beauticians, farmers, teachers, funeral parlor operators, social workers, town council members, insurance adjusters, lawyers, judges, and many others. I asked them about their perspectives on the transformations underway in their community, and I solicited examples of trouble cases that had not necessarily entered the legal system. At the same time, I spent what seemed like endless days sitting quietly in the back room of the Sander County courthouse, where I read hundreds of old case files, extracted from them their stories of local conflict, and constructed a quantitative portrait of the flow of litigation over an extended period of time.

How did all of this happen, and why? What sequence of events led me to attempt this kind of fieldwork in a small, out-of-the-way American community? I was not alone. I would soon discover that other colleagues who were then unknown to me — people such as Barbara Yngvesson, Carol Greenhouse, Frank Munger, and Sally Merry — were doing similar research in other parts of the country. Our community-based legal ethnographies were a product of their time — researchers attempt them less often nowadays. In retrospect, it seems quite clear that scholarship of this kind is not merely the result of our conscious choices and decisions. It grows out of the soil in which it's rooted. It pokes its head above the ground and responds to the intellectual climate that surrounds it. It turns toward the light that happens to shine at a particular time and place.

This opportunity to look back at the writing of “The Oven Bird’s Song” has helped me to situate it at the confluence of four particularly important influences. First, the field of law and society was emerging as a discipline in its own right, with an institutional structure and a “canon” that made the study of

disputes and dispute-processing a central concern. Second, the times being what they were in the 1960s and 1970s, many American law and society scholars had acquired experience in other countries and cultures. They were subsequently drawn to studies of their own society that would apply the same methods and cultural interpretive frameworks that they had developed in non-Western settings. Third, law and society research had begun to reflect broader intellectual trends that challenged exclusively positivist interpretations of social behavior and encouraged interpretivist and social constructionist perspectives. Fourth, when it comes to scholarly work, the personal is the professional. We as scholars like to pretend that our ideas, our interests, and our methods are somehow divorced from events in our private lives - the places we have been, the people we have befriended, our likes, our dislikes; our personal styles, and our values. But the writing of "The Oven Bird's Song," like the production of much scholarship, reflects the intersection of the author's autobiography with the ideas and intellectual influences of the day.

As I try now to explain the origins of this article, I find myself attempting to weave these four influences together into a plausible account. No doubt, the narrative I offer here is itself a product of the same four influences even as I write it down. Our explanations and self-justifications become part of an endless regression, frames within frames. But this is the best I can do at this time and at this stage in my own life, offering a version of events that occurred many years ago, seen now through the eyes of a person closer to the end than the beginning of his scholarly career.

In college and, briefly, in graduate school, I had been an American Studies student. In that sense, it is completely unsurprising that I would later join the small cohort of law and society scholars in the 1970s who decided to explore law and conflict in American communities. But in another sense, it was highly improbable that events in my life should have taken me in this direction. Circumstances had actually led me to drop out of my graduate program in American Studies at Yale at the height of the Vietnam war, travel to Thailand in the Peace Corps, and then, after coming back and finishing law school, return a second time to Thailand to conduct research on a court and community there. In other words, my first scholarly undertakings had everything to do with Asia and very little to do with American Studies or, for that matter, with America. After writing two monographs on Thai law, culture, and history, however, a somewhat random chain of events led to my first job at the American Bar Foundation (ABF), where it was assumed that I would focus primarily on US topics. I felt fortunate indeed to be employed by an institution that expected nothing more of me than fulltime research and writing - and which provided substantial resources to carry out my work. I had ample time
to design my Sander County study, obtain additional funding from the National Science Foundation, and then launch a multi-year ethnographic study of an American court and community. But what now seems obvious in retrospect is that the Sander County study was heavily influenced by my work in Thailand. I was both surprised and delighted to discover that, in their aversion to litigiousness and in their nostalgic evocation of a conflict-free community, the residents of Sander County talked and behaved in so many respects like the residents of Chiangmai. It is only a slight exaggeration to say that, in my mind, the farmers of Sander County were Thai villagers in overalls.

