

Some “What If” Thoughts: Notes on Donoghue v Stevenson

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Commentary

SOME “WHAT IF” THOUGHTS: Notes on *Donoghue v Stevenson*

ALLAN C. HUTCHINSON*

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“All the ancient histories, as one of our wits say, are just fables that have been agreed upon.”

—Voltaire

* Distinguished Research Professor, Osgoode Hall Law School, York University, Toronto, Canada. This short commentary is based on a talk I gave in May 2012 at a conference celebrating the 80th anniversary of *Donoghue v Stevenson*; it was held in Paisley, United Kingdom and organized by the University of West Scotland. I am grateful to Derek Morgan, Cynthia Hill, Jennifer Leitch, and Ian Langlois, as well as other friends and colleagues, for their critical assistance and intellectual support.

DONOGHUE V STEVENSON IS so well known that its facts and judgment need little further rehearsal or rendition.¹ Indeed, the case and its aftermath are some of the most documented in the long common law tradition. Many treat *Donoghue* as if it were the greatest of all “great cases.”² That being said, a vibrant debate about the precise meaning and ambit of its legacy still continues, especially regarding the putative leading judgment of Lord Atkin and its influence on the development of the common law of tort. Indeed, part of *Donoghue’s* greatness is considered to be its almost Delphic sweep and interpretive elusiveness; its importance is matched by and reinforced by its indistinctness. However, there is a tendency to approach the case as if its origin and later pre-eminence were somehow preordained—that it was always destined to be great and that it exerted its huge influence by dint of its irresistible rationale and inevitable effect.

Yet this assessment seems to depend on a very crude depiction of both the evolution of the common law and social history generally. The assumption seems to be that law is a rational exercise that is largely set apart from social history and that both law and social history unfold in a reasonably orderly, if unconnected, manner. This Whiggish sense of inevitability to the path of both law and social history is mistaken and misleading. Far from being a prime example of law and history’s methodical and almost inexorable operation and development, *Donoghue* is better understood as an occasion on which one can glimpse law and history’s organic and catch-as-catch-can quality. In short, *Donoghue* is a great case that illustrates the contingent nature of law, greatness, and history. Despite appearances to the contrary, *Donoghue* (and Lord Atkin’s judgment in particular) is not tantamount to a jurisprudential sermon on the mount that wields its influence and authority by that fact alone.

In this commentary, I look at *Donoghue* and its legacy through the lens of a different and speculative kind of inquiry. I seek to isolate what was and was not important about *Donoghue* in exploring the development and dynamics of legal change; the focus is upon asking *what if* the case had not unfolded in precisely the way that it did and *what if* there had been some slight changes in the surrounding circumstances and the *dramatis personae*. This may seem a rather obscure and elliptical approach to the case and the common law. However, this way of proceeding might allow a more critical and less trite analysis of how cases achieve greatness and how the developmental process of the common law works. Indeed, answering these “what if” questions demands confronting, if not resolving, some very big questions about law, law and society, and their change.

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1. [1932] AC 562, 101 LJPC 119 [*Donoghue* cited to AC].
 2. For my own account, see Allan C Hutchinson, *Is Eating People Wrong? Great Legal Cases and How They Shaped the World* (New York: Cambridge University Press, 2011) ch 6.

I. REIMAGINING HISTORY

Alternate or counterfactual history exists somewhere in that shadowy intellectual zone between the more familiar and traditional domains of fact and fiction. In attempting to explore a number of “what if” situations, this intellectual approach takes an authentic or agreed-upon point in history, posits some slightly different factual assumptions, and then spins out an alternate or competing narrative account of how events might have worked out differently (or not). While this approach can be utilized as an entirely fictional and imaginative endeavour,³ it can also be used to serve more strict and rigorous historiographical ends. The latter is achieved by isolating certain events or focusing on the role of a particular person in the traditional historical account, imagining that that event had not happened or that person had not existed or had acted differently, and then seeking to evaluate whether history might or might not have unfolded differently. In this way, the relative importance of any particular event or person can be better measured or adjudged.⁴ As such, this disputed mode of historiographical analysis can contribute to more nuanced and informed accounts of history. Imaginative reconstruction can be combined with factual reporting to offer a more revealing and suggestive account of history. In particular, it can be deployed to help isolate what might be central and what might be peripheral to the unfolding and explanation of specific events that did occur.

