

*Essay*

## An Observation and a Strange but True “Tale”: What Might the Historical Trials of Animals Tell Us About the Transformative Potential of Law in American Culture?

*by*

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As the title indicates, this Essay is based on an observation and a strange but true tale. The observation, which will probably strike many people as uncontroversial—perhaps even clichéd—is that law and legal procedures are at the core of American self-identity and are woven deeply into the fabric of our culture. This is not a new insight. Indeed, de Tocqueville’s famous observation that “[s]carcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question”<sup>1</sup> has been repeated so often that it has itself become a part of our national lore. Throughout the twentieth century, de Tocqueville’s

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1. 1 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 280 (Phillips Bradley ed., Henry Reeve trans., Vintage Classics 1990) (1835).

observation remained accurate. From the Scopes monkey trial to the trial of O.J. Simpson, from the national debate over abortion to the more recent clashes over doctor-assisted suicide, from the success of novelist John Grisham to the explosion of law shows on television, we can easily see that our national obsession with law continues unabated. And, even though lawyers are often objects of derision, when the chips are down, we Americans are apt to frame our struggles in the language of competing rights and to fight our battles in a legal forum. Perhaps Thomas Paine sealed our legalistic fate over 200 years ago when he decreed that, in America, law would be king.<sup>2</sup>

In recent years, some commentators have been critical of what might be called America's abiding legal faith. Self-proclaimed "communitarian" writers such as Mary Ann Glendon and Amitai Etzioni, as well as others,<sup>3</sup> have warned that our insistence on legal solutions is causing "the death of common sense," and encouraging us to become a society of litigants whose insistence on "rights talk" and litigation is thwarting our ability to reach consensus on social issues or instill shared values in our communities. In these scenarios, our legal faith has improperly supplanted other values: our faith in neighborliness, for example, or our belief in a unified American polity, our responsibilities to each other, or our willingness to solve problems through mutual understanding and compromise. We are told that, somehow, law is one of the culprits, perhaps the *primary* culprit, in the "disuniting of America."

There are two principal arguments that have been made in response to such criticisms. First, some contend that the premises underlying the criticisms are wrong. According to this view, it is a nostalgic fantasy to believe the United States *ever* consisted of a unified polity with shared values, and any effort to assert such values will merely impose a repressive and hierarchical vision of America on those with less political power. Second, it has been argued that, even though assertions of individual legal entitlements might sometimes trump majoritarian concerns, such results can nevertheless be justified on other grounds, perhaps as a matter of moral or political theory.

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2. THOMAS PAINE, *Common Sense*, in THE COMPLETE WRITINGS OF THOMAS PAINE 1, 29 (Philip S. Foner ed., 1969) (1945).

3. I have deliberately chosen critics writing for a popular audience because I intend this Essay to be a response to criticisms of law that appear to have considerable purchase within the public at large. I recognize, of course, that there exist a great number of other, more philosophical, critiques of the liberal legal tradition that are considerably more complex than the broadsides I discuss here.

Both of these responses may well have merit. However, I believe they are insufficient because they resolutely refuse to respond to those Americans who (whether correctly or not) experience our culture as increasingly fragmented, long for a sense of community consensus, and believe that legalistic thinking has been an integral part of our cultural dissolution. For those people, it will not do to say the perception is a nostalgic fantasy, and it may also be inadequate to insist that the various justifications *outweigh* the drawbacks to the community. Thus, I wish to propose another possible avenue of inquiry, which addresses more directly the concerns about our legalistic culture. My questions are: Instead of being seen as a necessary evil, can law<sup>4</sup> actually *help* us to heal rifts in our

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4. When I refer to “law” in this essay, I mean something very broad indeed. Not only do I refer to formal legal rules and procedures, but also to “quasi-legal” discourses and practices that sometimes straddle the law/entertainment boundary. See, e.g., Austin Sarat, *Imagining the Law of the Father: Loss, Dread, and Mourning in the Sweet Hereafter*, 34 LAW & SOC’Y REV. 3, 5-10 (2000) (arguing that sociolegal scholars must “take on” cultural studies by considering how law exists in a world of film and television images); Alison Young, *Murder in the Eyes of the Law*, 17 STUD. L. POL. & SOC’Y 31, 31 (1997) (exploring how law “appears and reappears in the cinematic text”); see generally Richard Sherwin, *Picturing Justice: Images of Law and Lawyers in the Visual Media*, 30 U.S.F. L. REV. 891 (1996). These include television court channels, legal talk shows, legal “thriller” novels and films, public memorials and ceremonies (such as the monument to victims of the Oklahoma City bombing or candlelight vigils to build community after hate crimes), and marches on Washington (such as the “Million Mom March” to lobby for stricter handgun regulations). Even more broadly, my invocation of law is meant to refer to the often unnoticed practice of “law talk” in the society at large. By law talk, I mean the use of legal concepts in everyday language. Such talk includes abstract (and often inchoate) ideas of street justice, due process, civil disobedience, retribution, deterrence, and rights, all of which are frequently invoked both in public discussions and dinner-table conversations alike. Indeed, I deliberately use a conception of law aimed at expanding the law’s generic constraints to encompass a broader spectrum of discourses talking in the “shadow” of official legal categories, but talking law nonetheless.

Over the past two decades, sociolegal scholars have increasingly embraced such a broad conception of “law.” They have taken seriously Clifford Geertz’ observation that law is not simply an instrument for enforcing a system of morality or justice but is also “part of a distinctive manner of imagining the real.” CLIFFORD GEERTZ, *Local Knowledge: Fact and Law in Comparative Perspective*, in LOCAL KNOWLEDGE: FURTHER ESSAYS IN INTERPRETIVE ANTHROPOLOGY 167, 184, (1983). Accordingly, scholars have emphasized that law cannot be distinguished from the rest of social life; rather, “law permeates social life, and its influence is not adequately grasped by treating law as a type of external, normative influence on independent, ongoing activities.” Bryant G. Garth & Austin Sarat, *Justice and Power in Law and Society Research: On the Contested Careers of Core Concepts*, in JUSTICE AND POWER IN SOCIOLEGAL STUDIES 1, 3 (Bryant G. Garth & Austin Sarat eds. 1998). As Paul Kahn has written recently, “We experience the rule of law not just when the policeman stops us on the street or when we consult a lawyer on how to create a corporation. The rule of law shapes our experience of meaning everywhere and at all times. It is not alone in shaping meaning, but it is rarely absent.” PAUL KAHN, THE CULTURAL STUDY OF LAW: RECONSTRUCTING LEGAL SCHOLARSHIP 124 (1999); see also PATRICIA EWICK & SUSAN S. SILBEY, THE COMMON PLACE OF LAW: STORIES FROM EVERYDAY LIFE 20 (1998) (“Legality . . . operates through social life as persons and groups

social fabric by creating a forum for useful discussion and debate among differing worldviews? And can this be done without simply imposing a hierarchical social order? In other words, if law is a constitutive part of who we are as Americans, can we see how this heritage might actually be used to draw us together as a people rather than divide us? And how might we begin to think creatively about this transformative potential?

Which brings me to the tale. In 1522, in the district of Autun, France, a group of villagers discovered that its barley crops had been eaten by rats.<sup>5</sup> The townspeople took the matter to the ecclesiastical courts, which duly investigated the “crime” and then delivered a summons to the rats, ordering them to stand trial. A court official went to an area of the countryside where the rats were believed to live, and served notice in a loud and solemn declaration.<sup>6</sup>

This seemingly bizarre case then proceeded to an actual trial. The court appointed an advocate to defend the rats, a young lawyer named Bartolomé Chassenée. When the defendants failed to appear in court in response to the summons, Chassenée intervened to save his clients from a default judgment. He argued that there had not been proper service of process because in fact “the salvation or ruin of all rats was at stake” in the case, and so *all* rats (and not just those in the village with the crops)

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deliberately interpret and invoke law’s language, authority, and procedures to organize their lives and manage their relationships. In short, the commonplace operation of law in daily life makes us all legal agents insofar as we actively make law, even when no formal legal agent is involved.”)

The great variety of discourses that might be brought under the rubric of “law talk” not only attests to the conceptual power of law in the collective American consciousness, but also simultaneously underscores the elusiveness of the very concept of “law.” For example, even relatively well-established forms of “alternative” dispute resolution, such as mediation and arbitration, are accepted by many legal practitioners as legitimate quasi-legal mechanisms; to others, however, they are viewed as antithetical, even subversive, to canonical law practice. This is merely one example of the way in which a narrow definition of “law” can serve as a hegemonic arbiter of what counts as sanctioned legal practice. Thus, a methodical definition of “law” is not only likely to be unsatisfying, but it also may tend to privilege certain understandings of law over others. In any event, attempting such a definition is a project far beyond the scope of this Essay. Accordingly, although I refer to “law” and “legal” discourse liberally, I do so with invisible quotation marks around them in order to acknowledge their broad interpretation and application. Cf. EWICK & SILBEY, *supra*, at 22 (choosing to use the term “legality” rather than “law” to describe a broader set of “meanings, sources of authority, and cultural practices that are commonly recognized as legal, regardless of who employs them or for what ends”).

5. For accounts of this trial, see ESTHER COHEN, *THE CROSSROADS OF JUSTICE* 120-21 (1993) [hereinafter COHEN, *CROSSROADS*]; E.P. EVANS, *THE CRIMINAL PROSECUTION AND CAPITAL PUNISHMENT OF ANIMALS* 18-19 (1906); Esther Cohen, *Law, Folklore and Animal Lore*, 110 *PAST & PRESENT* 6, 14 (1986) [hereinafter Cohen, *Folklore*]; Walter Woodburn Hyde, *The Prosecution and Punishment of Animals and Lifeless Things in the Middle Ages and Modern Times*, 64 *U. PA. L. REV.* 696, 706 (1916).

6. Hyde, *supra* note 5, at 704.

deserved to be informed.<sup>7</sup> At his demand, the priests of each and every parish within the diocese of Autun announced a new summons. When the rats once more failed to appear, Chassenée urged that, because the rats were dispersed across the countryside, more time was needed for them to make the migration to the courthouse.<sup>8</sup> Having been granted another delay, Chassenée pressed his case for the still-absent rats: he argued that a summons implied the full protection of the law on the way to the courthouse, but that his clients, though anxious to appear, were in fear for their lives from hostile cats and could not be expected to risk death in order to obey the summons.<sup>9</sup>

Strange as it may sound, this “tale” is not really a tale at all, for the trial described above actually took place. Moreover, it was not a unique occurrence. Records indicate that trials of animals took place throughout Europe and elsewhere from the ninth through the nineteenth centuries.<sup>10</sup> Individual animals were tried (usually for killing human beings) in secular courts according to common law precedents dating back to the Book of Exodus.<sup>11</sup> And, as with the rats of Autun, many animals were tried in groups as public nuisances before ecclesiastical tribunals.<sup>12</sup>

I have written previously about these trials and about similar legal proceedings in medieval England and ancient Greece condemning inanimate objects that caused harm to human beings.<sup>13</sup> But in this Essay I wish to connect these historical trials to the observation about America’s

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7. Statement of Bartolomé Chassenée, as quoted in *The Crossroads of Justice*. COHEN, CROSSROADS, *supra* note 5, at 121 (citing AUGUSTE DE THOU, 1 HISTOIRE UNIVERSELLE DEPUIS 1593 JUSQU’EN 1607, at 414-16 (1734)); *see also* EVANS, *supra* note 5, at 19; Hyde, *supra* note 5, at 706.

8. COHEN, CROSSROADS, *supra* note 5, at 121; EVANS, *supra* note 5, at 19; Hyde, *supra* note 5, at 706.

9. COHEN, CROSSROADS, *supra* note 5, at 121; EVANS, *supra* note 5, at 19; Hyde, *supra* note 5, at 706-07.

10. *See* EVANS, *supra* note 5, at 265-86.

11. *See* J.J. Finkelstein, *The Ox That Gored*, 71 TRANSACTIONS AM. PHIL. SOC’Y. (pt. 2) 5, 48-73 (1981) (linking the animal trials to the Biblical story of the ox that is slaughtered for having killed a man). *See generally* Exodus 21:28-32.

12. *See* COHEN, CROSSROADS, *supra* note 5, at 110. *But see* Finkelstein, *supra* note 11, at 64-66. Finkelstein argues that the ecclesiastical trials can be dismissed because they “were *not* proper trials, but were ritual procedures.” *Id.* at 65. His distinction is arbitrary and certainly not grounded in the medieval experience, which seems to have viewed both secular and ecclesiastical proceedings as serious judicial events. In any event, this Essay will argue that trials *are* in fact ritual forms, so his distinction is particularly unhelpful in the context of this analysis.

13. *See generally* Paul Schiff Berman, *An Anthropological Approach to Modern Forfeiture Law: The Symbolic Function of Legal Actions Against Objects*, 11 YALE J.L. & HUMAN. 1 (1999) [hereinafter Berman, *Forfeiture*]; Paul Schiff Berman, Note, *Rats, Pigs, and Statues on Trial: The Creation of Cultural Narratives in the Prosecution of Animals and Inanimate Objects*, 69 N.Y.U. L. REV. 288 (1994) [hereinafter Berman, *Narratives*].

legalistic culture I have already mentioned. Precisely because it is difficult for us to see any rational point to conducting a trial of a rat or a pig, these trials allow us to speculate about possible social functions<sup>14</sup> that trials (and legal discourse more generally) may fulfill for a community. These social functions may extend far beyond the usual justifications for law and legal proceedings—for example, the need to punish wrongdoers or discover the truth about an event, or the desire to create proper incentives or provide monetary compensation. As one commentator has noted, the trial of an animal “was not a game. It was undertaken for the good of society, and if properly conducted it was intended to bring social benefits to the community—benefits, that is, to human beings.”<sup>15</sup> Can we identify possible social benefits the trials brought to the people of these towns? If so, how might these benefits permit us to think creatively about the potential value of legal discourse as a language for debating community dilemmas?

In his seminal essay, *Nomos and Narrative*, Robert Cover argued that law functions in part as “a system of tension or a bridge linking a concept of a reality to an imagined alternative.”<sup>16</sup> In this view, law is a language that allows us to discuss, imagine, and ultimately even perhaps generate alternative worlds spun from present reality. Thus, Cover envisioned law as that which connects “reality” to “alterity.”<sup>17</sup>

If Cover’s vision is correct, then law has enormous potential as a creative and transformative language. Building on this vision, my goal is to see whether one can use the idea of law as generative discourse to develop a response to those who view the prevalence of “law talk” as inherently destructive of community. I choose the animal trials as my case study for this inquiry not because I believe they represent legal practices we should seek to emulate. Rather, the very unfamiliarity and seeming irrationality of

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14. Although this Essay discusses the possible social functions of these trials, I recognize that a discussion of social function by itself cannot explain why the trials occurred. Critics have often attacked functionalist arguments for implying such a causal link. See, e.g., JON ELSTER, *ULYSSES AND THE SIRENS: STUDIES IN RATIONALITY AND IRRATIONALITY* 32 (1979) (“A large body of sociological literature seems to rest upon an implicit regulative idea that if you can demonstrate that a given pattern has unintended, unrecognized and beneficial effects, then you have also explained why it exists and persists.”). My aim, instead, is merely to identify possible social functions so as to generate creative thought about the various roles legal language and procedures might fulfill for a society.