As I have said, I was not alone in this circuitous journey. World and national events had led other law and society scholars of my generation to spend time abroad and then return home. We came back to see our own society through new eyes. The familiar really had become strange to many of us, and we were eager to rediscover American law and culture, drawing on our experiences in Sweden (Barbara Yngvesson), India (Marc Galanter and Robert Kidder), Chile (Stewart Macaulay), Kenya (Richard Abel), Brazil (David Trubek), Israel (Richard Schwartz), Lebanon (Laura Nader), Tanzania (Sally Falk Moore), and elsewhere. It is unlikely that such large numbers of sociolegal scholars working on American topics had undergone a prior immersion in a non-US culture in previous eras. Our outlook on American law and society reflected the shared experience of an entire generation.

But it is also worth asking why so many of us were drawn to "law and society" as the lens for viewing our culture. What was the unique attraction of this emerging interdisciplinary field as opposed to the more traditional disciplines of sociology, anthropology, political science, or law? In the 1970s, the US-based Law & Society Association (LSA) was taking shape. LSA had been incorporated in 1964, and the first issue of the Law & Society Review (LSR) had been published in 1966 under the editorship of Richard D. (Red) Schwartz. But the first standalone meeting of LSA, not held in conjunction with the annual meeting of another disciplinary organization, occurred a decade later – in Buffalo in 1975 – and regular annual meetings of the LSA did not commence until 1978. Thus, LSA attained its formal organizational identity at the very time that my research in Sander County was underway. LSA's influence on my work cannot be overstated, and I am quite sure that other colleagues conducting fieldwork on law in American communities would say the same thing about their own research.

Sociolegal scholarship had, of course, been around long before the 1970s, and sociolegal centers and associations had arisen elsewhere in the world – the Japanese Association of the Sociology of Law, for example, was founded in 1947. But for US-based scholars in the 1970s, LSA had a unique attraction.
It was not only interdisciplinary — fostering highly productive conversations among researchers from many different scholarly backgrounds — but also comparative. The founding figures included North Americans with extensive experience abroad and also a group of non-North Americans whose work was highly influential in the development of LSA — scholars such as Upendra Baxi, Boaventura de Sousa Santos, Neelan Tiruchelvam, and others. The most prominent sociolegal research paradigm in the 1970s was “dispute processing.” LSA scholars of that era, regardless of their home disciplines, shared the assumption that disputes were a universal unit of analysis whose study would be valid in any place, time, and legal context. In a very significant way, dispute processing became the foundation on which LSA was built. From the individual dispute, one could extend the analysis as necessary to every other aspect of law and culture in order to explain how conflict arose and was handled, whether within the formal legal system or outside it. Influenced by Llewellyn and Hoebel’s classic study of the “trouble case” among the Cheyenne,6 research on dispute processing in the 1960s and 1970s fostered a vibrant body of theoretical and empirical literature, much of it published in the pages of LSR.7 This literature shaped the field, and the field shaped those of us who entered it.

When I first embarked on my own scholarly career, I had no knowledge of LSA as an organization or the research literature associated with it. If anything, I fancied myself a historian of Southeast Asia with an interest in the advent of legal modernity in Thailand. Sheer happenstance led me to the law and society field. After graduating from law school, I received a fellowship to return to Thailand, where I had lived for three years as a Peace Corps volunteer. I planned to spend a postgraduate year in Chiangmai, the historic northern capital, to document the establishment of Thailand’s European-style court system under King Chulalongkorn in the late nineteenth and early twentieth centuries. Before leaving for Thailand, I happened to visit my


cousins, Robin and Jim Magavern, in Buffalo. They shared my love of Southeast Asia, had lived and worked there themselves, and had even slept on the floor of my little Peace Corps house in southern Thailand. Jim, a valued mentor, told me about a colleague at the UB law school I should meet. An hour later, I was sitting in the Magaverns’ living room talking with a young law professor named Marc Galanter, and a new field opened up for me. Marc rattled off the names of a dozen people I should read and correspond with – people such as Dan Lev, Rick Abel, Bob Kidder, June Starr, Dave Trubek, and Barry Hooker. To my amazement, all of them answered my letters – this was before the age of email, of course. I quickly found myself part of the emerging law and society network, and there I discovered a set of theories and methods that helped to explain Thai law and culture much better than anything I had learned in law school. When I arrived back in Chiangmai and learned that the historical records I sought did not exist, my grounding in law and society research prepared me to change my project into a contemporary study of dispute processing centered in the local court but situated in its cultural and historical setting – and to combine the analysis of hundreds of case files with fieldwork interviews.