For example, a continuing debate in history and related disciplines is over the extent to which certain historical figures were essential to the historical record and dynamic of the twentieth century: Would there have been a Holocaust if Hitler had not existed? Would apartheid have been swept aside in South Africa without the leadership of Nelson Mandela? Or would India’s independence have occurred differently if Mahatma Gandhi had not been around? In sum, what if these characters had each fallen victim to some childhood illness or accident that had ended their lives? Would history have turned out fundamentally differently? Or, to put it another way, what if these figures had existed, but at a different place and time? Would their impact have been as significant or even noticed? While these questions obviously do not have definitive answers, a serious consideration of them does oblige a critical reassessment of certain accepted truths.

3. For two famous examples of alternative history in literature, see Vladimir Nabokov, *Invitation to a Beheading* (Toronto: McGraw-Hill International, 1969); Philip Roth, *The Plot Against America* (New York: Houghton Mifflin Company, 2004).

4. See e.g. Niall Ferguson, ed, *Virtual History: Alternatives and Counterfactuals*, revised ed (New York: Basic Books, 1999); Martin Bunzl, “Counterfactual History: A User’s Guide” (2004) 109:3 *Am Hist Rev* 845.

More broadly understood, these “what if” questions raise the historiographical chestnut of the relation between individual agency and broader social forces in their shaping of history. Any answer to the stated questions will both depend on and illuminate what is thought to be the balance between human personality and social circumstance. By positing an alternative history in which these people did not exist or acted very differently, it becomes possible to provide a more subtle, if indeterminate, assessment of the respective roles that personality and social dynamics played. While it seems reasonable to concede that events may not have happened in exactly the same way without these individuals, it seems a stretch to suggest that the larger historical pattern and outcomes would have been vastly different: Nazi Germany was not only about Hitler; South African apartheid was wobbling anyway; and India, like other colonies, would likely have achieved independence at some similar point in time. Yet, this assessment may itself reveal certain contested assumptions and propositions about historical development and change. Accordingly, it is important to remain open to the broader historiographical debate in offering more focused accounts of particular historical events.

That said, what are the uses and consequences of applying this alternative or counterfactual thinking to *Donoghue*? What can such an approach do to provide new or telling insights into the case, the common law, and the relationship between law and society? Of course, the nature of this jurisprudential inquiry is unavoidably conjectural and inconclusive. Nevertheless, by isolating a series of occurrences and the roles of particular people, this inquiry might uncover some suggestive and hidden insights into how law develops and how law and society interact over time. Accordingly, the ambition of this commentary is not to offer definitive or grand answers to some perennial questions of jurisprudence. Instead, its more modest goal is to shed some light on one episode in the contingent and experimental drama of the common law.⁵ It will be for others to determine the cogency and suggestiveness of my provocations for a broader account of the common law’s changing doctrines.

II. BEER AND SNAILS

A first question to ask any theorist of the common law might be: Would the history of tort law have been significantly different if May Donoghue had not gone to the Wellmeadow Café on that summery August evening? Of course, this would

5. For more on a broader understanding of the common law and society, see Allan C. Hutchinson, *Evolution and the Common Law* (New York: Cambridge University Press, 2005).

mean that *Donoghue* would not have entered the law reports. So, to that extent, at least, the history of tort law would be different. However, it does not follow that the history of tort law would be different in some fundamental or substantive way—whoever drank that fateful bottle of ginger beer might well have initiated similar litigation, or Donoghue or another person might have consumed some other noxious substance in similar circumstances on a different date. To address and unpack these particular queries, it is necessary to move quickly to some deep and contestable issues about how law changes and takes shape and how the relationship between legal doctrine and social conditions is understood. While it is hard to conclude that a general tort of negligence would not have seen the doctrinal light of day if Donoghue had not gone to the Wellmeadow Café, it is also unconvincing to imagine that everything would have nonetheless unfolded in much the same way.⁶

The next task is to distinguish between those events and personalities that might have had some alternative effect on the law's development and those that might not have had such an effect. For instance, while the non-involvement of Lord Atkin or Walter Leachman (Donoghue's lawyer) might well have had a significant impact on what occurred and followed, it is much more difficult to speculate that the non-involvement of Lord Tomlin or Wilfrid Normand (David Stevenson's appellate counsel) would have had a significant effect. However, even this distinction is open to challenge and can be seen to depend upon larger assumptions about the dynamics of historical change. Was it important that Donoghue went to the Wellmeadow Café as opposed to another establishment? That she had a ginger beer as opposed to another beverage? That her friend paid for the drink and not her? All these elements will take on particular significance and resonance depending on what a commentator's historiographical commitments are about the progress of law, society, and history.