15. Nicholas Humphrey, *Introduction*, in EVANS, *supra* note 5, at xx.

16. Robert M. Cover, *Foreword: Nomos and Narrative*, *The Supreme Court 1982 Term*, 97 HARV. L. REV. 4, 9 (1983).

17. ROBERT M. COVER, *The Folktales of Justice: Tales of Jurisdiction*, in NARRATIVE, VIOLENCE, AND THE LAW: THE ESSAYS OF ROBERT COVER 173, 176 (Martha Minow et al. eds., 1992) (citing G. STEINER, *AFTER BABEL* 222 (1975)).

the practice forces us into what I believe is a useful thought experiment; if we can imagine plausible social functions that those trials might have served, then it might help us to identify possible social roles law might still fulfill today.

Part I of this Essay sketches the contours of what I will call America's abiding legal faith. I also survey the arguments of some contemporary writers who decry our "legalistic" way of parsing the world, and then I consider possible responses to this critique. Part II outlines the history of animal trials and describes how these trials may have served as fora for societal debates among conflicting narratives for describing the relationship between human beings, animals, and the "natural" world. Part III speculates that legal proceedings, even in contemporary America, may bring social benefits that are often overlooked. Drawing from anthropologist Victor Turner's theory of "social dramas," I ask whether we can conceive of a role for law that is generative rather than destructive. As a starting point for such a discussion, I offer for consideration three potential social functions for legal discourse, all based on insights gleaned from the animal trials discussed in Part II. First, the mere assertion of legal jurisdiction may, in and of itself, help to define the boundaries of membership in the community. Accordingly, even if a community condemns a transgressor, the very use of legal mechanisms nevertheless confirms that the individual is, in fact, a *member* of that community. Second, law provides a rationalizing framework and a formal discourse that encourages a dialogue built on appeals to broader philosophical and legal principles. In addition, the ritualized<sup>18</sup> nature of legal discourse may itself be a source of comfort in times of traumatic stress. Third, and perhaps most importantly, legal and quasi-legal discourse, particularly when it is widely dispersed within a culture, may provide a useful language for both

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18. The term "ritual" will be used throughout this Essay to mean a formal, socially standardized, and repetitive action wrapped in a web of symbolism that serves to channel emotion, define experience, and guide understanding. This relatively broad definition follows the conceptual understanding employed by most contemporary anthropologists. Until a generation ago, the term ritual was more often used only to describe supernatural or religious rites. This definition stemmed from Emile Durkheim's influential statement that rituals are "rules of conduct which prescribe how a man should comport himself in the presence of . . . sacred objects." EMILE DURKHEIM, *THE ELEMENTARY FORMS OF RELIGIOUS LIFE* 56 (Joseph W. Swain trans., London, G. Allen & Unwin 1915) (1912). Fundamental to Durkheim's belief was that rituals were coercive moral forces dictating right behavior and that they were connected to organized religion. Contemporary cultural scholars have broadened the focus somewhat by studying how all members in a culture use the narratives produced by various social institutions to construct meaning. Thus, ritual is seen as "an analytic category that helps us deal with the chaos of human experience and put it in a coherent framework." DAVID I. KERTZER, *RITUAL, POLITICS, AND POWER* 8 (1988); see generally *id.* at 1-14.

debating and contesting social and political issues and for adjudicating among the multiple narratives<sup>19</sup> that are inevitably present in a heterogeneous society. Thus, law may function as a symbolic terrain of engagement for competing worldviews. In this vision, our supposed national tendency to wage legal battles may not be a sign of true divisiveness, but rather of the constructive need for a discursive forum to tell alternative stories.

If law can actually play such a generative role as a site for discourse, then perhaps our nation's abiding legal faith is not solely the albatross we have been led to believe it is. Perhaps our faith is also an opportunity. By creating both a forum and a language for conversation among diverse cultural narratives, and by establishing a commitment to a culture of conversation about competing values, legal debates could foster dialogue in a postmodern culture where most historical verities have been exposed as

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19. I use the word "narrative" in a broad sense to describe any type of explanatory framework for describing reality. Over the past several decades, anthropologists, literary critics and legal scholars have increasingly studied the role of narratives in structuring our experience of the world. See generally VINCENT CRAPANZANO, TUHAMI: PORTRAIT OF A MOROCCAN (1980) (exploring conflicting storytelling styles between anthropologist and subject); JACQUES DERRIDA, OF GRAMMATOLOGY (Gayatri Chakravorty Spivak trans., Johns Hopkins Univ. Press 1974) (1967) (drawing on the work of linguist Ferdinand de Saussure to argue that language provides no direct access to reality and therefore what we call "reality" is really a set of narrative conventions); RENATO ROSALDO, CULTURE AND TRUTH: THE REMAKING OF SOCIAL ANALYSIS (1989) (advocating that social science acknowledge the role of conflicting narratives and subjectivity in descriptions of reality); THE ANTHROPOLOGY OF EXPERIENCE (Victor W. Turner & Edward M. Bruner eds., 1986) (collecting essays exploring the relationship between experience and narratives used to describe experience); Roland Barthes, *Introduction to the Structural Analysis of Narratives*, in IMAGE—MUSIC—TEXT 79 (Stephen Heath trans., Noonday Press 1977) (1967) (using linguistics to construct, describe, and classify a theory of narratives); Peter Brooks, *The Law as Narrative and Rhetoric*, in LAW'S STORIES 14, 14 (Peter Brooks & Paul Gewirtz eds., 1996) ("Narrative appears to be one of our large, all-pervasive ways of organizing and speaking the world—the way we make sense of meanings that unfold in and through time."); Cover, *supra* note 16, at 4 (arguing that "[n]o set of legal institutions or prescriptions exists apart from the narratives that locate it and give it meaning"); Claude Lévi-Strauss, *The Effectiveness of Symbols*, in STRUCTURAL ANTHROPOLOGY 186, 197-201 (Claire Jacobson & Brooke Grundfest Schoepf trans., Basic Books 1963) (1958) (describing the use of narratives to encapsulate pain); Hayden White, *The Value of Narrativity in the Representation of Reality*, in ON NARRATIVE 1, 2 (W.J.T. Mitchell ed., 1981) (finding that "[n]arrative is a metacode, a human universal on the basis of which transcultural messages about the nature of a shared reality can be transmitted"). Narratives are now seen as encompassing almost any form of social discourse and not just traditional narrative forms, such as folktales. See, e.g., Barthes, *supra*, at 79 ("The narratives of the world are numberless. Narrative is first and foremost a prodigious variety of genres. . . . [U]nder this almost infinite diversity of forms, narrative is present in every age, in every place, in every society; it begins with the very history of mankind and there nowhere is nor has been a people without narrative."). The focus on narratives allows critics to study how the vessel by which we impart social knowledge—conversational forms, gestures, news items—itself constitutes our apprehension of reality.



products of hierarchy. Such dialogue, because it includes the possibility for continuous self-criticism and re-creation, may even open the space Cover envisions for generating bridges to alternative realities.

This is an idealistic vision, to be sure, and I certainly do not mean to suggest that law always, or even often, lives up to this vision. But if we are indeed a society founded on a legal faith, then perhaps instead of railing against that heritage we should attempt to construct a more productive narrative about law's transformative potential. This Essay is an attempt to begin that process. Thus, what I offer is not proof that law *is* transformative, but only speculation and hope that it *could be*. This speculation and hope constitutes my own legal faith.

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Before continuing, three caveats are in order. First, I do not attempt in this Essay a thorough historical analysis of the animal trials. No doubt these trials meant different things to peoples of different cultures and eras, and I do not presume to say that these meanings were the same throughout history or that legal proceedings today necessarily carry the same meanings as they did in the past. Rather, I assert only that these trials possessed *some* cultural meaning for the communities in which they took place and that we should be aware of law as a form of cultural story-telling. Moreover, for my purposes the usefulness of the animal trials lies not so much in trying to divine the historical causes or significance of the practice, but in employing the trials to stimulate imaginative thinking about the possible cultural roles of law more generally.

Second, this Essay is intended to stimulate creative discussion, not to provide policy prescriptions. While a great number of normative ramifications may flow from the ideas I present, any specific proposal would require us to balance the possible community-building benefit against the various other values that may be implicated. My goal is only to encourage us to think broadly about law's potential.

Finally, although this Essay responds to those who worry that we are losing a sense of cultural unity or shared values, it is important to emphasize that the vision of law I propose is not aimed at actually trying to create a *consensus* about particular cultural values. Indeed, pursuing such a project strikes me as more likely to create resentment among those whose values are inevitably suppressed, thereby leading to long-term simmering dissension rather than harmony. Instead, I argue that law can benefit society by providing a useful site for the play of cultural discourses and the encounter with the Other. As I will discuss in Part III, I believe such a forum for public discourse can, in and of itself, help to unify society—even though it does not impose a single set of values—because it encourages us

to acknowledge the legitimacy of the multiple points-of-view that exist on any given issue. As a result, “law talk” in the United States, including informal legal and quasi-legal discourse<sup>20</sup> that takes place outside of official legal institutions, may be an essential part of creating and perpetuating what political scientists refer to as “civil society.”<sup>21</sup> Thus, to whatever extent we perceive the erosion of civil society or feel the need for cultural unity,<sup>22</sup> I believe our legal faith may still be part of the solution and not just part of the problem.

## I. The Observation: America’s Legal Faith and Its Discontents

### A. Survey of Our Historical Legal Faith

There is probably no real way to demonstrate conclusively that law is a constitutive part of American self-identity, and in this section, I do not attempt such a demonstration, nor do I provide a systematic or empirical study of American attitudes about law. Instead, I offer only an impressionistic account of law’s continued claim on the American psyche.<sup>23</sup> For better or worse, law has always maintained a privileged place in our national discourse.<sup>24</sup> We have mythologized law, we have followed the

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20. See *supra* note 4.

21. It is not completely clear what writers actually mean by the term “civil society,” see, e.g., Alan Ryan, *My Way*, N.Y. REV. OF BOOKS, Aug. 10, 2000, at 47 (“By ‘civil society,’ writers have meant something not very precise but intuitively plausible.”), but I take a civil society generally to be one where the citizenry teach each other, through both formal and informal mechanisms, the behaviors necessary to make communities work effectively.

22. For example, Robert Putnam has recently argued that the dissolution of American civil society and the slow erosion of American “social capital” in the past three decades is cause for serious concern. See generally, ROBERT D. PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* (2000). “For the first two-thirds of the twentieth century a powerful tide bore Americans into ever deeper engagement in the life of their communities, but a few decades ago—silently, without warning—that tide reversed and . . . we have been pulled apart from one another and from our communities. . . .” *Id.* at 27. Putnam links the rise in demand for lawyers since 1970 to declines in social capital, suggesting that we turned increasingly to “preventive lawyering” when “informal understandings no longer seemed adequate or prudent.” *Id.* at 147. While this correlation may be accurate, Putnam does not address the possibility that legal and quasi-legal discourse could actually help generate social capital. This Essay attempts to articulate such a possibility.

23. This account owes much to the discussion in David Ray Papke, *The American Legal Faith: Traditions, Contradictions and Possibilities*, 30 IND. L. REV. 645 (1997). See also generally JOHN E. SEMONCHE, *KEEPING THE FAITH: A CULTURAL HISTORY OF THE U.S. SUPREME COURT* (1998).

24. Some commentators have criticized this discourse, arguing that elites have historically encouraged the veneration of law as a way to retain their power while offering the illusion of justice to those who might otherwise rebel. A discussion of this critique is beyond the scope of

great trials and legal debates of each successive era, and we have remained fascinated by the workings of our legal system as reflected both in the courts and in the popular culture.

This national discourse about law was evident as early as the nation's founding. As Robert Ferguson has observed, "[t]he centrality of law in the birth of the republic is a matter of national lore."<sup>25</sup> Perhaps most famously, Thomas Paine, in *Common Sense*, suggested that, in order to fill the gap left by overthrowing the monarch, the American people could draft a legal charter, place it on top of the Bible, and then place a crown on the charter, declaring to all the world "that in America the law is king."<sup>26</sup> Indeed, the revolutionary crisis of 1763-76 may even be seen as "the dramatic, ironic final act"<sup>27</sup> in a "litigation explosion"<sup>28</sup> that was already prevalent in colonial America. As one historian has pointed out, "[l]aw went everywhere in our early legal history. . . . Throughout their colonial and revolutionary experience, Americans developed a passion for law, a legalism that pervaded social, economic, religious, and political relationships. They laid their disputes with one another before the courts of law to an extent exceeding all other peoples."<sup>29</sup>

As the nation grew, the idea of law "assumed a vital role as the integral constituting element of a society that had come into being over the previous seventy-odd years."<sup>30</sup> Schoolbooks routinely spoke of the Constitution as divinely inspired and glorious.<sup>31</sup> Prominent figures such as Daniel Webster referred to the Constitution as "complete and perfect"<sup>32</sup> and observed that it was "the basis of our identity, the cement of our Union, and the source of our national prosperity and renown."<sup>33</sup> Political scientist Sanford Levinson has noted that the Constitution has often been analogized to a sacred text in order to emphasize national unity and integration.<sup>34</sup>

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this Essay. Regardless of how our legal faith arose, I argue only that such a faith remains a part of our culture and that we should explore the transformative potential of this faith.

25. ROBERT A. FERGUSON, *LAW AND LETTERS IN AMERICAN CULTURE* 11 (1984).

26. PAINE, *supra* note 2, at 29.

27. PETER CHARLES HOFFER, *LAW AND PEOPLE IN COLONIAL AMERICA* 97 (1992).

28. *Id.* at 96.

29. *Id.* at ix-x.

30. CHRISTOPHER L. TOMLINS, *LAW, LABOR, AND IDEOLOGY IN THE EARLY AMERICAN REPUBLIC* 26 (1993).

31. Papke, *supra* note 23, at 650.

32. Brooks D. Simpson, *Daniel Webster and the Cult of the Constitution*, 15 *J. AM. CULTURE* 15, 17 (1992).

33. *Id.* at 16.

34. SANFORD LEVINSON, *CONSTITUTIONAL FAITH* 17 (1988).

While the Constitution can thus be seen as an icon that symbolized the American legal faith, the courtroom trial has been possibly the most important ritual of that faith.<sup>35</sup> In rural areas, the arrival of a judge riding circuit was a major event, and trials became the primary manifestation of government in these communities.<sup>36</sup> The trials were so popular, in fact, that one treatise-writer of the era observed: "The cabinet maker is known in his town; a good physician for 100 miles; a lawyer throughout America."<sup>37</sup> The legal proceedings were also widely publicized. Periodicals of the era published special trial reports,<sup>38</sup> and the new daily penny press of the 1830s and 1840s treated trial reporting as one of their principal beats.<sup>39</sup> "Readers, many of whom were first-generation literate, could find in the trial reports a forum for denouement, a locus for resolution of social problems, and an expression of community norms."<sup>40</sup>

American political and scholarly rhetoric continued to emphasize the importance of law. For example, Abraham Lincoln, echoing Thomas Paine, went so far as to propose that Americans swear an oath to revere the law:

Let reverence for the laws be breathed by every American mother to the lisping babe that prattles on her lap; let it be taught in schools, in seminaries, and in colleges; let it be written in primers, spelling-books, and in almanacs; let it be preached from the pulpit, proclaimed in legislative halls, and enforced in courts of justice. And, in short, let it become the political religion of the nation . . . .<sup>41</sup>

Likewise, de Tocqueville's writings on the importance of law in American culture,<sup>42</sup> whether or not accurate as a descriptive matter, undoubtedly contributed to the mythologizing of law in the national discourse.