By the time I began work at the American Bar Foundation, I considered myself as much a law and society scholar as a Thailand specialist. The transition from research based in Chiangmai to research based in Sander County seemed quite natural. As the LSA began to hold annual meetings on a regular basis, I met other like-minded colleagues with similar personal stories. In particular, I found myself on panels with two young anthropologists named Barbara Yngvesson and Carol Greenhouse. All three of us had independently conducted our own studies of American courts and communities. We soon realized we were completing one another’s sentences and influencing one another’s ideas. Later we decided to write a single book about our three communities, combining our insights from different regions of the country.\(^8\) Sheer happenstance, but also the result of intellectual and institutional developments beyond our control. Free will or determinism? I’m not sure.

As I began to write about the Sander County research, the intellectual climate had changed within LSA and in the related disciplines. Originally, I had thought my aim was to map disputes in Sander County as they emerged from the social milieu and traveled to different forums, in some cases all the way to the court. That is what the first draft of “The Oven Bird’s Song” looked like. But this paradigm felt less and less satisfactory as time went on. In the late 1970s and early

\(^8\) Carol J. Greenhouse, Barbara Yngvesson, and David M. Engel, Law and Community in Three American Towns (Cornell University Press, 1994).
1980s, the so-called “interpretive turn” began to change the thinking of many in the law and society field. The writings of Clifford Geertz have become overly familiar to us today, and some of his most felicitous turns of phrase have become clichés — nowadays, who doesn’t claim to do “thick description”? But in the 1970s, Geertz had a liberating impact on law and society research and encouraged us to see behavior and practice as inseparable from meaning. As he wrote, the analysis of culture is “not an experimental science in search of law but an interpretive one in search of meaning. It is explication I am after, construing social expressions on their surface enigmatical.”

Reading Geertz and other interpretivist theorists and responding to the paradigm shift underway in our field, I identified myself with a group of LSA scholars who struggled against the constraints of the conventional dispute-processing framework. I tried to ask different kinds of questions about the community where I had conducted my fieldwork. What was the meaning of the narratives offered by the longtime residents of Sander County? Why were they so often filled with anguish, anxiety, and loss? Why were the interviewees so concerned about the problem of litigiousness when law actually played such a negligible role in local injury cases? What were the words behind the words that the interviewees spoke?

A later draft of the article became my job talk at SUNY Buffalo, and I kept working on it after I moved to Buffalo in 1981. Once again, the institutional context proved crucially important. I doubt that any other law school in the country would have hired me on the basis of that presentation! But the UB law school, with its unique mix of critical legal scholars and law and society specialists, stood for something different. It had even hired as its dean a sociologist, Red Schwartz, who was an LSA founder and president. By the time I got there, both Red and Marc Galanter had left, but a group of remarkable colleagues were still determined to challenge traditional legal and social scientific ideas. Thomas Headrick’s deanship was an exciting time, before the long shadow of the US News and World Report rankings made legal academics afraid to defy convention. Settling for conventional scholarship in my new law-school setting almost felt like letting the team down. It was in this institutional climate that “The Oven Bird’s Song” took its final form, in conversation with my new colleagues — Fred Konefsky, Jim Atleson, Jack Schlegel, Rob Steinfeld, Guyora Binder, Virginia Leary, and others.