So, for the sake of argument, it might be assumed that the involvement of Lord Atkin and Leachman was significant for both the *Donoghue* litigation itself and its subsequent elevation to a "great case." From an alternative history perspective,

6. Of course, there is an analogue to all this in so-called chaos theory in which the butterfly effect is given pride of place (*i.e.*, in deterministic non-linear contexts, large systems are sensitive to changes in their initial conditions such that a very tiny change in one place can bring about vast changes throughout the systems). See Edward N Lorenz, "Predictability: Does the Flap of a Butterfly's Wings in Brazil Set Off a Tornado in Texas?" (Address delivered at the 139th Meeting of the American Association for the Advancement of Science, Washington, DC, 29 December 1972), [unpublished], online: Massachusetts Institute of Technology, Earth, Atmospheric and Planetary Sciences <http://eaps4.mit.edu/research/Lorenz/Butterfly_1972.pdf>.

the key issue would be not only whether this involvement was significant, but also how significant it was: What if Leachman had not championed Donoghue's plight? What if there had been a different bench of law lords? What if Lord Buckmaster's pinched judgment had won out over Lord Atkin's more expansive effort? Or, what if later judges and lawyers had taken more of a shine to Lord Macmillan's judgment than Lord Atkin's? As focused as these questions might be, they do offer a keyhole glimpse into the wider world of jurisprudential debate about how the common law changes—what is the nature of the relationship between the common law's development and changing social dynamics?

Almost all legal scholars maintain that the substance and development of law are relatively autonomous (*i.e.*, they are neither entirely beholden to nor completely independent of socio-economic forces). However, this proposition is so trite and capacious as to be almost meaningless. There is a world of difference between a stance that maintains that law is primarily separate from society but is partly determined by it, and one that insists that law is primarily determined by society but is partly separate from it. So, while it might well be that law has some relative autonomy from its larger social and historical context, the more compelling questions are about how relative and how autonomous it is. Accordingly, it is incumbent on legal scholars to give some substance and specificity to the claim about law's relative autonomy. A "what if" approach is one way to contribute to that jurisprudential task.

The challenge, of course, is to determine why *Donoghue* did take place and unfold as it did as much as why it might not have done so. There had to be a certain confluence of forces and findings in place for the considerable shift to a tort of negligence to occur at all.⁷ Unless one is a dyed-in-the-wool legalist, it beggars belief to imagine that negligence's introduction and acceptance was simply a matter of internal and intellectual engagement within the legal community; there were definite political leanings and social values in place that made the creation of a tort of negligence more likely than not or, at least, that made its creation less than unacceptable to the judicial profession. As Lord Esher had stated almost fifty years earlier, "[A]ny proposition the result of which would be to show that the Common Law of England is wholly unreasonable and unjust, cannot be part of the Common Law of England."⁸ Moreover, *Donoghue* is an extension of a principle that Justice Benjamin Cardozo articulated in 1916 in the American case of *MacPherson v Buick Motor Co.*,⁹ to which the judges in

7. See Robert L Rabin, "The Historical Development of the Fault Principle: A Reinterpretation" (1981) 15:4 Ga L Rev 925.

8. *Emmens v Pottle* (1885), 16 QBD 354 at 357-58, 50 JP 228.

9. 217 NY 382, 111 NE 1050 (App Ct 1916) [*MacPherson*].

Donoghue referred.¹⁰ This might lead to the conclusion that, even if *Donoghue* had not seen the doctrinal light of day, the courts would have found another occasion on which to develop the intellectual roots of negligence and to tap into the prevailing milieu around what is “reasonable” and “just.”