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35. Papke, *supra* note 23, at 651 ("Like rituals in a conventional faith, the trial provided reassurance that there was a community of believers.").

36. See FERGUSON, *supra* note 25, at 69-70.

37. JACKSON TURNER MAIN, *THE SOCIAL STRUCTURE OF REVOLUTIONARY AMERICA* 200 (1965) (quoting Letter from St. George Tucker to Masters Theodorick and John Randolph (June 12, 1787), in *ST. GEORGE TUCKER PAPERS, COLONIAL WILLIAMSBURG*).

38. See DANIEL A. COHEN, *PILLARS OF SALT, MONUMENTS OF GRACE: NEW ENGLAND CRIME LITERATURE AND THE ORIGINS OF AMERICAN POPULAR CULTURE, 1674-1860*, at 26-31 (1993).

39. Papke, *supra* note 23, at 651.

40. *Id.*

41. ABRAHAM LINCOLN, *Address Before the Young Men's Lyceum of Springfield, Illinois*, in 1 *COMPLETE WORKS OF ABRAHAM LINCOLN* 35, 43 (John G. Nicolay & John Hay eds., 1894).

42. See, e.g., 1 *TOCQUEVILLE*, *supra* note 1, at 280 ("The language of the law thus becomes, in some measure, a vulgar tongue; the spirit of the law, which is produced in the schools and courts of justice, gradually penetrates beyond their walls into the bosom of society, where it descends to the lowest classes, so that at last the whole people contract the habits and the tastes of the judicial magistrate.").

The pervasive presence of law in American society grew still greater in the twentieth century, penetrating even more spheres of social and domestic life.<sup>43</sup> The century saw the enfranchisement of women and the enforcement of civil rights protections for African Americans. In addition, we witnessed the establishment of public defenders offices to represent criminal defendants, the expansion of the Bill of Rights to cover a range of police procedures and prison conditions, and the creation of an income tax law, bank deposit insurance laws, social security laws, and regulatory laws aimed at everything from environmental protection to the filing of corporate financial statements. Government agencies dispatched agents around the country to enforce legal rights and duties. Litigation among business corporations grew rapidly,<sup>44</sup> and the size of law firms serving corporate clients increased as well.<sup>45</sup> By the end of the twentieth century, the threat of legal liability permeated the operation of universities, public school systems, hospitals, and municipal governments, as well as tobacco companies, land developers, and product manufacturers. Perhaps most significantly, ordinary individuals increasingly came to think of themselves as possessing legal rights and therefore defined “the law” not only as a range of official demands and constraints, but as a universally available set of entitlements.<sup>46</sup>

Popular trials continued in the twentieth century to function as flashpoints for larger cultural battles. “Scopes, Sacco-Vanzetti, the Rosenbergs, the Chicago Seven—these names have come to represent bitter conflicts and dramatic moments in our social history.”<sup>47</sup> More recently, trials of O.J. Simpson, Louise Woodward, Jack Kevorkian, and the officers who arrested Rodney King crystalized great societal debates about contested issues that extended far beyond the trials themselves. Indeed, most of our great societal dilemmas continue to be played out in legal fora. Thus, debates about abortion and euthanasia, affirmative action, the role of religion in civic life, the efficacy of school vouchers, the need to save the environment, and the strength and extent of individual property

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43. The examples in this paragraph are drawn from a useful discussion of law in twentieth-century America found in Robert Kagan et al., *Facilitating and Domesticating Change: Democracy, Capitalism, and Law's Double Role in the Twentieth Century*, in *LOOKING BACK AT LAW'S CENTURY* (Kagan et al. eds., forthcoming 2001) (on file with author).

44. See, e.g., William Nelson, *Contract Litigation and the Elite Bar in New York City, 1960-1980*, 39 *EMORY L.J.* 413 (1990).

45. See, e.g., MARC GALANTER & THOMAS PALAY, *TOURNAMENT OF LAWYERS: THE TRANSFORMATIONS OF THE BIG LAW FIRMS* (1991).

46. See generally EWICK & SILBEY, *supra* note 4.

47. Robert Hariman, *Performing the Laws: Popular Trials and Social Knowledge*, in *POPULAR TRIALS: RHETORIC, MASS MEDIA, AND THE LAW* 1, 1 (Robert Hariman ed., 1990).

rights all have been aired principally in a legal context. And, whatever one might think about the role of the courts in the presidential election of 2000, there can be little doubt that the post-election contest is a testament to the extraordinary willingness of Americans to wage political battles in a legal forum.

Law continues to occupy a prominent position in our popular culture as well. In 1989, the *Yale Law Journal* devoted an entire symposium issue to "Popular Legal Culture,"<sup>48</sup> largely inspired by the success of the television series "L.A. Law"<sup>49</sup> and the novel *The Bonfire of the Vanities*.<sup>50</sup> Since that time, law has become an even more ubiquitous presence in our popular culture, with four prime-time television series devoted to lawyers,<sup>51</sup> both fiction and non-fiction bestsellers on legal themes,<sup>52</sup> and a slew of movies revolving around law and lawyers.<sup>53</sup> A quick scan of daytime television reveals no fewer than three television shows in which celebrity judges resolve actual cases<sup>54</sup>—and that's not even counting the 24-hour law coverage on the Courtroom Television network. As Richard K. Sherwin has recently argued, we are increasingly seeing not just an intermingling of law and popular culture, but an erosion of the line between the two.<sup>55</sup>

## B. The Critics

In recent years, a number of writers have both acknowledged and criticized our national tendency to use law as a mechanism for addressing social issues. These commentators have argued that our reliance on legal solutions undermines our sense of community, fosters an adversarial and contentious culture, limits our ability to forge consensus solutions, and

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48. Symposium, *Popular Legal Culture*, 98 YALE L.J. 1545 (1989).

49. *L.A. Law* (NBC television series).

50. TOM WOLFE, *THE BONFIRE OF THE VANITIES* (1988).

51. See, e.g., *Ally McBeal* (FOX television series); *JAG* (CBS television series); *Law and Order* (NBC television series); *The Practice* (ABC television series).

52. See, e.g., JOHN GRISHAM, *THE STREET LAWYER* (1998); DAVID GUTERSON, *SNOW FALLING ON CEDARS* (1995); JONATHAN HARR, *A CIVIL ACTION* (1995); RICHARD NORTH PATTERSON, *THE FINAL JUDGMENT* (1995); SCOTT TUROW, *PERSONAL INJURIES* (1999).

53. See, e.g., *THE RAINMAKER* (Paramount Pictures 1997); *A CIVIL ACTION* (Touchstone Pictures 1999); *THE PELICAN BRIEF* (Warner Brothers Studios 1993); *THE CLIENT*; *A TIME TO KILL* (Warner Brothers Studios 1995); *MURDER IN THE FIRST* (Warner Brothers Studios 1995); *PRIMAL FEAR* (Paramount Pictures 1996); *GUILTY AS SIN* (Buena Vista International 1993); *THE ACCUSED* (Paramount Pictures 1988); *ERIN BROCKOVICH* (Paramount Pictures 2000).

54. See, e.g., *Judge Joe Brown* (CBS television show); *Judge Judy* (CBS television show); *The People's Court* (NBC television show).

55. See generally RICHARD K. SHERWIN, *WHEN LAW GOES POP: THE VANISHING LINE BETWEEN LAW AND POPULAR CULTURE* (2000).

fragments the populace. Together, such criticisms pose a significant challenge to those who would defend our abiding legal faith.

These “anti-law” arguments tend to focus on three aspects of our legal system: the invocation of legal “rights,” the reliance on legal regulations, and the tendency to pursue litigation to solve problems. I will briefly discuss each of these criticisms.

(1) *Critique of a Discourse of Rights*

At the beginning of the 1990s, Mary Ann Glendon and Amitai Etzioni issued popular broadsides against what they called the discourse of rights in American society. They argued that the national focus on individual entitlements deflects attention from collective responsibilities and encourages intractable arguments based on absolutes. As Glendon put it, “[d]iscourse about rights has become the principal language that we use in public settings to discuss weighty questions of right and wrong, but time and again it proves inadequate, or leads to a standoff of one right against another.”<sup>56</sup> In a similar vein Etzioni contended that, by re-casting a privilege (such as higher education) as a right or entitlement, we fail to consider seriously the difficult policy questions regarding how to pay for education and how best to use collective resources.<sup>57</sup>

Both Glendon and Etzioni argue that our use of “rights talk” to debate social issues has increased dramatically over the past forty years. In their view this trend goes hand in hand with a more general dissolution of American cultural values since the 1950s. Thus, Glendon sees the resort to absolutist legal arguments about rights as a response to “the communications problems that beset a heterogeneous nation whose citizens decreasingly share a common history, literature, religion, or customs.”<sup>58</sup> Likewise, Etzioni observes that, “[s]ince the early sixties, many of our moral traditions, social values and institutions have been challenged.”<sup>59</sup> Although he acknowledges that these challenges often were valid attacks on repressive and hierarchical social structures, the “end result,” according to Etzioni, “is that we live in a state of increasing moral confusion and social anarchy.”<sup>60</sup>

In the face of this confusion and the breakdown of the old unifying hierarchy, individuals and fragmented groups have insisted that their

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56. MARY ANN GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE*, at x (1991).

57. AMITAI ETZIONI, *THE SPIRIT OF COMMUNITY* 5 (1993).

58. GLENDON, *supra* note 56, at xii.

59. ETZIONI, *supra* note 57, at 12.

60. *Id.*

interests be heard. However, according to Glendon and Etzioni, because we tend to frame these interests in the legal language of rights, we become more and more fragmented and are unable to enter into constructive dialogue. This legal language, to Glendon, unwisely places the needs of the self at the center of the universe, promotes the short-run over the long term, and elevates particular interests over the common good.<sup>61</sup> As a result, our political discourse becomes “[s]aturated with rights” and “can no longer perform the important function of facilitating public discussion of the right ordering of our lives together.”<sup>62</sup>

(2) *Critique of Legal Regulations*

Philip K. Howard, in his 1994 work *The Death of Common Sense: How Law is Suffocating America*,<sup>63</sup> also criticizes our cultural reliance on legal solutions, but he focuses on the use of statutes and regulations to try to control human behavior. According to Howard, the breadth and detail of such regulations have expanded rapidly in the past forty years. Thus, he observes that the “Federal Register, a daily report of new and proposed regulations, increased from 15,000 pages in the final year of John F. Kennedy’s presidency to over 70,000 pages in the last year of George H. Bush’s.”<sup>64</sup>

Howard attributes this growth not merely to government’s expanded role in providing social services and protecting the public welfare, but also to changes in our attitude towards law. He argues that we now seek “self-executing” laws that limit human discretion as much as possible.<sup>65</sup> He characterizes the contemporary American view as the belief that, in all matters of regulation, “law itself will provide an answer.”<sup>66</sup> Thus, “[s]entence by sentence, [law] prescribes every eventuality that countless rule writers can imagine. But words, even millions of them, are finite. One slip-up, one unforeseen event, and all those logical words turn into dictates of illogic.”<sup>67</sup>

Echoing Glendon’s and Etzioni’s views about the impact of rights talk, Howard argues that regulations likewise render meaningful debate about policy matters impossible. According to Howard, regulations create

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61. GLENDON, *supra* note 56, at xi.

62. *Id.*

63. PHILIP K. HOWARD, *THE DEATH OF COMMON SENSE: HOW LAW IS SUFFOCATING AMERICA* (1994).

64. *Id.* at 25.

65. *Id.* at 51.

66. *Id.*

67. *Id.*



inflexible rules that prevent people from working together to solve problems. He concludes that Americans feel disconnected from government in part because “rigid rules shut out our point of view.”<sup>68</sup> He therefore advocates that we “step[ ] out from law’s shadows.”<sup>69</sup> We may therefore face a degree of uncertainty regarding the rules that govern behavior, but, to Howard, “[c]onstant exposure to uncertainty and disagreement is critical to everything we value, like responsibility, individualism, and community.”<sup>70</sup>

(3) *Critique of Litigation*

Finally, we turn to two recent critics who decry what they call America’s “litigation explosion,” Walter K. Olson and Patrick M. Garry. Both writers offer statistics to indicate that the number of lawsuits filed in this country since 1960 has risen dramatically.<sup>71</sup> They also point to the rising dollar value of tort judgments, and they lament the increased expense of defending suits as well as the cumbersome process of moving cases through clogged courts.<sup>72</sup>

Like Glendon, Etzioni and Howard, Olson and Garry also focus on America’s over-reliance on law to address social problems. For example, Olson warns that thinking of civil lawsuits as vessels for “compensation” and “deterrence” is “seductive” because:

In no time at all you get to thinking of them less as a personal tragedy and more as a policy opportunity. You begin to imagine that the more people sue, the more will find happiness; while the more people get sued, the more responsibly everyone will behave for fear of sharing the same fate. The more lawsuits there are, in short, the closer to perfect the world will become.<sup>73</sup>

Likewise, Garry argues that, because of “America’s litigation obsession,”<sup>74</sup> courts “have increasingly become the forum for public policy,” whereby political interest groups can bypass the political process entirely and “tak[e] their agendas directly to the courts.”<sup>75</sup> These courts, in Garry’s

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68. *Id.* at 173.

69. *Id.* at 177.

70. *Id.* at 178.

71. PATRICK M. GARRY, *A NATION OF ADVERSARIES: HOW THE LITIGATION EXPLOSION IS RESHAPING AMERICA* 15 (1997); WALTER K. OLSON, *THE LITIGATION EXPLOSION: WHAT HAPPENED WHEN AMERICA UNLEASHED THE LAWSUIT* 5-6 (1991).

72. GARRY, *supra* note 71, at 16; OLSON, *supra* note 71, at 1-11.

73. OLSON, *supra* note 71, at 4.

74. GARRY, *supra* note 71, at 15.

75. *Id.* at 7. Garry apparently has in mind recent lawsuits against tobacco companies and gun manufacturers, as well as the attempts by antiabortion groups to file malpractice claims against doctors who perform abortions. *See id.* at 95-96.

view, can then award new rights “that are safely off-limits to any future legislative action.”<sup>76</sup>

These critics, like those already discussed, see our reliance on legal solutions as at least partly responsible for the increasing fragmentation of our culture since the beginning of the 1960s. Garry argues that the litigation explosion has realigned “American society toward an adversarial model and away from the assimilation (or ‘melting pot’) model that prevailed largely up until the late 20<sup>th</sup> century.”<sup>77</sup> He identifies the assimilation model as one in which “society was seen as a collection of cooperating individuals who sacrificed their differences for the sake of social cohesion.”<sup>78</sup> While he recognizes that this model “often denied the inherent diversity of American culture,”<sup>79</sup> the alternative, according to Garry, is a multicultural model where there is no meaningful way for individuals to relate to each other.<sup>80</sup> The result, Garry argues, is an adversarial culture “bred by the values and lessons of the litigation explosion.”<sup>81</sup>

Olson takes a similar approach. He argues that our national focus on litigation

has done cruel, grave harm and little lasting good. It has helped sunder some of the most sensitive and profound relationships of human life: between the parents who have nurtured a child; between the healing professions and those whose life and well-being are entrusted to their care. It clogs and jams the gears of commerce, sowing friction and distrust between the productive enterprises on which material progress depends and all who buy their products, work at their plants and offices, join in their undertakings. It seizes on former love and intimacy as raw materials to be transmuted into hatred and estrangement. It exploits the bereavement that some day awaits the survivors of us all and turns it to an unending source of poisonous recrimination. It torments the provably innocent and rewards the palpably irresponsible. It devours hard-won savings and worsens every animosity of a diverse society. It is the special American burden, the one feature hardly anyone admires of a society that is otherwise envied the world around.<sup>82</sup>

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76. *Id.* at 95-96.