I should add that the title of the article, taken from a Robert Frost poem about the call of a woodland bird during a time of change and decay, was itself

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Afterword

a bit unconventional and caused some difficulty. Frost's poem depicted the bird's loud and inharmonious song as a response to a post-lapsarian world, when springtime is long past, "the highway dust is over all," and one is left to ask "what to make of a diminished thing." This poem seemed an apt expression of the worldview I found in Sander County, where the denunciation of litigation by longtime residents became part of what I called "a ceremony of regret" to mourn the loss of "an untainted world that existed nowhere but in their imaginations." During the publication process, however, I was told to change the title, not just because it was unconventional, but also because potential readers would have no idea what the article was about. I consulted a number of colleagues, particularly Felice Levine, who had been a close colleague at the ABF and tends to have excellent judgment about this sort of thing. Felice thought for a moment and then advised me to keep the title. "This might be an article," she said, "that people will read ten years from now, and they will see the title as part of its identity." That's why it's still called "The Oven Bird's Song."

CORE THEMES, PAST AND FUTURE

It is this backward motion toward the source,
Against the stream, that most we see ourselves in,
The tribute of the current to the source.
It is from this in nature we are from.
It is most us.

Robert Frost, "West-Running Brook"

After publishing "The Oven Bird's Song," I became, in Isaiah Berlin's terms, a hedgehog not a fox. I found myself returning again and again to the article's central theme: the radical disparity between "the mythology of modern law"10 and the actual tendency of rights holders to avoid lawyers, frame important issues in non-legal terms, and forgo claims when they suffered harm. Although law seemed to offer remedies for the problems facing many residents in Sander County, they viewed legal recourse in injury cases as a Catch 22. To make a legal claim was to identify themselves as uncultured – as outsiders to the community in which they sought acceptance. For those at the margins who lacked power and were most likely to suffer injustice, this posed a painful dilemma. Invoking the law seemed to deny them the very things it purported to offer: dignity, respect, and status.

Something similar was true of the men and women with disabilities whom Frank Munger and I interviewed in the 1990s. Many felt they had been treated unfairly and excluded, but they also worried that asserting their rights under the Americans with Disabilities Act to gain access to mainstream settings would simply reaffirm their identities as dependent and abnormal outsiders. Claiming legal rights took them through the looking glass – the faster they ran toward social justice, the farther they fell behind.11

When I returned to Thailand to explore changes in litigation and legal consciousness a quarter of a century after my initial research there, I expected to find at least modest growth in the invocation of legal rights among injury victims. After all, globalization is said to heighten people’s awareness of the rule of law as a resource to redress social wrongs. Much to my surprise, however, I found that the central theme of “The Oven Bird’s Song” – the avoidance of law and the positive value accorded to “lumping” – was even more evident than before. In Chiangmai Provincial Court I found fewer tort cases litigated per injury than was the case in the 1970s. Among injury victims, a new philosophy of karmic acceptance had replaced a centuries-old view that village-based wrongs demanded village-based remedies for the good of the entire community. Litigation now seemed selfish and anti-communitarian. For an injury victim to mobilize the law was to oppose fundamental cultural and religious values. Interviewees feared that legal claims would ultimately work to the disadvantage of the claimant and offer little in return. In short, economic development had disrupted longstanding customary law traditions, and “modern” legal institutions had failed to replace them in the minds of our interviewees.12

Pursuing the core themes of “The Oven Bird’s Song” has thus been a recurring preoccupation. My latest book, The Myth of the Litigious Society: Why We Don’t Sue,13 returns even more explicitly to the questions that animated “The Oven Bird’s Song” and illustrates my current perspective on tort law, culture, and legal consciousness in contemporary American society. Ample research over the past three decades has documented again and again that the vast majority of injury victims never make a claim of any kind against those who harm them. When injured, only a tiny percentage of Americans consult lawyers, file lawsuits, or even approach the injurers or their insurance

companies extrajudicially to request compensation. Lumping as default in injury cases has been confirmed in so many studies that its predominance is beyond dispute – although this fact conflicts directly with what most Americans believe about their own supposedly litigious society. In fact, most injury victims – more than 90 percent, at a conservative estimate – simply absorb the sometimes devastating costs and consequences of their mishaps and rely on their own resources, on friends and family, or on government benefits.