It also bears noting that, contrary to common understanding, *Donoghue* did not release tort liability for negligence onto an unsuspecting legal world. While contract was the primary mode of civil obligation in the 1930s, there existed a patchwork quilt of statutory and judicial schemes of tort liability that imposed on actors a range of duties to take care. While *Donoghue* extended negligence liability to some new areas and grounded tort liability where none had existed previously, it also reduced liability in other old areas from its existing strictness to a more negligence-focused liability. As is so often the case with the common law, two steps forward was accompanied by one step back; the path of the common law is not the unidirectional or straightforward one that many envision or wish for.

III. LORDLY MATTERS

Even if Lord Atkin had not sat on the *Donoghue* bench (or Lord Tomlin had sided with Lord Buckmaster), the tort of negligence might well have emerged, albeit not in the majestic form of the “neighbour” principle. In his supporting judgment (and what is considered the swing vote), the recently appointed Lord Macmillan refused to go as far as Lord Atkin in extending liability to all negligent actors; he confined himself to the manufacturer-consumer relationship in his imposition of negligence liability aside from contract. However, as well as finding against Stevenson on the basis of negligence, he did throw down the doctrinal gauntlet to later generations of judges and jurists by declaring that “[t]he categories of negligence are never closed.”¹¹ Similarly, Lord Thankerton was more tentative than Lord Atkin, but hinted strongly at the possibility that a duty of care might exist more generally even if it is “impossible ... to catalogue finally, amid the ever varying types of human relationships, those relationships in which a duty to exercise care arises apart from contract... .”¹² Indeed, Lord Macmillan and Lord Thankerton’s less daring and more step-by-step approach might well have been more in line with the traditional incrementalist spirit of the common law.

10. See *Donoghue*, *supra* note 1 at 577.

11. *Ibid* at 619.

12. *Ibid* at 603.

Also, it was surely not the rhetorical potency of Lord Atkin's bold judgment alone that carried the day and made *Donoghue* into a great case. For *Donoghue* to rise to its historic status, there had to be a few generations of judges and jurists (and, of course, society at large) who bought into the idea and practice of an expanding principle of negligence liability. Although the reaction to the law lords' decision in *Donoghue* was predictably mixed, there was more support than criticism. Among the legal community, it was celebrated as a necessary step forward in negligence law and as a decision that brought the law more in line with contemporary sensibilities. The eminent Sir Frederick Pollock praised the "Scots Lords," including Lord Atkin, in the *Law Quarterly Review* for "overriding the scruples of English colleagues who could not emancipate themselves from the pressure of a supposed current of authority in English Courts."¹³ Insofar as the decision pierced public consciousness, there was warm approval. Whereas the newspaper *The Scotsman* wrote that the decision "should be welcomed by the public,"¹⁴ the *Law Times* said that the decision was "revolutionary" and represented a "radical change" in tort law that was "strictly in accord with the needs of modern economic times."¹⁵

The staying power of Lord Atkin's neighbour principle can be attributed to an organic combination of its intellectual appeal and its socio-political acceptability. Although the House of Lords wavered in its commitment to a principled articulation of tort law, it often sought to satisfy Lord Atkin's aspiration to identify "some general conception of relations giving rise to a duty of care, of which the particular cases found in the books are but instances."¹⁶ Most boldly, in *Anns v Merton London Borough Council* in 1977, Lord Wilberforce declared that it was no longer necessary to proceed on a case-by-case basis.¹⁷ Instead, he said courts should ask "whether ... there is a sufficient relationship of proximity or neighbourhood" between the harmed plaintiff and the negligent defendant.¹⁸ If so, a prima facie duty of care is established unless "there are any considerations which ought to negative, or to reduce or limit the scope of the duty..."¹⁹ And, as late as 1990 in *Caparo Industries plc v Dickman*, the House of Lords revised Lord Atkin's neighbour principle to encompass public policy concerns such that, even

13. "The Snail in the Bottle, and Thereafter" (1933) 49:1 Law Q Rev 22 at 22.

14. (27 May 1932), cited in Allan C Hutchinson, *Laughing at the Gods: Great Judges and How They Made the Common Law* (New York: Cambridge University Press, 2012) at 124.

15. (1932) 173 LT 411, cited in *ibid.*

16. *Donoghue*, *supra* note 1 at 580.

17. (1977), [1978] AC 728, [1977] 2 All ER 118 [cited to AC].

18. *Ibid* at 751.