77. *Id.* at 4.

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. OLSON, *supra* note 71, at 2.

Olson's litany serves as a fitting summary of the arguments surveyed in this section. To these critics, America's abiding legal faith is our cultural albatross, leading us inevitably towards dissolution and ruin.

### C. Possible Responses to the Critics

For those who seek to defend the value of our nation's legal faith, there are numerous responses to these critics that could be (and have been) advanced.

First, of course, one could challenge the accuracy of the premises from which the critics begin. Is it really true that, in some nostalgic period before the 1960s, we were a unified culture with a shared set of values? Were we actually less adversarial?<sup>83</sup> One need only read accounts of litigiousness in colonial America<sup>84</sup> or recall episodes in our history like the Civil War, the beginning of the labor movement, the Red Scare of the 1920s, or McCarthyism to question whether the yearned-for era of community ever existed.<sup>85</sup>

We might also question whether a growing unwillingness to cooperate is truly traceable to our increasing resort to legal solutions. Perhaps the perceived increase in "legalism" merely reflects the fact that more people have access to the legal system than in the past. After all, there can be little doubt that various segments of the society now have recourse to law who were essentially unheard before.

Or, we might oppose these critics on the ground that their arguments are thinly disguised attempts to reimpose norms of social control and hierarchical dominance that were challenged in the 1960s and thereafter. Thus, we might observe that these authors are really serving the interests of entrenched (and often legally enforced) power in society and only oppose the use of law when it gives power to minorities against majorities or individuals against corporate interests.

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83. For example, Marc Galanter has repeatedly cast doubt on claims that we are experiencing a "litigation explosion" or that court dockets are in general more crowded today. *See generally* Marc Galanter, *Beyond the Litigation Panic*, in *NEW DIRECTIONS IN LIABILITY LAW* 18 (Walter Olson ed., 1988); Marc Galanter, *Real World Torts: An Antidote to Anecdote*, 55 *MD. L. REV.* 1093 (1996); Marc Galanter, *The Day After the Litigation Explosion*, 46 *MD. L. REV.* 3 (1986); *see also generally* MARC GALANTER & THOMAS PALAY, *TOURNAMENT OF LAWYERS* (1991).

84. *See, e.g.*, Marc Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 *UCLA L. REV.* 4, 41 (1983).

85. In the alternative, one could argue that the critics overstate the degree to which American society is balkanized today. For one example of this argument, *see generally* ALAN WOLFE, *ONE NATION, AFTER ALL: WHAT MIDDLE CLASS AMERICANS REALLY THINK ABOUT GOD, COUNTRY, FAMILY, RACISM, WELFARE, IMMIGRATION, HOMOSEXUALITY, WORK, THE RIGHT, THE LEFT, AND EACH OTHER* (1998).

Finally, we might simply say, yes, we now have more rights, more regulations, and more litigation, and yes these changes may have downsides, but we must *balance* these cultural costs against the good that has been achieved. Under this approach, we might acknowledge, for example, that some of the assertions of rights in recent years may go too far or may lead to intractable battles, but we might nevertheless say that, partly as a result of “rights talk,” we have a freer and more egalitarian society, with increased opportunities for women and minorities.<sup>86</sup> Likewise, we might admit that regulations may sometimes stifle industry or be unnecessarily picky, but nevertheless argue that, on balance, such costs are outweighed by the benefits of increased safety in the workplace or greater environmental protection. Or, we might concede that litigation may often be cumbersome and impose social costs, but maintain that such costs are outweighed by the fact that less powerful people in society now have access to the legal system and can (at least occasionally) challenge the actions of those with greater wealth or political might.

All of these potential responses have some merit, and I do not necessarily disagree with any of them. Nevertheless, I think those who would defend our nation’s legal culture might do well to consider another type of response. After all, none of the responses outlined above addresses squarely the primary concerns expressed by these critics: that our increasingly diverse nation is becoming increasingly fragmented, that we have lost any way for the various balkanized communities of this nation to converse about social issues, and that we no longer have a shared belief in a common national enterprise. Instead, the possible responses I have discussed either attack these concerns as being incorrect (or secretly venal), or they accept these social costs as a necessary evil that is outweighed by greater freedom and egalitarianism.

Such responses are unlikely to convince the critics because they do not sufficiently respect the very real alarm these critics articulate about the fragmentation of our culture. Maybe the concerns are incorrect and maybe they are less important than the need to offer a voice to the powerless, but it seems to me that those who would defend America’s legal faith must acknowledge that these fears run deep within the American populace and cannot simply be sloughed off as incorrect or irrelevant.

Thus, for the purpose of this Essay I wish to accept the premises of the critics as true. I will accept as given that Americans feel an increasing sense of cultural dissolution and the loss of community conversation and

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86. For an example of this type of balancing argument, see SAMUEL WALKER, *THE RIGHTS REVOLUTION: RIGHTS AND COMMUNITY IN MODERN AMERICA* (1998).

long for our social institutions to foster dialogue and healing. The question then becomes whether the resort to law and legal procedures can be defended on the ground that law can actually help *repair* community fragmentation. Can law supply mechanisms for healing and reintegration? Can it provide a forum for communication among divergent worldviews? And can it therefore help us to feel more unified without simply reimposing old hierarchical relationships? In order to explore such questions, I will turn to a series of legal proceedings in a completely different cultural and historical context. Perhaps by looking outside our own legal system, we can more effectively identify a transformative and healing role for law in our own communities.

## II. The “Tale”: The Strange But True History of Legal Proceedings Against Animals

In order to speculate about possible social roles law can play within a community, it is first necessary to conceive of law broadly, not merely as a set of behavioral rules or as a procedure for resolving disputes or meting out punishment, but as a discourse for conceptualizing reality.<sup>87</sup> As anthropologist Clifford Geertz has observed, “[l]aw is not a bounded set of norms, rules, principles, values, or whatever from which jural responses to distilled events can be drawn, but part of a distinctive manner of imagining the real.”<sup>88</sup> Thus, law is one mechanism through which we construct meaning from the world around us. It is a “complex of characterizations and imaginings, stories about events cast in imagery about principles. . . .”<sup>89</sup> These stories, or “narratives”<sup>90</sup> provide a framework to interpret what we experience and a language for describing reality.

Narratives are particularly relied upon in times of change, disorientation, trauma, and conflict. For example, a disaster will stimulate “pronouncements, prayers, eulogies, addresses, white papers, and other formal offerings that later dissolve back into the welter of conversation characterizing the ordinary business of living together.”<sup>91</sup> A society’s social institutions must function as storytellers at such crisis moments. Religious narratives and their accompanying rituals are the clearest example of an institution constructing meaning out of death and other irrational and

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87. See *supra* note 4.

88. GEERTZ, *supra* note 4, at 173.

89. *Id.* at 215.

90. See *supra* note 19.

91. Hariman, *supra* note 47, at 19.

frightening events.<sup>92</sup> The rites link us to our past and future by enacting enduring and underlying patterns.<sup>93</sup> And the narratives provide explanations, or affirmations of faith, or parables, all of which create a framework for understanding the crisis event and healing psychological wounds. Thus, it has been said that cultural narratives provide a “shield against terror.”<sup>94</sup>

Courts too are social institutions that construct narratives in the face of societal conflict, change, or trauma. And this story-telling function may exist wholly apart from the more commonly understood adjudicatory or coercive functions of law. Even judges, who are involved on a practical, day-to-day level with the workings of our legal system, have recognized the multi-faceted nature of legal proceedings. For example, Harry T. Edwards, Chief Judge of the United States Court of Appeals for the District of Columbia Circuit, recently acknowledged that one might think of trials as “rhetorical, as well as fact-finding, events” where “different narratives are permitted to compete for prominence, and ‘victory’ may involve more than a judgment at trial.”<sup>95</sup>

It may be difficult to discern the cultural or symbolic aspects of law and legal procedures when we are examining our own legal system. Indeed, we are likely to be so accustomed to our own legal rituals or so steeped in the traditional justifications for them that we cease to look more carefully. By considering legal regimes that appear to us to have no obvious rational basis, however, we may better understand some of the cultural roles law might play. Thus, my aim in discussing historical trials of animals is not to offer a definitive explanation for why these trials occurred. Rather, if we can generate a plausible account of the *possible* cultural roles these trials may have fulfilled, we can think more creatively about the potential power of law and legal procedures more generally. First, I will briefly sketch the history of these proceedings, and then I will focus on a representative trial and study how the language of the legal proceeding articulated and adjudicated among various different narratives for understanding a random misfortune. By surveying the history of the animal trials, we may see them as an essential part of the community’s healing process in the face of incomprehensible crisis.

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92. Lévi-Strauss, *supra* note 19, at 186-204.

93. KERTZER, *supra* note 18, at 9-10.

94. *Id.* at 4.

95. Harry T. Edwards, *Comments on Mirjan Damaška’s Of Evidentiary Transplants*, 45 AM. J. COMP. L. 853, 858-59 (1997).

### A. History of the Animal Trials

The custom of putting animals (as well as inanimate objects) on trial extends at least as far back as ancient Greece. On the north side of the Athenian Acropolis stood a building called the Prytaneion, which acted as a ceremonial center of the city and as a site for special social functions.<sup>96</sup> In addition, a law court located in the building was dedicated to hearing only three kinds of cases: those in which (1) a murderer was unknown or could not be found; (2) a death was caused by an inanimate object; or (3) an animal had killed a human being.<sup>97</sup>

Classics scholar Walter Woodburn Hyde has gathered together the few references to the Prytaneion that exist in the extant Greek literature. He concludes that, though ceremonial in character, the trials observed ordinary procedural requirements.<sup>98</sup> Even jurisdiction was sometimes at issue. In one instance, a boy was killed by a javelin while watching a man practice in the gymnasium.<sup>99</sup> The court was forced to determine whether the boy, the man, or the javelin was to blame. Only if it were deemed to be a trial of the javelin could the case be heard at the Prytaneion.<sup>100</sup> Such questions were apparently taken very seriously. According to Plutarch, the great statesman Pericles once spent an entire day arguing with the famous sophist Protagoras about this issue.<sup>101</sup>

This dispute suggests that the action against an offending animal or object was not conceived merely as a way of punishing a negligent or guilty owner. Rather, the javelin was considered to be capable of its own guilt, quite apart from the person who threw it, and the community took action to rid itself of the moral taint attaching to the object itself. Thus, the proceedings in the Prytaneion, like all other murder trials, took place in the open air so that the judges would not be contaminated by moral pollution emanating from the accused.<sup>102</sup> If the court found the accused guilty, it

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96. Finkelstein, *supra* note 11, at 58; *see also* JOHN W. JONES, *THE LAW AND LEGAL THEORY OF THE GREEKS* 256-57 (1977) (using the Latin spelling "Prytaneum").

97. Finkelstein, *supra* note 11, at 58; *see also* ARISTOTLE, *CONSTITUTION OF ATHENS AND RELATED TEXTS* 135 (Kurt Von Fritz & Ernst Kapp trans., Hafner Pub. Co. 1950) ("When [one] does not know who committed the offense, he institutes proceedings against 'the person who did the deed.' The [officials at the Prytaneion] conduct prosecution[s] of inanimate things and animals also.").

98. Hyde, *supra* note 5, at 704.

99. *Id.* at 697-98.

100. *Id.*

101. 1 PLUTARCH'S LIVES 260 (Arthur H. Clough ed., 1961).

102. Hyde, *supra* note 5, at 696-97; *see generally* JONES, *supra* note 96, at 254-57 (discussing the conception of pollution in ancient Greece and methods used to diminish its danger).

issued an order banishing the offending animal or object beyond the borders of the city.<sup>103</sup>

Turning to animal trials in Europe, because we must rely on isolated references from fragments of court records and written documentation preserved in archives of small towns around Europe, it is impossible to tell just how many trials were held.<sup>104</sup> The evidence indicates, however, that the practice was widespread and long-lived. A 1906 work by modern and classical language scholar E.P. Evans, *The Criminal Prosecution and Capital Punishment of Animals*, still contains the most complete listing of animal trials to date. He cites over two hundred cases, occurring between 824, in which moles were tried in the valley of Aosta,<sup>105</sup> and 1906, the year of his writing, when a dog was sentenced to death in Switzerland.<sup>106</sup> The trials occurred in nearly every country in Europe (as well as isolated cases in England, Brazil, Canada, and the United States).<sup>107</sup> A majority of the cases involved pigs that ran freely through the streets of medieval towns and so were frequently involved in altercations, particularly with small children.<sup>108</sup> Pigs were not the only defendants, however, for there are records of proceedings against asses, beetles, bulls, caterpillars, cocks, cows, dogs, dolphins, eels, field mice, flies, goats, grasshoppers, horses, insects, leeches, locusts, moles, rats, serpents, sheep, slugs, snails, termites, turtledoves, weevils, wolves, worms, and other unspecified vermin.<sup>109</sup>

The bulk of the recorded cases arose in France during the sixteenth and seventeenth centuries, but it would be inaccurate to assume that the list of recorded trials is exhaustive or that the patterns indicate anything more than that there were better court records kept in some eras than others.<sup>110</sup>

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103. JONES, *supra* note 96, at 256-57; *see also, e.g.*, D.M. MACDOWELL, ATHENIAN HOMICIDE LAW IN THE AGE OF THE ORATORS 86-87 (1963) (quoting Demosthenes (352 B.C.E.)) (“[I]f an inanimate object falling on someone hits him and kills him, a trial is held for it in [the Prytaneion] and it is cast beyond the frontier.”); H. MYERS & J. BRZOSTOWSKI, DRUG AGENTS’ GUIDE TO FORFEITURE OF ASSETS 2-3 (1981) (quoting Aeschines the Greek (389-14 B.C.E.)) (“[W]e banish beyond our borders sticks and stones . . . if they chance to kill a man.”); Finkelstein, *supra* note 11, at 58 (quoting Pollux (2d century A.D.)) (“[The Prytaneion] was presided over by the phylobasileis, whose duty it was to remove beyond the border the inanimate object which had fallen upon the man.”).

104. *See* Finkelstein, *supra* note 11, at 67-68.

105. Evans consistently identifies place names by province or town, presumably based on the name listed in the actual court records. EVANS, *supra* note 5, at 313. Since some of these towns may no longer exist or may have changed names, it is often difficult even to identify the present-day country that corresponds to Evans’ appellations.

106. *Id.* at 334.

107. *Id.* at 313-34.

108. Cohen, *Folklore*, *supra* note 5, at 11.

109. EVANS, *supra* note 5, at 313-34.

110. *Id.* at 137; Finkelstein, *supra* note 11, at 67-68.