But what we don’t understand very well is why lumping is the predominant response to injuries in American society. My new book offers the results of a broad-ranging search for answers, not only in the law and society literature, but also in books and journal articles from rehabilitation science, nursing, anesthesiology, neuroscience, psychology, behavioral economics, anthropology, cultural studies, and other disciplines that study injury and pain, mind and body, human decision-making, law, and culture. These findings can be summarized in four general explanations of the tendency to lump injuries.

First, many injury victims are actively coping with trauma and pain, which disrupts their ability to make rational choices about the value of pursuing a claim as compared to lumping. Injury victims are not cool and dispassionate rational actors, pausing in the aisle of a grocery store to choose between two different brands of toothpaste. Physical injuries are exhausting and debilitating. It becomes difficult to think clearly. Injuries’ effects and treatment – including the use of powerful pain medications – can lead to social isolation and confusion. Furthermore, as Elaine Scarry has made clear, pain is difficult to communicate.14 The person in pain feels he or she has entered a new world impossible to describe to others. Injuries quite literally impair the use of language and thus make it exceedingly difficult to voice a claim. “Physical pain,” Scarry writes, “does not simply resist language but actively destroys it.”15 Cognitive scientists tell us that “we think with our bodies,” not just with our brains.16 But what happens when the bodies with which we think are damaged and in agony? Pain promotes lumping because it obstructs rational decision-making and makes it difficult to articulate and pursue a remedy.

Second, researchers in many disciplines have discovered that people who suffer pain and trauma have a baffling tendency to blame themselves above all else. They believe that somehow they must have caused their own misfortune, through carelessness or through some moral failure. Pain is punishment – not

15 Ibid, 4.
just etymologically ("pain" derives from the Latin *poena*, meaning punishment) but also psychologically and even theologically. Victims are not the only ones who feel intuitively that injuries must be their own fault; studies show that outside observers have the same perception. They tend to think that if someone has experienced injury, disability, or disfigurement, that person must somehow have deserved it. It follows that blaming the victim becomes a reason not to blame the injurer, no matter how culpable he or she may have been. The claimant’s supposed responsibility for the harm displaces and preempts the injurer’s responsibility. Lumping becomes the only appropriate response, even if the victim is only partly at fault—and even if tort law doctrine would allocate some of the blame to both parties.

Third, cultural practices and framing make many injuries appear “natural” even when they can be foreseen and easily prevented. Injuries are not objective facts; they are social constructs. Our culturally conditioned perceptions of injuries can make them appear a normal part of life and not at all an appropriate occasion for bringing a claim against anyone. For example, it took quite a while for people to see anything wrong with cars that lacked seat belts and air bags, since it seemed natural for passengers in a violent collision to be thrown from the car or through the windshield. And it is only in the past few years that people have begun to view vehicles without rearview cameras as defective, despite the thousands of children who were killed or injured each year by cars backing up. As Sarah Lochlann Jain has observed, every product, every activity, is encoded with a certain quantum of acceptable injury. But those codes are not necessarily legible to injury victims or to others. The suffering of individual victims appears inevitable until a consensus develops that their injuries are worth avoiding by the adoption of different, safer ways of doing things. Moreover, the machinery of cultural production that constructs injuries as natural or unnatural is more accessible to the Haves than the Have-Nots, for all the reasons Marc Galanter first explained in “Why the Haves Come Out Ahead.” Repeat players and potential tort defendants have a much greater capacity to persuade the public that injuries are unavoidable. When an injury is naturalized, lumping by the victim appears to many Americans to be the only sensible response, and claiming appears absurd.

Fourth, the infrequency of claims also results from the social stigma that attaches to those who challenge their injurers directly. Tort litigation has acquired a very bad name, and tort litigants are belittled. Social stereotypes


Galanter, *Why the Haves Come Out Ahead*. 
portray injury claimants and their lawyers as greedy, whining, dishonest, and dishonorable. Think of Saul Goodman in *Breaking Bad*, who keeps a box of neck braces in his office to help his clients exaggerate (or fabricate) their injuries. Think of Walter Matthau as lawyer “Whiplash Willie” in *The Fortune Cookie*, encouraging Jack Lemmon to fake partial paralysis after a Cleveland Browns football player runs over him at a game. Longstanding negative images of tort plaintiffs and their lawyers have been magnified by a highly effective PR campaign waged by tort reform advocates since the 1980s with ample funding from tobacco companies, other large corporations, and insurance companies. William Haltom and Michael McCann have documented how the tort reform campaign permeated the mass media and shaped societal understandings of tort litigation.¹⁹ Our culture is saturated with negative perceptions of injury victims who bring claims. These stereotypes influence potential claimants as well as the family and friends who advise them. Lumping is the predictable result in a culture that stigmatizes people who bring claims instead of the people who cause them harm.