19. *Ibid* at 752 [citations omitted].

if foreseeability and proximity or neighbourhood are found to be present, a duty of care will only arise when it is “fair, just and reasonable that the law should impose a duty of a given scope upon the one party for the benefit of the other.”²⁰

Furthermore, even if we assume, contrary to fact, that Lord Atkin’s judgment did not prevail over Lord Buckmaster’s narrower and more skeptical judgment, it is by no means certain that a tort of negligence would not have become part of the law. Lord Buckmaster’s opinion may have galvanized opposition and given life to a political momentum to establish an even more expansive tort of negligence or even strict liability. Indeed, it has to be remembered that Lord Buckmaster, who had been a relatively progressive and experienced Liberal politician in the 1920s and 1930s, was as concerned with corralling the activist role of courts in a democracy as he was with stymieing the creation of the substantive tort of negligence itself. Against the political and social context of the time (in which the welfare state was midwived), it is hard to resist the conclusion that the government might well have introduced some form of legislation to do exactly what Lord Atkin’s opinion did for negligence liability in the common law.

Accordingly, asking questions from a counterfactual or alternate history can help to illuminate or, at least, hint at those historical circumstances and personalities that were likely more required than not for a *Donoghue*-like principle to become part of the common law. There is nothing scientific or determinative about such an approach, but it does enable a more critical perspective that avoids a knee-jerk Panglossian response to each and every twist and turn of legal doctrine. The common law is constantly moving, but never arriving anywhere in particular.

IV. BROADER CONSIDERATIONS

One way to approach the issue of what is and is not important in determining the role of *Donoghue* and its component parts in the development of negligence liability is to gather together all of the case’s pertinent and contextual features and then ask which ones are essential to the development of a tort of negligence and which are not. On such a basis, while it is clear that some small changes would undercut the importance and even existence of *Donoghue* as a landmark case, it is less obvious which changes would be sufficient to prevent completely the establishment of a tort of negligence. In other words, while some small changes in character and circumstances might effectively nullify the impact of *Donoghue*

20. [1990] 2 AC 605 at 618, [1990] 1 All ER 568, Bridge of Harwich LJ.

itself and its doctrinal template, it would require much more substantial changes to prevent entirely the introduction of negligence liability into English law over the following decades. So, for instance, although Lord Atkin's presence or absence in the case might prove to be important in mapping out exactly how the law would have developed without his neighbour principle, it is far from conclusive that a similar tort of negligence would not have seen the light of day.

It is a considerable analytical stretch to insist that Lord Atkin's involvement alone was pivotal to the development of negligence liability in English law and that, without him, there would have been no tort of negligence. After all, the tort of negligence did take hold in American law around the same time as *Donoghue*.²¹ At the risk of sounding silly, it is apparent that Lord Atkin played no role in such an occurrence; the case occurred in another jurisdiction and several years before *Donoghue*. This strongly suggests that it was less the particular characters and circumstances of *Donoghue* that drove English law's evolution towards negligence and more the social dynamics in play that propelled it towards negligence law. In short, the time was right and, if it had not been Lord Atkin, it might well have been someone else who seized the doctrinal day and laid down a test for duty or proximate cause. Of course, this argument raises the obvious difficulty of explaining why English law did not later take a similar turn to American legal doctrine in the 1960s. The California case of *Greenman v Yuba Power Products* in 1963 ushered in the doctrine of strict liability that soon took hold across the United States and replaced much of the jurisprudence on negligence.²²

Efforts to elucidate the divergence of legal doctrine between England's continuing adherence to negligence liability, especially for products liability, and the United States' move towards strict liability might take a number of routes. Two main ones come to mind: first, that different regimes of legislative protection were enacted for consumers in the two jurisdictions (*i.e.*, the English political landscape allowed for more consumer-friendly legislative interventions than the American political landscape); and second, that the practical application and judicial exception making that occurred rendered the apparently different legal doctrines more similar than different (*i.e.*, the American legal doctrine is less strict in operation and the English doctrine is more exacting than might be initially appreciated).²³ That said, there might well be a host of other explana-

21. *MacPherson*, *supra* note 9.

22. *Greenman v Yuba Power Products*, 59 Cal 2d 57, 27 Cal Rptr 697 (Sup Ct).