The sketchy record-keeping makes it likely that there were many more trials held than the two hundred Evans was able to discover. In the earliest French record of an animal trial in 1266, for instance, historian Esther Cohen reports that the matter-of-fact manner in which the proceedings are recorded would seem to indicate that the custom had long been in existence by that time.<sup>111</sup> In addition, we can find references to animal trials in the works of Victor Hugo,<sup>112</sup> Racine,<sup>113</sup> and Shakespeare,<sup>114</sup> indicating that the general public was likely familiar with the practice.

When a domestic animal caused the death of a human being, the beast was treated in all ways possible the same as a human criminal.<sup>115</sup> Animals were confined in human prisons and subjected to the same treatment as human prisoners.<sup>116</sup> Once the trial began, it too was conducted along

111. See Cohen, *Folklore*, *supra* note 5, at 20 (citing execution of a pig at Fontenay-aux-Roses).

112. In his nineteenth-century novel *Notre-Dame de Paris*, Hugo describes the trial of a goat belonging to the gypsy Esmerelda. See VICTOR HUGO, *NOTRE-DAME DE PARIS* 330-32 (Alban Krailsheimer trans., 1993) (1831); see also *id.* at 330 ("At that time nothing could be simpler than putting an animal on trial for sorcery.")

113. In 1688, the French playwright Racine devoted a whole play to a parody of the animal trials. In *Les Plaideurs* (*The Suitors*), a dog is tried for stealing and eating a capon. The prosecution and defense lawyers address the court in flowery and overblown rhetoric complete with quotations from the Bible and Aristotle. The accused is condemned to the galleys. As his last plea for mercy, the defense counsel brings into court a litter of puppies, and appeals for clemency:

Come hither, you family desolate;  
Come, little ones, whom he would orphans render,  
Give utterance to your understandings tender.

Jean Racine, *Les Plaideurs* [*The Suitors*], in 7 *THE DRAMA: ITS HISTORY, LITERATURE AND INFLUENCE ON CIVILIZATION* 283, 318 (Alfred Bates ed., Irving Browne trans., 1903) (1688). The judge is moved by the plea because he too is a father and cannot let the young puppies grow up as orphans. See *id.* at 318-20. Not only does Racine's parody indicate that he knew the animal trials would be very familiar to his audience, but it is also one example of the criticism that seems to have accompanied the animal trials from the inception of the practice.

114. Gratiano refers to animal trials in *The Merchant of Venice*:

Thy currish spirit  
Governed a wolf who, hanged for human slaughter,  
Even from the gallows did his fell soul fleet.

WILLIAM SHAKESPEARE, *THE MERCHANT OF VENICE* act 4, sc. 1. See also notes of editor Kenneth Myrick: "Wolves, dogs, and other animals were sometimes hanged for killing or attacking people; hence the phrase *hangdog look*." *THE COMPLETE SIGNET CLASSIC SHAKESPEARE* 629 n.134 (Kenneth Myrick ed., 1963).

115. For a description of European criminal procedure at the time with regard to human beings, see generally ADHEMAR ESMEIN, *A HISTORY OF CONTINENTAL CRIMINAL PROCEDURE* 55-177 (John Simpson trans., 1913) (discussing criminal procedure in the feudal era through the sixteenth century); see also O.F. ROBINSON ET AL., *AN INTRODUCTION TO EUROPEAN LEGAL HISTORY* 44-58, 335-76 (1985).

116. For example, in the town of Pont de Larche, records from the fifteenth century indicate that the sheriff at one time paid a particular prison-keeper the sum of nineteen sous six deniers tournois "for having found the king's bread for the prisoners detained, by reason of crime, in the

precisely the same lines as that of a human defendant. The prosecution was represented by professional advocates, and defense lawyers were also hired.<sup>117</sup> Witnesses and evidence were heard prior to judgment. And though the animals were usually found guilty, such a verdict was certainly not assured. On January 10, 1457, a sow was convicted of “murder flagrantly committed on the person of Jehan Martin, aged five years, the son of Jehan Martin of Savigny,” and sentenced to be “hanged by the hind-feet to a gallows-tree.” Her six sucklings, found at the scene of the crime stained with blood, were included in the indictment as accomplices, but “in lack of any positive proof that they assisted in mangling the deceased, they were restored to their owner, on condition that he should give bail for their appearance, should further evidence be forth-coming to prove their complicity in their mother’s crime.”<sup>118</sup>

In 1750 at Vanvers, France, a man was convicted of bestiality for having sex with a donkey. The man was sentenced to death. The animal, however, was acquitted on the ground that she was the victim of violence and had not participated in her master’s crime of her own free will. At the trial, the defense had presented a statement signed by many inhabitants of the commune stating that they had known the donkey for four years, that she had always shown herself to be virtuous and well-behaved both at home and abroad and had never given occasion of scandal to anyone, and that therefore, “they were willing to bear witness that she is in word and deed and in all her habits of life a most honest creature.” This document seems to have had a decisive influence upon the judgment of the court.<sup>119</sup>

As with human defendants, the animals could also receive a pardon prior to punishment. On September 5, 1379, as two herds of pigs, one belonging to the commune and the other to the priory of St.-Marcel-le-Jeussey, were feeding together near that town, three pigs from the communal herd mortally wounded the son of the game-keeper.<sup>120</sup> The three sows were tried and condemned to death. Both the herds were believed to have encouraged the crime by their cries and aggressive action, which indicated approval of the attack. Therefore, all the pigs were

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said prison.” The jailer gave the names of the persons in custody, and concluded the list with “Item, one pig, conducted into the said prison and kept there from the 24th of June, 1408, inclusive, till the 17th of the following July,” when it was hanged “for the crime of having murdered and killed a little child.” The jailer charged two deniers tournois a day for the pig’s board, the same as for boarding human prisoners. EVANS, *supra* note 5, at 340-41.

117. *See, e.g., id.* at 38 (noting the name of the defense lawyer for a group of insects in a trial in 1545).

118. *Id.* at 153-54.

119. *Id.* at 150-51.

120. For an account of this trial, see *id.* at 144-45.

arrested as accomplices and sentenced by the court to death as well. But the prior, Friar Humbert de Poutiers, not wanting to lose his entire herd, sent a petition to Philip the Bold, Duke of Burgundy, asking for clemency for all but the three instigating pigs.<sup>121</sup> The Duke pardoned the animals and released them. Significantly, the language of the remission did not question the legitimacy of the practice of trying animals. The Duke proclaimed that the mayor had arrested the pigs “in order to execute reason and justice in the proper manner.” Nevertheless, since only the three pigs were truly guilty, the order concluded that “while justice was done to the three or four said pigs, the rest should be released.”<sup>122</sup>

Assuming there were no remission, the offending animal was executed, usually by hanging. There are also recorded instances of animals being burnt at the stake or buried alive.<sup>123</sup> Even in the execution, the customs were the same for animals and human beings. Sometimes the animal was actually dragged through the streets as was the practice with a human criminal.<sup>124</sup> If it accidentally escaped, an effigy was burned, again mirroring the treatment of human defendants. Animals were even put in the rack prior to the execution in order to extort “confessions.”<sup>125</sup>

In contrast to these murder and bestiality cases, many other trials of animals involved large groups of pests that caused hardship throughout the community or created a public nuisance. In these instances, there was neither a single victim nor one animal to hold responsible, and so the entire rural commune became the plaintiff, revealing, even more than the murder trials, how directly the community participated in these judicial rituals.

Unlike the murder trials, the pests in question before the court had not committed any specific crime, and it was often argued by defense counsel that these animals were merely obeying God’s command to be fruitful and multiply throughout the land. The trials thus served as the scenes for “extremely thorough debates concerning the roles and interchanging relationships of God, man, animals and the vegetable world that fed all of God’s creatures.”<sup>126</sup> Since no individual animal could be punished, these trials often ended with anathemas<sup>127</sup> and excommunications placed on the guilty party by an ecclesiastical tribunal.

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121. *Id.*

122. COHEN, CROSSROADS, *supra* note 5, at 112.

123. *See, e.g.*, EVANS, *supra* note 5, at 147.

124. COHEN, CROSSROADS, *supra* note 5, at 113.

125. EVANS, *supra* note 5, at 139.

126. COHEN, CROSSROADS, *supra* note 5, at 119.

127. “Anathemas” were formal ecclesiastical curses, usually accompanied by excommunication. WEBSTER’S THIRD INTERNATIONAL DICTIONARY 78 (1986).

All of the animal trials evince a scrupulous concern for ensuring procedural justice to the nonhuman defendants. In a fourteenth-century Swiss trial against some Spanish flies, for example, the judge ordered the appointment of counsel to represent the flies “in consideration of their small size and the fact that they had not yet reached their majority.”<sup>128</sup> Likewise, at the conclusion of a 1519 trial against some field-mice in western Tyrol, an agreement was reached whereby the mice would be moved to a new tract of land. The defense lawyer demanded that they should be provided with a “safe conduct” securing them against harm or annoyance from dog, cat, or other foe. The judge agreed, but only as it applied to the weakest field-mice. He therefore mitigated the sentence of perpetual banishment by ordering that “a free safe-conduct and an additional respite of fourteen days be granted to all those which are with young and to such as are yet in their infancy; but on the expiration of this reprieve each and every must be gone, irrespective of age or previous condition of pregnancy.”<sup>129</sup>

#### B. The Animal Trials as a Forum for Competing Narratives

The trials of animals all began with the breach of a social norm. Either an animal killed a human being, or a group of animals, such as the rats of Autun, created human deprivation. Such random acts of violence necessitated some type of societal response to reassert order. As Michel Foucault has noted, in the medieval world,

the ravages of disease and hunger, the periodic massacres of the epidemics, the formidable child mortality rate, the precariousness of the bio-economic balances—all this made death familiar and gave rise to rituals intended to integrate it, to make it acceptable and to give meaning to its permanent aggression.<sup>130</sup>

Thus, the community was forced to construct a narrative, or provide “social meaning,”<sup>131</sup> responding to the sense of lawlessness and healing the breach

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128. EVANS, *supra* note 5, at 110-11.

129. *See id.* at 111-13.

130. MICHEL FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* 55 (Alan Sheridan trans., Vintage Books 1977) (1975).

131. Some scholars have preferred to use the term “social meaning” to describe the broad inquiry I encapsulate in the word “narrative.” *See, e.g.*, Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943 (1995). But regardless of the label, both concepts are similar attempts to speak of “the frameworks of understanding within which individuals live; a way to describe what they take or understand various actions, or inactions, or statuses to be; and a way to understand how the understandings change.” *Id.* at 952.

Both of these concepts must be distinguished, however, from the idea of a “social norm.” Cass Sunstein has defined “norms” to be “social attitudes of approval and disapproval, specifying

of the societal order. Seen in this light, the trial of an animal may have functioned, at least in part, as a way for the community to debate possible explanatory narratives. Ultimately, the trials may have allowed the community to establish cognitive control, to impose order on this world of random violence, and to create a narrative that made sense of inexplicable events by redefining them as crimes and placing them within the rational discourse of the trial.

In this section, I will focus on one trial in more detail, a sixteenth century proceeding against weevils<sup>132</sup> that were destroying vineyards in the town of St. Julien,<sup>133</sup> so that we can see how this process may have played out. This trial, which seems typical of the conduct of the animal trials, provides a particularly clear understanding of how the proceedings adjudicated among different social constructions of reality even as they addressed the stated issue of guilt and innocence. At the trial, the arguments of the advocates often echoed philosophical and spiritual debates in the society at large regarding the proper ordering of the universe. Thus, the trial served to reinforce the order of the human community while also providing a ritual forum for the members of that community to debate possible narratives for understanding the chaotic world around them.

The proceedings against the weevils were actually divided into two trials, spaced some thirty years apart. The original complaint was made by the wine-growers of St. Julien in 1545. Attorneys were hired to defend the animals. After an initial presentation by both sides, the ecclesiastical court dismissed the case in a proclamation recommending that public prayers would be the requisite first step in the proceedings.<sup>134</sup> After first declaring

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what ought to be done and what ought not to be done.” Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903, 911 (1996). Although the study of social norms is obviously related to the study of how meaning is constructed, (and a social norm is certainly a “narrative” as I use that term), it is important to understand that the issue of social norms centers more on the question of the optimal societal rules for external *behavior*, whereas I have chosen to pursue a less normative and more psychological account of how people come to apprehend and describe reality, as well as the possible effect these narrative choices might have for the community.

132. Weevils are a particular type of snout-nosed beetle. WEBSTER'S THIRD INTERNATIONAL DICTIONARY 2592 (1986).

133. I have previously described this trial in Berman, *Narratives*, *supra* note 13, at 310-13. For a full account, see EVANS, *supra* note 5, at 37-49. See also Hyde, *supra* note 5, at 705-06 (summarizing the trial).

134. EVANS, *supra* note 5, at 38-39 (quoting court proclamation):

Inasmuch as God, the supreme author of all that exists, hath ordained that the earth should bring forth fruits and herbs . . . not solely for the sustenance of rational human beings, but likewise for the preservation and support of insects, which fly about on the surface of the soil, therefore it would be unbecoming to proceed with rashness and precipitance against the animals now actually accused and indicted; on the contrary, it would be more fitting for us to have recourse to the mercy of heaven and to implore

the court's desire not to act rashly against God's creatures, the order then gave instructions prescribing a series of prayers. The required rituals included three consecutive days of high mass followed by a religious procession around the vineyards to be joined by at least two persons of every household.<sup>135</sup> A signed document in the court records attests that the prayers were given and that the weevils disappeared soon after.<sup>136</sup>

Even in this first stage of the trial, we can see how the court shaped a narrative for understanding the destruction brought on by the weevils. Back in the thirteenth century, Thomas Aquinas, in his *Summa Theologiae*, had questioned whether it was permissible to curse irrational creatures. He argued that curses and blessings should only be pronounced on beings that could receive evil or good impressions from them, and so such spells could only be aimed at rational and sentient beings. Because animals were devoid of understanding, they could not, in Aquinas' view, commit a wrong. Aquinas concluded that, if animals are regarded as creatures coming from the hand of God and employed by Him as agents for the execution of His judgments, then cursing them constitutes blasphemy. On the other hand, if animals are treated as lesser, nonrational creatures, then cursing them is "idle and futile and therefore wrong."<sup>137</sup> Choosing the first of these formulations, the ecclesiastical court in St. Julien viewed the animals as God's creatures; therefore, the devastation was seen as a sign passed from God to human beings through the animals.

The second stage of the trial began thirty years later, when the weevils returned to the same vineyard. In the complaint, the petitioners stated that the animals had "resumed their depredations and are doing incalculable injury."<sup>138</sup> Because the original defense lawyers had died, the petition asked that new advocates be appointed to defend the weevils in excommunication proceedings.

After a brief adjournment, the weevils' newly appointed counsel, Pierre Rembaud, answered the complaint with a plea to dismiss the case. Rembaud stated that the animals had done nothing to make themselves worthy of excommunication. Citing the Book of Genesis, he argued that the lower animals were created before Man and that God blessed all the living creatures of the earth.<sup>139</sup> The Creator would not have given this

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pardon for our sins.

135. *Id.* at 39.