These are the explanations for lumping that I offer in my latest book. My interest in the problem has roots extending back to “The Oven Bird’s Song.” Since my article was published in 1984, we have learned that Sander County was not a unique cultural throwback or a quaint rural exception to the general rule of American litigiousness. Sander County spoke more broadly to American culture and to our legal consciousness as a society – a point that Carol Greenhouse, Barbara Yngvesson, and I tried to make in our combined study of communities in three different parts of the country, whose residents shared an aversion to litigation and explained their reasons in similar words.

Despite the obvious continuities between “The Oven Bird’s Song” and my latest book, there are some differences that reflect changes in the field and in my own thinking about the problem of legal culture and consciousness. For example, the first explanation of lumping described above – the alienating and disabling effects of trauma on potential claimants – was not apparent to me thirty years ago. Indeed, I taught torts and wrote about legal consciousness for many years without properly appreciating the significance of the fact that tort plaintiffs tended to be persons in physical pain. Even worse, after conducting research among persons with disabilities, I utterly failed to put two and two together and recognize that disability was a common result of tortious injuries. A number of the people with disabilities whom Frank Munger and I interviewed in the 1990s were former injury victims. Their ambivalence

about law was very closely connected to the ambivalence I had previously encountered in Sander County, although I didn't see the relationship at the time.

On the other hand, the second explanation for lumping — victim-blaming and self-blame — was at least partially apparent to me at the time of my Sander County research. As described in “The Oven Bird’s Song,” when I told one of the community observers about the little girl in Sander County who had been seriously harmed by an “attractive nuisance,” he rather coldly blamed the child by commenting that he would “figure that the kid ought to be sharp enough to stay away” from the hazard.20 And sure enough, the mother in that case eventually came around to the view that she herself was to blame for not watching her daughter closely enough. I was not prepared at that point to generalize about the significance of self-blaming and victim-blaming, but in my new book, drawing on additional research from a variety of disciplines, I was ready to conclude that blaming the victim is one of the most powerful explanations for lumping in injury cases.

The third explanation for lumping — the naturalization of injury — was also partially evident to me at the time of “The Oven Bird’s Song.” From my discussions with farming families, I learned that these stoic and admirable oldtimers considered injuries a part of life. Farming was hard work, and it involved dangerous machinery. Injuries and pain were familiar hazards, though risks could be reduced if one was careful (again, the importance of self-blame!). But it was “normal” to experience painful accidents, and what was “abnormal” was to view those mishaps as potential windfalls and to convert them into demands for compensation from someone else. As I wrote in “The Oven Bird’s Song,” “money was viewed as something one acquired through long hours of hard work, not by exhibiting one’s misfortunes to a judge or jury or other third party, even when the injuries were clearly caused by the wrongful behavior of another.”21 Unless injuries were perceived as an exception, as contrary to the natural order, they would not be viewed as an occasion to assert a claim. My new book presents numerous examples of the naturalization of injury, but the original insight is rooted in my experience in Sander County.

The fourth explanation for lumping — the stigmatization of claiming in a culture that disvalues tort litigation — owes everything to my research in Sander County. The light bulb that went on as I was reading Geertz while struggling to write “The Oven Bird’s Song” was the realization that so-called

20 Engel, The Oven Bird’s Song, p. 570. 21 Ibid, 559.
American litigiousness was not an objective fact but a symbolically important myth. This was the meaning of the song that the oven bird sang—it expressed nostalgia for an imagined world before the economy shifted away from agriculture, before "strangers" entered the community, before racial and ethnic diversity became visible on the main street of the town. It extolled lumping because claiming was a sign of cultural decline.