23. In *Donoghue* itself, Lord Macmillan was mindful to emphasize that he "rather regard[s] this type of case as a special instance of negligence where the law exacts a degree of diligence so stringent as to amount practically to a guarantee of safety." *Supra* note 1 at 611-12.

tions that pass historiographical muster. Again, it bears emphasizing that there is no theoretical formula or generalizable account that will work in all instances to explain historical development or what is needed to reach the tipping point for significant social or legal change.

Nevertheless, it does seem possible to draw some general observations about the role of *Donoghue* and its context in the history of negligence liability. The challenge is to do so without making extravagant claims about the overall evolution of legal doctrine across the jurisprudential board. Both society in general and law in particular are far too messy in their patterns and practices to be reducible to neat equations of cause and effect. The historical interaction between one feature of society and another cannot be described or formulated once and for all: “[T]he system as a whole has no single ideological imprint.”²⁴ The fact is that not only does law fail to conform to any internal or external deep logic, but also the specific relation between external forces and internal rationality resists generalization; no one account of that relation is valid for all time and all places. The development of the common law is neither serendipitous nor scientific. As such, the relationship between law’s development and changing social relations is more complicated and indeterminate than is usually allowed or conceded; it defies simple or consistent elucidation. Nonetheless, this does not preclude a profitable analytical account of one episode in the common law’s development.

While the history of English tort law might have unfolded differently if *Donoghue* had not walked into the Wellmeadow Café, if Leachman had not been on a mission to skewer Paisley’s ginger beer manufacturers, or if Lord Atkin had not been on the bench that day, it would not be so different a history looked at from today’s standpoint more than eighty years later. The path travelled may have been slightly different in timing and terrain, but the overall direction and destination would surely have been much the same. Is it really feasible to maintain that without these three personalities, the whole of negligence law would be entirely and meaningfully different?

None of this is to say that the involvement of *Donoghue*, Leachman, or Lord Atkin was not important. It was. They had a continuing impact on the fine texture and local development of the law. But the impact of particular individuals must be measured and assessed in light of the pervasive social and historical forces in play in 1932 and soon after. To prioritize individual personalities over

24. Duncan Kennedy, *A Critique of Adjudication: fin de siècle* (Cambridge: Harvard University Press, 1997) at 225-26. For a more fully developed account of this insight, see Allan C. Hutchinson, *It’s All in the Game: A Nonfoundationalist Account of Law and Adjudication* (Durham: Duke University Press, 2000) at 216-51.

social forces (and vice versa) as a general matter of historiographical principle is mistaken; each interacts with and influences the other. On another day and in another case, their involvement might well have been decisive. Accordingly, it can be concluded tentatively that the precise interaction of the general social forces in play and the particular situational dynamics in law can unfold very differently from one context to another. *Donoghue* is simply one chapter, albeit a significant one, in the evolution of the common law. The doctrinal story and plot of the common law might have experienced a significant twist as a result of *Donoghue's* occurrence or non-occurrence. Whether the law's tale would have turned out entirely differently over time seems possible, but unlikely.

V. CONCLUSION

As I was completing this short commentary, it was the fiftieth anniversary of John F. Kennedy's assassination. There was much talk about how things in the United States and the world might have happened differently if he had not died in Dallas in late November 1963. Would Vietnam have happened? Would the Cold War have played out differently? Would the push for civil rights have been stronger? And would Kennedy himself have become and remained the iconic figure that he is now perceived to be?²⁵ These are each fascinating and unanswerable "what if" questions. But their posing and the ensuing efforts to answer them do offer an occasion to muse on larger questions of historical judgment and historiographical insight. Kennedy was a "great man" by most standards. Yet, extant social and political forces of his presidency and its aftermath shaped, at least in some part, his contemporary status and later influence. In the same way that Kennedy and his legacy are inseparable from his and our times, so also is *Donoghue*. To attempt to detach the force of personality from the impact of larger currents is folly; to attempt to develop a grand account of how they work to constitute and reconstitute each other is also foolhardy.

25. See e.g. Robert Dallek, *An Unfinished Life: John F. Kennedy 1917-1963* (Boston: Little, Brown and Company, 2003); Robert Dallek, *Camelot's Court: Inside the Kennedy White House* (New York: HarperCollins, 2013).