136. *Id.*

137. ST. THOMAS AQUINAS, *SUMMA THEOLOGIAE* 207 (2a-2ae, q. 76) (Thomas Gilby trans., Blackfriars 1975) (1290).

138. EVANS, *supra* note 5, at 42.

139. *Id.* at 42-43.

blessing unless he intended that the creatures would be able to sustain themselves. In fact, the Bible states that God ordered that “to every thing that creepeth upon the earth every green herb has been given for meat.”<sup>140</sup> Therefore, Rembaud argued, the weevils had a prior right to the vineyards, conferred upon them at the time of creation. In addition, defense counsel contended that, because animals could only be subject to natural law and instinct, bringing them within human jurisdiction would be absurd and unreasonable.<sup>141</sup> Rembaud thus introduced two alternative narratives on behalf of the animals. The first conceptualized the acts of the weevils as part of God’s ultimate scheme for all creatures of the earth. The second declared that animals could not be understood or judged at all in human terms.

When the prosecuting attorney presented a document detailing the misery suffered by the villagers on account of the weevils, the defense requested, and was granted, a second adjournment to review the submission. In the meantime, François Fay, the commune’s advocate, offered his reply. Fay argued that, although the animals were created before human beings, they nevertheless were made subservient to the needs of human beings, who maintain dominion over the earth.<sup>142</sup> Fay’s narrative asserted a hierarchy and order to the universe that insisted on human jurisdiction over animal behavior.

The defense answered only by stating that it had not yet received a copy of the document that had been presented, and so the case was adjourned again. When the parties returned to court, Antoine Filliol, an attorney for the insects, responded to Fay by arguing that the subordination of the lower animals to Man did not confer a right to excommunicate them.<sup>143</sup> In addition, he returned to the argument that animals could only be subject to natural law, “a law originating in the eternal reason and resting upon a basis as immutable as that of the divine law of revelation, since they are derived from the same source, namely, the will and power of God.”<sup>144</sup> Filliol’s narrative, like Fay’s, acknowledged a hierarchy and order to the universe, but positioned God as the only dominant adjudicator.

While this legal wrangling continued, the inhabitants of St. Julien organized a public meeting in the town square. At the meeting, the villagers decided to set aside land outside the vineyards for the weevils, so that the insects might live freely away from the town. After selecting a

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140. *Genesis* 1:30.

141. EVANS, *supra* note 5, at 43.

142. *Id.* at 44.

143. *Id.* at 45.

144. *Id.*

piece of property, the townspeople drew up an elaborate contract with the weevils, giving the insects the right to an area known as La Grand Feisse.<sup>145</sup> The contract even went so far as to specify the land in question by its precise location, dimensions, and the character of its foliage and herbage. The contract reserved for the villagers the right to pass through the land “without prejudice to the pasture of the said animals,” and to make use of the springs of water contained therein, which were also to be at the service of the weevils.<sup>146</sup> In addition, the town would retain the right to extract minerals from the area as long as the insects were not harmed. Finally, the contract permitted the townspeople to take refuge on the weevils’ land in time of war.

By creating this contract, the townspeople implicitly asserted that the weevils possessed free will. According to this narrative, rational negotiation could lead to peaceful coexistence of human beings and animals in the natural world. If the animals could be convinced to leave through the use of incentives that would appeal to human beings, the animals could be understood as somehow similar to human beings and motivated by the same desires. Thus, not only would order be restored and the crops saved, but the animals would be rendered more familiar and therefore not as threatening.

When the commune’s counsel appeared in court and demanded enforcement of the contract, the defense requested another delay to review the agreement, and the proceedings were adjourned for an additional six weeks. After the court reconvened, Filliol, the weevils’ attorney, objected that the land offered to his clients was sterile and not able to fulfill the weevils’ subsistence needs. When the commune insisted that the land was suitable for insects, the court adjourned again after appointing experts to examine the area and to submit a written report of its fitness as a home for the weevils. The court’s actions evince a concern that the contract be fair, thereby implicitly adopting a narrative that abstract principles of justice could be applied to animals, and that the weevils would likewise acknowledge the supremacy of such principles.

Ironically, the final decision of the case cannot be ascertained because apparently some insects destroyed the last page of the trial records. Evans fancifully suggests that the weevils might have been dissatisfied with the decision and eaten the paper in retaliation.<sup>147</sup>

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145. *Id.* at 46-47.

146. *Id.* at 46.

147. *Id.* at 49.



From a twentieth-century perspective, it seems hard to imagine that people really believed a judicial proceeding would encourage weevils to stop destroying the vineyards or that by hanging a pig, other animals would be deterred from committing crimes.<sup>148</sup> Although we might be tempted to dismiss the proceedings as a product of superstitious or religious thinking,<sup>149</sup> the significance of these trials cannot truly be understood without analyzing the use of legal proceedings to resolve the societal problems.<sup>150</sup> For example, even if we agree that there was widespread belief in the Church's power to excommunicate those animals found guilty at trial, we must still try to understand the importance of the court proceeding

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148. Not surprisingly, the bizarre nature of the trials has inspired several fictionalized accounts, including a feature film, a novel, and a video work. See JULIAN BARNES, *A HISTORY OF THE WORLD IN 10 ½ CHAPTERS* 61-80 (1989); *THE ADVOCATE* (Miramax Films 1994); Videotape: *Rhyme 'em to Death* (The Wooster Group 1994).

149. Of the very few scholarly accounts of the animal trials in the twentieth century, most have dismissed the phenomenon as part of a primitive and barbarous past. See, e.g., EVANS, *supra* note 5, at 186 (explaining these trials as indicative of "[t]he childish disposition to punish irrational creatures and inanimate objects . . . common to the infancy of individuals and races"). Other writers viewed the trials in connection to the "animism of primitive man." According to this theory, human beings erroneously endowed inanimate objects with both a soul and human (or superhuman) mental facilities. Finkelstein, *supra* note 11, at 48 (quoting HANS KELSEN, *GENERAL THEORY OF LAW AND STATE* 3-4 (Anders Wedberg trans., 1961) (1945)). Still another view is that the trials were an outgrowth of the superstitious belief that the Devil could inhabit offensive beasts. See Cohen, *Folklore*, *supra* note 5, at 16 n.31. For additional commentary dismissing the trials in similar ways, see 3 SIR JAMES G. FRAZER, *FOLK-LORE IN THE OLD TESTAMENT* 415-45 (1919); Frank A. Beach, *Beasts Before the Bar*, 59 *NAT. HIST.* 356 (1950); Joseph P. McNamara, *Animal Prisoner at the Bar*, 3 *NOTRE DAME LAW.* 30 (1927-28); E.V. Walter, *Nature on Trial: The Case of the Rooster That Laid an Egg*, in *CIVILIZATIONS EAST AND WEST* 51 (E.V. Walter et al. eds., 1985).

150. Surprisingly, even Walter Woodburn Hyde, in his 1916 article on the animal trials, ignored these jurisprudential questions despite the fact that he was writing in a legal journal. Instead, Hyde merely recycled the ideas of philosopher Edward Westermarck, stating that "[t]he savage, in his rage, obliterates all distinctions between man and beast, and treats the latter in all respects as the equal of the former." Hyde, *supra* note 5, at 722 (discussing EDWARD WESTERMARCK, *THE ORIGIN AND DEVELOPMENT OF MORAL IDEAS* (2d ed. 1924)).

In contrast, Jacob Finkelstein, a professor of ancient literature, proposed in 1981 that the trials did not indicate that people thought of the animals as rational beings. Instead, he argued that people were extremely conscious of the fact that animals existed on a lower level in the hierarchy of creation. By killing a human being, the animal infringed on that order and was subject to punishment. Finkelstein, *supra* note 11, at 73 ("The visible evidence of the breach of this order had to be removed—and removed in solemn public procedure—in order that the cosmologic equilibrium would be widely recognized as having been restored.")

Esther Cohen's recent book, *Crossroads of Justice*, is distinctive because it explores the relationship between the community and the judicial ritual of the animal trials. Her analysis interweaves law and culture to create the most complex, nuanced picture of the proceedings to date. COHEN, *CROSSROADS*, *supra* note 5. Because Cohen focuses only on the medieval period, however, she does not raise broader questions about the social function of trials. This Essay poses some of these more general questions. See also Berman, *Narratives*, *supra* note 13.

itself. After all, it would have been much simpler to have a holy person curse the offending animals without any prior judicial ritual.

Some commentators have suggested that, at least with regard to individual animals, the trials might have served to deter negligence on the part of the animal's owner.<sup>151</sup> However, such a justification provides only a partial account, for, as Oliver Wendell Holmes has observed, if the animal had been sold prior to the arrest, the new owner would suffer the loss, not the allegedly culpable owner.<sup>152</sup> Other critics have viewed the seizing of animals as primarily a source of revenue to the King and his feudal lords, and have explained the practice on economic grounds.<sup>153</sup> This explanation too falls short. As historian Esther Cohen points out, because the incarceration, trial, and execution cost as much for an animal as for a human being, and because the profit of the animal's labor was lost to the lord as well as to the beast's owner, the trials and executions of animals often *deprived* the King and the feudal lords of revenue.<sup>154</sup>

In the end, although we might be able to invent any number of possible theories to explain the animal trials, it is probably impossible to decide upon a unifying rationale. No doubt the motivations—psychological, economic, religious—varied from community to community, and from one social class to another. Thus, instead of trying to explain the practice, it may be more fruitful to analyze the trials on their own terms. These proceedings were public spectacles, and they were conducted with the active participation of the community.<sup>155</sup> The trials not only adjudicated a conflict, but also served as a forum for debates about how best to come to terms with a grave misfortune or a freak accident. By analyzing this discursive function of the trials, we may be able to isolate various cultural roles that may still have relevance to contemporary legal practice. In the next section I identify three such roles and connect them to the questions about America's legal faith with which I began.

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151. See, e.g., 1 WILLIAM BLACKSTONE, COMMENTARIES \*300-01.

152. OLIVER WENDELL HOLMES, THE COMMON LAW 11, 23-24 (Mark D. Howe ed., Harv. Univ. Press 1963) (1881) (“[I]t has been repeated from Queen Elizabeth’s time to within one hundred years, that if my horse strikes a man, and afterwards I sell my horse, and after that the man dies, the horse shall be forfeited.”).

153. See, e.g., Jacob J. Finkelstein, *The Goring Ox: Some Historical Perspectives on Deodands, Forfeitures, Wrongful Death and the Western Notion of Sovereignty*, 46 TEMP. L.Q. 169, 257 (1973).

154. COHEN, CROSSROADS, *supra* note 5, at 115.

155. It is important to note that the animal trials, like all criminal procedures of the medieval era, were public. In the feudal period, for example, “[t]he hearing was usually held in the open air, at the gate of the castle or at the public meeting-place of the town.” ESMEIN, *supra* note 115, at 56. Likewise, in *Notre-Dame de Paris*, Victor Hugo sets the trial of Esmeralda’s goat before a large crowd at the Great Chamber of the Palais de Justice. HUGO, *supra* note 112, at 323-32.

### III. The Transformative Potential of Law

So now we come to the crucial question: Can we conceive of a role for law within a society that is generative rather than destructive? Can we create a new narrative about America's abiding legal faith, one that celebrates our reverence for law as among our greatest cultural achievements? And how might my true "tales" of the rats of Autun or the weevils of St. Julien help us to construct such a narrative?

As a starting point, it may be useful to view law as a constitutive element in what anthropologist Victor Turner has called a "social drama."<sup>156</sup> Turner outlined a four-part sequence to explain how social dramas operate in society:

- 1) *breach* of regular norm-governed social relations; 2) *crisis* during which there is a tendency for the breach to widen . . . ; 3) *redressive action* ranging from personal advice to informal mediation or arbitration to formal juridical and legal machinery to the performance of public ritual; 4) either the *reintegration* of the disturbed social group or the social recognition and legitimation of *irreparable schism* between the contesting parties.<sup>157</sup>

While the legal process obviously plays a role in the third, "redressive" stage of the social drama by resolving the actual conflict, the question is whether there is something about the resort to legal solutions that may fulfill the fourth stage as well. Can legal discourse provide a forum that encourages a "reintegration of the disturbed social group" despite the inevitable jostling that occurs whenever norms are contested?

#### A. Three Possible Cultural Roles of the Animal Trials

As we think about the animal trials, we must ask ourselves why a full legal proceeding was employed. Even if we assume that people believed that the animals were morally culpable or that punishing one animal might deter others, that does not answer the question of why a formal *trial* was necessary. Certainly it would have been far easier and less expensive simply to kill an animal that had become a public nuisance. Thus, it appears that the resort to law must have fulfilled some further cultural roles that simply killing the animal would not. What possible roles can we envision?

I would like to suggest three possibilities, all of which should be relevant in our thinking about the transformative potential of law more generally. First, by bringing the animal transgressors within a human

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156. VICTOR TURNER, DRAMAS, FIELDS, AND METAPHORS 23-59 (1974); see also Victor Turner, *The Anthropology of Performance*, in PROCESS, PERFORMANCE, AND PILGRIMAGE 63 (1979) [hereinafter Turner, *Anthropology*].

157. Turner, *Anthropology*, *supra* note 156, at 63-64.

scheme of justice, the trials may have helped the community “domesticate” chaos by conceptualizing the animals not as uncontrollable forces of nature, but as actual members of the community who had simply committed a misdeed. Second, the mechanism chosen—a legal trial—may have served to place societal concern and debate about the breach into a rationalizing framework, thus encouraging a formal dialogue built on appeals to philosophical and legal principles. Third, the trials may have provided a forum in which various parties, both inside and outside of the courtroom, could offer a variety of narratives for understanding and coming to terms with an act that shattered the community’s peace. As a result of these three aspects of the proceedings—the assertion of community dominion, the establishment of a rationalizing framework, and the creation of a forum for societal debate—the trials may have had a therapeutic effect on the community over the long term, regardless of the actual outcome.

(1) *The Assertion of Community Dominion*

When a transgressor behaves in some way contrary to society’s moral code, the community can choose to view the transgressor in one of two ways. First, the community can close ranks by defining itself in opposition to the transgressor and by treating the transgression purely as an *external* threat. Or, second, the community can claim dominion over the transgression by conceptualizing the transgressor as a member of the community that has committed what might be considered an *internal* offense. We may liken these two strategies to the difference in the responses of the United States Government to the bombing of Pearl Harbor in 1941 and the bombing of the World Trade Center in New York City in 1995. The Pearl Harbor bombing was seen as an offense perpetrated by an outsider, and the government responded by fighting a war against a threat that it could not control. With the World Trade Center bombing, although some of the attackers were foreign nationals, the government prosecuted them in U.S. courts. This action reflected a conception of the perpetrators as community members to be punished internally.

The choice to define a threat as internal or external is, in part, a decision about jurisdiction.<sup>158</sup> When a community exercises legal jurisdiction, it is symbolically choosing to assert its dominion over an actor. This jurisdictional reach can serve to transform what otherwise might have been considered an external threat into an internal adjudication.

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158. For further discussion of the symbolic ramifications of the assertion of jurisdiction, see generally Cover, *supra* note 17.

Accordingly, the assertion of jurisdiction can be seen as one way that communities domesticate chaos.