Surely this deep connection between the myth of litigiousness and the resentment of a modern, globalized, multicultural society is even more evident today than it was thirty years ago in rural Illinois. Today, the discourse of social decay is everywhere. The stigmatization of tort claimants makes injury victims even more fearful of demanding their rights. In Sander County, the norms opposing tort claims created a symbolic wall to separate insiders from outsiders in a changing community. Today, the call for moral rectitude has taken on even greater urgency in the face of social changes many Americans find confusing and threatening. One might think that moral rectitude would mean invoking the law and conforming to it, but for personal injury victims it means just the opposite. The morally upright person is one who abstains. He or she refuses to mobilize the law when injured by another. The paradox is compounded when we realize that people who oppose invoking the law against tort defendants tend to be the same people who applaud using the law against criminal defendants who injure others. Using the law to sanction injurious behavior is not in itself a signifier of moral depravity or societal decline; it is the use of law by the wrong people against the wrong defendants in the wrong kinds of cases. Those whose lives are transformed by pain and trauma are told to endure their misfortune and not to challenge those who harm them. In 2016 there is much less tort litigation in state courts and more lumping than there was thirty years ago, when "The Oven Bird's Song" was published. In this sense, America has become Sander County writ large.

The question remains as important and complex as ever—can or should the law play a role when pain disrupts the relationship between self and community? Pain isolates its victims from society, it destroys their relationships with others and their ability to communicate, and too often it leaves them destitute or with a greatly reduced capacity to earn and to thrive. And the pain of accidental injuries does not fall equally on the rich and the poor alike. Statistically speaking, risk flows down the social hierarchy and pools among the least privileged. Have-nots are exposed to more accidental injuries than the have-nots, yet they are the ones least able to bear the after-effects of serious harm. What a terrible irony, then, that the effort to seek a legal remedy frequently reinforces the injury victim's identity as socially marginal, as inferior, and as culturally alien. It remains an urgent task for law and society
scholars to understand the cultural meaning and social consequences of painful and damaged bodies— for individuals, for entire communities, and for justice.

Research on tort law and society has advanced considerably in the past thirty years, but there is so much left to discover. My research growing out of “The Oven Bird’s Song” has focused primarily on physical injuries, despite our growing recognition of non-physical harms to reputation, privacy, and emotional well-being. In my next project, I hope to remedy this shortcoming, but other law and society scholars are already leading the way.22 It is always useful and gratifying to revisit the past, but the future of law and society scholarship is full of promise, as exemplified by the scholars who have contributed to this volume. Law and society researchers will continue to explore the most important sociolegal myths that prevail in our society. But, equally important, they will expand our theories about law and deepen our understanding of when and how law actually matters. What is true of tort law is equally true of other fields—the human side has been largely neglected in favor of explicating theories and rules that often have little practical relevance to the individuals whom law is meant to serve. If it is true that the vast majority of injury victims simply lump their misfortunes, if they never bring a claim of any kind against their injurers, then we must reconsider both the value and the efficacy of a great deal of tort law doctrine. Law and society research at its best forces us to question the obvious, to reassess prevailing legal practices in the light of actual behavior, and to remember that the law concerns real human actors, not fictional beings such as the reasonable person or the rational actor.

Too seldom do we hear the real voices of injury victims. What do pain and trauma mean for their lives? What are their anxieties, feelings, and concerns? How do power relationships affect the risks they face and their responses to harm when it occurs? I am confident that the next generation of law and society scholars will continue to take full advantage of the countless opportunities for research on injuries and on other pressing issues relevant to law in the lives of ordinary people. In the last analysis, “The Oven Bird’s Song” was no more than a single response to this wealth of topics awaiting the attention of law and society researchers. It was shaped by the inspiring work of contemporaries and forebears and it was given meaning by the scores of imaginative studies that followed. It offered the portrait of a community, but it was also the product of a community of colleagues to whom I remain forever grateful.

22 See, for example, Samantha Barbas, Laws of Image: Privacy and Publicity in America (Stanford University Press, 2015).