For example, in deciding how to respond to acts of violence or depredation caused by animals, communities were faced with a choice of whether to view the acts as internal or external threats. Random acts of violence caused by insensate agents undoubtedly brought a deep feeling of lawlessness: not so much the fear of laws being broken, but the far worse fear that the world might not be a lawful place at all.<sup>159</sup> To combat such a fear, it may have been essential to view the animals not as uncontrollable natural forces belonging to the outside world, but as members of the community who could actually break the community's laws. By asserting dominion over the animals, members of communities could assure themselves that, even if the social order had been violated, at least there was a social order capable of violation, and not simply undifferentiated chaos.

From this perspective, Bartolomé Chassenée's many procedural excuses on behalf of the rats of Autun were not merely the clever delaying tactics of a canny advocate, but, as one jurist of the time described them, noble pleas for "the order and forms of justice."<sup>160</sup> The trials were more than just a way of punishing animals; they also represented an attempt by a community to apply its own moral scheme to the natural world and create an integrated sense of justice. Thus, Chassenée's arguments (or those of Pierre Rembaud on behalf of the weevils of St. Julien<sup>161</sup>) reflected the conviction that justice was universal, applicable to animals as well as human beings.<sup>162</sup>

But the trials of animals and inanimate objects also reflected more than just a global *notion* of justice. By trying an animal or an object using the same formula applied to a human murderer, the court was incorporating the human and nonhuman within one *community* of justice. The trials applied the formal rules of court to what otherwise would seem to be random and inexplicable acts of irrational actors. In this way, the community integrated the offender within its moral scheme,<sup>163</sup> thereby helping to heal the breach of the social order.

Thus, it is perhaps not surprising that in 1576, when a hangman, without legal authority, killed a pig at the gallows after it had bitten the ear

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159. Humphrey, *supra* note 15, at xxv.

160. COHEN, CROSSROADS, *supra* note 5, at 121 (quoting DE THOU, *supra* note 7, at 414-16).

161. See *supra* text accompanying notes 139-141.

162. In fact, Cohen points out that medieval courts also tried the dead. See COHEN, CROSSROADS, *supra* note 5, at 134-45.

163. *Id.* at 83-84.

off a child, the community viewed the act as being to “the disgrace and detriment of the city.”<sup>164</sup> The hangman was forced to flee the town. An execution without the imposition of the forms of justice was intolerable. Chassenée, too, railed against human beings who chastised their domestic animals and put particularly dangerous animals to death. To him, such an act was arbitrary and autocratic, and if systematically applied to human beings would be denounced as intolerable tyranny. Chassenée insisted that under no circumstances should one impose a penalty except by judicial decision. In support of the principle, he referred to the apostle Paul, who had declared in the Bible that sin is not imputed where there is no law.<sup>165</sup>

This scrupulous concern for according due process to animal transgressors can be seen as a necessary part of restoring the community’s sense of social order. After all, simply lashing out to destroy the animal would continue to imply that the animal was an uncontrollable “other,” a part of the “natural” world that could not be reasoned with or domesticated. Such “unlawful” punishment might even mean that the community symbolically had succumbed to the disorder of the natural world and that it was now drawn into an ongoing war with forces of darkness it could not control. Just as retaliatory acts of a lynch mob are unlikely to restore a sense of order to a community, so too punishment of animals without legal procedures could well have increased the fear of the unknown that Foucault associated with the medieval psyche.<sup>166</sup>

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164. EVANS, *supra* note 5, at 146-47.

165. *Id.* at 34-35.

166. *See supra* note 130 and accompanying text. One might well wonder why communities would be concerned about providing due process to a pig when, presumably, the same pig could have been slaughtered for food without the benefit of any procedural protections at all. The answer may be that a human being killing an animal for food was considered a “natural” occurrence, making resort to legal process unnecessary, whereas an animal killing a human being was deemed a threat to the hierarchy of creation itself. Combating such a threat to the established order perhaps required the use of legal rituals.

In support of that theory, it is interesting to note that the proceedings against animals and inanimate objects, both in England and on the Continent, appear to derive from the Bible where, in the Book of Exodus, an ox that killed a human being was sentenced to death by stoning, and its flesh could not be eaten. *Exodus* 21:28-32. The punishment of stoning is a distinctive sentence in the Bible, reserved for only a few types of crimes. In those cases, there is no designated “executioner,” for the community assembled is the common executioner of the sentence. Offenses which entail this mode of execution must therefore be of a character that, either in theory or in fact, “offend” the corporate community or are believed to compromise its most cherished values to the degree that the commission of the offense places the community itself in jeopardy. Finkelstein, *supra* note 11, at 26-27. Stoning is also called for in the Bible as a punishment for worshipping foreign gods, being a disloyal son, being a non-virginal bride, and engaging in adultery, child sacrifice, sorcery, necromancy, blasphemy, sedition, and violation of the Sabbath. *Id.* at 27.

Instead, the trials implicitly constructed a narrative asserting that animals, along with human beings, were *part of* a community and *subject to* universal norms of justice. Paradoxically, even though the trials often resulted in the execution of the individual animal, the proceedings, by their very nature, first insured that the animal was conceptualized as a member of the community. Thus, the trials may have fulfilled Turner's stage four<sup>167</sup> by "reintegrating" the transgressor within the social group, even as that transgressor was punished for committing a crime.

(2) *The Establishment of a Rational Framework*

The animal trials also may have permitted members of a community under siege to channel their feelings of misfortune into a formal, ritualized framework and a more abstract legal language. Instead of feeling victimized by the inexplicable destruction of their vineyards, for example, the wine-growers of the town of St. Julien could attend the trial<sup>168</sup> and feel that they were part of a more ordered universe, where formal codes of procedure governed, and legal rules and principles offered both explanation and guidance.

The trials therefore offered a type of formalized *discourse* that, in and of itself, may have helped members of the community respond to feelings of anger and helplessness. This capacity of law to transform private rage has been recognized at least as far back as ancient Greece. In the last play of Aeschylus' *Oresteia* trilogy, the Furies, avenging spirits of the slain Clytemnestra, create misfortunes across the land. In response, Athena "remands" the case of Orestes to a human court in Athens. By this act, the Furies are transformed into the Eumenides, and the community is

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The common denominator of all the offenses entailing the punishment of death by stoning is that they are thought to strike at the moral and religious fibers which the community as a whole sees as defining its essence and integrity. Such crimes, in other words, amount to insurrections against the cosmic order itself.

*Id.* at 27-28.

The Biblical treatment of the ox indicates that actions against non-human transgressors were treated as crimes against the community as a whole. Moreover, it was irrelevant whether or not the ox was "morally" guilty. Rather, the guilt was treated as an objective contagion that "must be eradicated in the most public way, and the public must participate in the act of eradication as a demonstration that it is consciously and effectively restoring the order that had been disturbed." *Id.* at 58.

167. See *supra* text accompanying note 157.

168. See *supra* note 155.

healed.<sup>169</sup> Thus, “*The Oresteia* ushers in the luminous idea of law, not force, as the mediator between self and community.”<sup>170</sup>

It has often been observed that legal systems historically arose as an alternative to private retributive violence by offering the coercive power of the state to replace the unchecked passions of individual actors.<sup>171</sup> In common with this view, I too suggest that the animal trials may have offered an alternative to private suffering and incomprehension. My point is somewhat different, however, for I am not so much concerned with the animal trials as a demonstration of state (rather than private) power, as with the way in which the very format of a trial and the use of legal discourse may have had a therapeutic effect on the “victims” of the animals’ “crimes.” Accordingly, instead of concentrating on the coercive force behind the trials, I choose to focus on the potential symbolic impact of the trials themselves. From this perspective, the most important healing aspect of the trials may have been not the demonstration of state power but the ability of the trials to construct a ritual proceeding composed of explanatory narratives.

It is in this context that we may perhaps understand the involvement of the townspeople of St. Julien in the trial of the weevils. According to the records of the proceedings, the members of the community participated in two primary ways beyond simply initiating the action: first, they engaged in a series of religious rituals and prayers seeking relief from the scourge; second, they drew up a legal contract with the weevils. Both actions can be understood as appeals to the governing principles and ritual forms of an ordered universe. The prayers symbolically invoked the rule of God, as well as a set of philosophical arguments about the connection between God’s will, the actions of human beings, and the natural world. In contrast, the contract implicitly asserted the primacy of *human* law and appealed to the formal rules of human property relations as well as the philosophical justifications for such rules. Thus, both cultural mechanisms, though obviously quite different, transformed a narrative of human suffering into a new discourse based on abstract conceptions of order. The prayers shifted the focus to questions of God’s will and the possible role of animals as divine messengers. And the contract negotiations insisted that the problems faced by human beings are best addressed by resort to abstract governing principles of the community.

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169. Aeschylus, *The Eumenides*, in ORESTEIA 133, 151-52, at ll. 470-89 (Richmond Lattimore trans., 1953).

170. Burt Neuborne, *Ghosts in the Attic: Idealized Pluralism, Community and Hate Speech*, 27 HARV. C.R.-C.L. L. REV. 371, 372 (1992).

171. See, e.g., HOLMES, *supra* note 152, at 6.



(3) *The Creation of a Forum for Competing Narratives*

Finally, as we saw with the trial of the weevils at St. Julien, the animal trials appear to have functioned in part as a forum for adjudicating among competing explanatory narratives regarding the forces of nature. Thus, in considering the culpability of an animal, the trials may also have helped determine how members of communities would conceptualize the world around them. Were the animals to be deemed messengers from God, or agents of Satan? Or, if they were purely “natural” creatures, did they have some prior right to behave as Nature intended even if their actions harmed human beings? Or, instead, were animals to be seen as lower than human beings in the hierarchy of creation? Were animals capable of knowing when they had committed offenses? Were animals rational actors? And should animals be considered members of the human community of justice? Could they even be guilty of crimes? Would punishment deter animals from creating future misfortune? All of these questions were raised both explicitly, in the arguments of the advocates, and implicitly, in the fact that the debate itself was conducted as part of the adjudicatory structure of a criminal trial.

The active participation of the townspeople of St. Julien in the trial also indicates that this play of narratives was not exclusively a formal legal event. Rather, the trials also functioned as public performances:

[T]he public watching legal rituals was, despite its ostensible passivity, perhaps the most important element in the entire picture. Unless the spectacle spoke the language of the audience, used its symbols and cultural perceptions, the entire purpose of the exercise was lost. The judge in his gallery viewing a stage set at his orders and the spectator in the crowd looking, jostling and being jostled, shouting assent or dissent, were both participants in the legal drama.<sup>172</sup>

As we have seen already, the language of the trials reflected popular debates within the society about the relationship between God, human beings, and animals. Indeed, the arguments of the advocates echoed various scholarly opinions on the subject that had been advanced by Aquinas and others.<sup>173</sup> Thus, the trials may have provided a way for the community as a whole to take part in a debate that otherwise would have been confined to scholarly discourse. On this view, the animal trials served in part to provide a popular forum for debating fundamental points of conflict within the community.

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172. COHEN, CROSSROADS, *supra* note 5, at 74.

173. For further discussion of this scholarly debate, see Berman, *Forfeiture*, *supra* note 13, at 305-09.

## B. Some Thoughts on the Contemporary Potential of Law

Finally, we return to the concerns about contemporary legal practice with which we began. In this last section, I offer ways we might conceptualize the potential power of law as a productive forum for addressing social rifts. And, in contrast to the critics discussed earlier, I focus on the ways in which law has been or might be used to foster productive community discourse. Having isolated three plausible cultural roles the trials of animals might have fulfilled, I ask whether any of these roles might still be relevant. By taking seriously such cultural roles, we may see that resort to legal solutions can actually help facilitate the reintegration stage of Turner's social drama.<sup>174</sup>

### (1) *The Assertion of Community Dominion*

Just as the animal trials implicitly communicated a symbolic message that nonhuman transgressors were nevertheless subject to human control, so too our contemporary notions of jurisdiction continue to be linked to how we define the limits of the community and who should be deemed a "member."<sup>175</sup> When a locality exercises jurisdiction over an individual, it is implicitly sending a message both to the individual and to the community at large that the individual is a member of that community, at least with regard to the subject matter of the case.<sup>176</sup>

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174. See *supra* text accompanying note 157.

175. For a related perspective on jurisdiction, see generally Cover, *supra* note 17.

176. Thus, we can understand the Supreme Court's expansion of the limits of long-arm jurisdiction in this century as a reflection of the changing notion of community membership in the United States. As interstate travel and commerce have grown, we are increasingly part of a larger national community, and differences from state to state may be less important. Indeed, the Court, in elaborating rules on jurisdiction, has explicitly acknowledged changes in technology, transportation, and commerce, as key factors in the jurisdictional calculus. See, e.g., *McGee v. Int'l Life Ins. Co.*, 355 U.S. 220, 222-23 (1957).

[The expansion of personal jurisdiction is in part] attributable to the fundamental transformation of our national economy over the years. Today many commercial transactions touch two or more States and may involve parties separated by the full continent. . . . At the same time modern transportation and communication have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity.

*Id.*

The link between jurisdiction and community membership has arisen again recently in debates concerning the appropriate jurisdictional rules to be applied to online interactions. Compare David R. Johnson & David Post, *Law and Borders—The Rise of Law in Cyberspace*, 48 STAN. L. REV. 1367 (1996) (arguing that cyberspace should be its own jurisdiction), with Jack Goldsmith, *The Internet and the Abiding Significance of Territorial Sovereignty*, 5 IND. J. GLOBAL LEGAL STUD. 475 (1998) (arguing that traditional jurisdictional rules can be applied to online transactions). For further discussion of changing social conceptions of space and distance and their relation to the determination of jurisdictional rules for online interaction, see generally Paul

This exercise of jurisdiction can be part of a reintegrative process in and of itself. For example, a person injured by a defective product may feel powerless to affect the behavior of a distant, seemingly uncontrollable corporation. Indeed, just as the weevils may have been viewed as an uncontrollable “other,” so too the products of global capitalism may seem to be external forces of destruction that obey only their own law. By bringing the corporation within local jurisdiction, the individual and the community may feel they have regained some control over their world. And it may also be that, because of the potential exercise of local jurisdiction, a multinational corporation may, in turn, conceive of itself as a corporate citizen of many different localities.

In addition, the ability to assert the jurisdiction of a court may give people some sense of *their own* membership in the community. A prison inmate bringing a civil rights action against an abusive guard, for example, may feel partially vindicated simply by the fact that he or she is able to invoke the jurisdiction of a court. Regardless of outcome, the fact that the inmate’s grievance is aired and considered, however briefly, may give a marginal member of society more of a sense of community affiliation.<sup>177</sup> Thus, the assertion of community dominion may be therapeutic both for the community, which can assert its control over otherwise uncontrollable behavior, and for the individual, who achieves a form of community membership through the legal process. Even a criminal defendant is implicitly deemed to be a member of the community who has gone astray.

The need to assert community dominion may also be a significant part of our desire to use legal and quasi-legal proceedings to respond to atrocities such as war crimes or crimes against humanity. Arguably, the trial of accused Nazi war criminal Klaus Barbie, held in France several years ago, was less about punishing an individual (who, after all, was extremely old and in failing health at the time of the trial), than about asserting the community’s sense of control after a horrific and chaotic human tragedy. Psychologist Nicholas Humphrey has noted a parallel between the animal trials and the recent proceedings against Barbie:

Aren’t we seeing again nothing other than people’s need to make sense of nonsensical events—to close the book on a chapter of otherwise inexplicable calamity. Barbie’s living presence in the courtroom has almost no significance. If he were dead, his corpse would serve the role of the defendant just as well. At the end of it, Barbie’s body will

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Schiff Berman, *The Internet, Community Definition, and the Social Meaning of Legal Jurisdiction*, in VIRTUAL PUBLICS: POLICY AND COMMUNITY IN AN ELECTRONIC AGE (Beth E. Kolko ed., forthcoming 2001).

177. See, e.g., Roland Acevedo, *Thoughts of an Ex-Jailhouse Lawyer*, N.Y.L.J., Aug. 5, 1998, at 2.

metaphorically be thrown into the Rhone. We shall all feel curiously relieved . . . .<sup>178</sup>

In addition, the assertion of community dominion may have relevance in evaluating the usefulness of alternative legal procedures aimed at restorative justice, such as the growing use<sup>179</sup> of truth commissions as a mechanism for societal reconciliation. When discussing the animal trials, we noted that part of the significance of the trial was that it implicitly rendered the offending animal a member of the community and not an outside entity. Similarly, the Truth and Reconciliation Commission (TRC) proceedings in South Africa (to use the most recent example of the truth commission model to date) have attempted to restore psychic membership in the South African community to both victims and perpetrators.<sup>180</sup> Instead of a criminal prosecution against a non-participative "other," as at the trial of Adolph Eichmann after World War II,<sup>181</sup> the TRC required that those perpetrators seeking amnesty first acknowledge the community's jurisdiction by appearing before the Commission, and then speak their misdeeds to the entire nation. Likewise, victims who for years were not acknowledged as full-fledged members of the South African community were given a forum both to speak about their pain and to participate in the community's legal system instead of remaining outside of it. Thus, the TRC proceedings implicitly expressed the hope that victims, perpetrators, and spectators could all be integrated into the new South African community. Whether or not the TRC's effort is successful (and we will probably not be able fully to evaluate the question for many decades), the proceedings were firmly premised on the reintegrative potential of law. At least one American commentator has

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178. Nicholas Humphrey, *Society Tomorrow (Body and Soul): Court in the Act*, GUARDIAN (London), June 3, 1987, quoted in Jack Smith, *Putting Animals, Bugs and Corpses on Trial Sounds Weird, but What's a Body to Do?*, L.A. TIMES, July 21, 1987, § 5, at 1.

179. Priscilla B. Hayner, *International Guidelines for the Creation and Operation of Truth Commissions: A Preliminary Proposal*, 59 LAW & CONTEMP. PROBS. 173, 175 (1996) (finding that "[t]ruth commissions have been multiplying rapidly around the world in recent years").

180. See generally S. AFR. TRUTH AND RECONCILIATION COMM'N, FINAL REPORT OF THE TRUTH AND RECONCILIATION COMMISSION (1998). For further discussion of the Truth and Reconciliation Commission as well as other attempts to address issues of so-called "transitional justice," see generally MARTHA MINOW, BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE (1998); RUTI TEITEL, TRANSITIONAL JUSTICE (2000). For a discussion of the Commission from the point of view of South African jurists, see generally Richard J. Goldstone, *Justice as a Tool for Peace-Making: Truth Commissions and International Criminal Tribunals*, 28 N.Y.U. J. INT'L L. & POL. 485 (1996); Pius Langa, *South Africa's Truth and Reconciliation Commission*, 34 INT'L LAW. 347 (2000).

181. See generally HANNAH ARENDT, EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL (1963).

suggested that we might consider such a commission ourselves to explore the history and legacy of race relations in this country.<sup>182</sup> And the core idea of bringing parties to a dispute or crime into a community forum to seek some form of restorative justice may have practical applications even in more commonplace legal proceedings.<sup>183</sup>

(2) *The Establishment of a Rational Framework*

In looking at the animal trials, we speculated that the resort to legal procedures and legal language can, in and of itself, help to transform private anger and pain by providing both a rationalizing discourse and a ritual setting. There are at least four reasons why a legal framework might function in this way even today.

First, the language of legal argument almost inevitably requires us to generalize from the specific facts and emotions of the particular episode under consideration, and instead discuss more abstract rules or principles. In the case of the weevils, for example, we can see that the legal debate transformed the issue from the crop damage caused by the animals in St. Julien to an argument about the proper relationship of God, animals, and human beings in the ordering of the universe. This tendency toward abstraction has sometimes been criticized by contemporary commentators who argue that law may sometimes distort personal narratives.<sup>184</sup> Nevertheless, a more abstract narrative can provide a way of conceptualizing and coming to terms with a painful event. If the vineyards are dying, legal narratives debating the proper ordering of the universe or asserting that animals are governed by established rules of contract and property may well provide a therapeutic language for coming to terms with the devastation.<sup>185</sup>

Second, by forcing us to look beyond the particular emotions generated by a traumatic event, legal language may allow us to develop a more thoughtful, nuanced view. For example, Ronald Dworkin has argued that many of the clauses of the U.S. Constitution cannot be understood

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182. Martha Minow, *Not Only for Myself: Identity, Politics, and Law*, 75 OR. L. REV. 647, 681-83 (1996).

183. See *infra* notes 201-208 and accompanying text.

184. See generally Lucie E. White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on Hearing of Mrs. G.*, 38 BUFF. L. REV. 1 (1990); Martha Minow & Todd Rakoff, *Is the "Reasonable Person" a Reasonable Standard in a Multicultural World?*, in EVERYDAY PRACTICES AND TROUBLE CASES (Austin Sarat et al. eds., 1998).

185. See Lévi-Strauss, *supra* note 19, at 197-98 (arguing that cultural narratives give shape to pain and allow for effective response to crisis).

except as appeals to moral philosophy.<sup>186</sup> If so, then it may be that arguments about contentious issues, when cast in constitutional terms, encourage us to frame our debate as a discussion about core philosophical values rather than as a question of political expediency or rancorous name-calling. Instead of simply shouting at each other about whether, for example, burning the American flag is acceptable behavior, we may have a more profitable community discussion when the argument is framed in the more abstract language of our First Amendment jurisprudence.

Third, the formal, ritualized nature of the legal process may itself be a source of comfort. Just as religious rites provide us with a reassuring sense of order through their standardized repetition and prescribed procedure, so too it is easy to imagine that victims of a crime or plaintiffs in a product liability or mass tort action might well find that the legal process, with its solemn tone, slightly archaic language, and elaborate rules, provides some structure for their grief, regardless of outcome.

Fourth, broad participation in legal rituals may reinforce a sense of connection to the broader community. Robert Hughes' study of the colonization of Australia illustrates the potential psychological benefits of such participation. Hughes discusses the efforts of the prison administrator Maconochie to reform the most oppressive and seemingly hopeless penal colony, Norfolk Island.<sup>187</sup> Maconochie determined that, because of their harsh treatment, the prisoners had lost all sense of connection with the outside world and were not being encouraged to think of themselves as full-fledged human beings. One of his responses to this problem was to make sure that trials for breaches of prison rules were held in the open Barrack Yard. As Maconochie describes it, he engaged the prisoners "to act as Jurors, Pleaders, Accusers, or otherwise, as the Case might be; I derived extraordinary advantage from this . . . in interesting the Body of the Men in the Administration of Justice. Their sole Object on all occasions had been to defeat it, but now they began to sympathise with it. . . ."<sup>188</sup> According to Maconochie, engaging the prisoners in the performance of law was crucial to reintegrating them into the community beyond the penal colony.

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186. RONALD DWORKIN, *The Moral Reading and the Majoritarian Premise*, in FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION 7-10 (1996).

187. ROBERT HUGHES, *THE FATAL SHORE* 509 (1987). I am grateful to Christopher A. Stone for bringing this passage to my attention.

188. *Id.*

(3) *The Creation of a Forum for Competing Narratives*

Finally, in analyzing the trial of the weevils at St. Julien, we noted that the legal proceedings functioned in part as a forum for adjudicating among various different explanatory narratives. If, as discussed earlier, narratives constitute the language we use for conceptualizing reality, then it is particularly important that there be societal mechanisms for debating these narratives. I would like to suggest that law may be particularly well-suited for this role because it is a social practice that explicitly recognizes the existence of many different narratives and the importance of public conversation among competing worldviews.

Both trials and judicial opinions, for example, ultimately construct a narrative about a disputed event by rendering a decision or verdict. They do so, however, only after first enacting a performance in which the society “creates, tests, changes, and judges” the various competing discourses that could make up our social knowledge.<sup>189</sup> As James Boyd White has observed, law’s strength is precisely in its ability to provide a forum for testing the persuasive power of competing narratives.

The multiplicity of readings that the law permits is not its weakness, but its strength, for it is this that makes room for different voices, and gives a purchase by which culture may be modified in response to the demands of circumstance. It is a method at once for the recognition of others, for the acknowledgment of ignorance, and for cultural change.<sup>190</sup>

In White’s view, law provides a set of institutions that help construct our society as “a discoursing community, committed to talking with each other about our differences of perception, feeling, and value, our differences of language and experience.”<sup>191</sup>

Trials, because they are inherently multivocal,<sup>192</sup> most obviously fulfill this vision. We have seen that participants in the animal trials provided many different popular and scholarly interpretations, and the proceedings therefore allowed the community to consider and weigh the competing narratives.

It is not only trials that are multivocal, however, but legal discourse itself (at least as traditionally practiced and taught in this country). Let us

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189. Hariman, *supra* note 47, at 29.

190. James Boyd White, *Law as Language: Reading Law and Reading Literature*, 60 TEX. L. REV. 415, 444 (1982).

191. JAMES BOYD WHITE, JUSTICE AS TRANSLATION 80 (1990).

192. James Boyd White, *Is Cultural Criticism Possible?*, 84 MICH. L. REV. 1370, 1373 (1986); see also Hariman, *supra* note 47, at 29 (arguing that “the popular trial fulfills a special social function because it provides the social practice most suited to comparing competing discourses”). For further discussion of this perspective, see generally JAMES BOYD WHITE, HERACLES’ BOW (1985).

consider, for example, the paradigmatic exchange between teacher and student in a first-year law school classroom. The student has an initial reaction to a case or an issue. Immediately, that student is forced to confront multiple alternative narratives for understanding the question. For instance, the student might be asked to consider a less sympathetic set of facts, or to argue the issue from the opposing party's point of view. Or the student might be forced to address the question from the perspective of law and economics, or critical legal studies. The teacher might point out the historical reasons the law evolved in a contrary fashion. Ultimately, the debate might include questions of public policy, judicial competence, the appropriate division of responsibility among branches of government, and the practical impediments to reaching a solution. In the end, the student is encouraged to develop a more nuanced viewpoint, one that takes greater account of all the various available narratives on the issue. At its best, this process should be a lesson in tolerance for opposing viewpoints, an exercise in humility through which the student can develop a greater understanding and appreciation for other ways of conceptualizing issues. From this idealized exchange, we can envision law as a "method of individual and collective self-education, a way in which we teach ourselves, over and over again, how little we can foresee, how much we depend on others, and how important to us are the practices we have inherited from the past."<sup>193</sup>

Thus, we can perhaps tell a story of law as a terrain of engagement among multiple populations and multiple worldviews. And when we think of law in this way, we need not limit ourselves to the idea that law is only the official discourse that takes place in courtrooms and legal memoranda. Rather, law talk is dispersed throughout the culture—in the newspaper accounts of legal decisions, in the everyday conversations that invoke conceptions of legal rights, and in the way law is portrayed in movies, on television, and in books. Accordingly, we are all continuously producers and consumers of our legal culture, and the story is always in flux. Indeed, all of these multiple understandings and perspectives are inevitably part of the language of justice. As one commentator has pointed out, "justice . . . involves reconciling diversities into a restored and new multiple unity. Justice requires a unity of differences; mutuality and incorporation rather than annihilation of opposites and distinctions."<sup>194</sup>

Such a unity is always provisional, always contingent, always contested. As Richard K. Sherwin has recently observed, "It is precisely the

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193. WHITE, *supra* note 191, at 266.

194. Jane Flax, *The Play of Justice*, in DISPUTED SUBJECTS: ESSAYS ON PSYCHOANALYSIS, POLITICS AND PHILOSOPHY 111, 123-24 (1993).



proximity of disorder—deriving from constant contestation among conflicting discourse communities as well as from the various irrational forces that surround and suffuse them—that compels new forms of legal self-organization. . . . This is how law adapts to the contingencies and vicissitudes of shifting social, cultural, and technological (among other) developments.”<sup>195</sup> In the end, law’s transformative potential in American culture rests on its availability as a site for continuous self-criticism and re-creation. And the effort to articulate principles of justice, the creation of fora for debating those principles, the commitment to a culture of conversation about them, and the recognition that clashes among various forms of knowledge are inevitable and desirable—these are the aspects of law we might want to celebrate, tell stories about, and strive to achieve.

On this view, the oft-criticized willingness of lawyers to espouse any point of view regardless of personal belief does not necessarily signal a cynical lack of conviction. Rather, it is an acknowledgment that all points of view deserve to be aired. It is a recognition that truth is contingent, that many different narratives are possible for describing any single event. Indeed, one might even say that the very language and structure of our legal processes are premised on the idea of a discourse among multiple worldviews.

### Conclusion

Perhaps the most fundamental concern expressed by those critics of contemporary American legal practice discussed earlier is that, in part because of our “jurismania,”<sup>196</sup> we as a nation have lost the ability to speak in a common language or share a common set of societal commitments. Such a concern stems in part from cultural and political changes over the past forty years. During that time, various political and critical strategies have quite effectively exposed old historical “truths” and “values” as mere products of hierarchy. The question is whether, in today’s world, there is any way to develop cultural unity without simply reimposing that hierarchy. I think the answer is yes, and I think that legal discourse and legal proceedings, because they are inherently structured as debates among conflicting narratives, offer one possible forum for developing a shared commitment to conversation and productive dialogue.<sup>197</sup>

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195. SHERWIN, *supra* note 55, at 238-39.

196. See generally PAUL F. CAMPOS, JURISMANIA: THE MADNESS OF AMERICAN LAW (1998).

197. Of course, a shared commitment to conversation may not, in and of itself, produce the more unified polity for which some critics seem to yearn. Nevertheless, as Lewis Coser observed in 1956, maintaining fora for expressing social conflict may serve to stabilize and unify social

There can be little doubt that, over the past several decades, anthropologists, literary critics, and legal scholars have challenged traditional claims to truth. Instead of a world consisting of “facts” to be discerned, these writers have argued that truth itself is contingent, and that any claim to truth is inevitably a product of culture, language, class, upbringing, gender, race, etc. Such an attack inevitably aims “to disrupt and erode the power of the grand normalizing discourses . . . .”<sup>198</sup> In a typical example of this antifoundationalist position, anthropologist Renato Rosaldo has proclaimed that “classical modes of analysis, which in their pure type rely exclusively on a detached observer using a neutral language to study a unified world of brute facts, no longer hold a monopoly on truth. Instead, they now share disciplinary authority with other analytical perspectives.”<sup>199</sup>

Building from this attack on all claims to objective truth, feminists, multiculturalists, and others have argued that knowledge itself is inherently biased and that we must be more aware of the experiences, perspectives, and truths of those who have been ignored or silenced in the past. For example,

Once there was a single narrative of national history that most Americans accepted as part of their heritage. Now there is an increasing emphasis on the diversity of ethnic, racial, and gender experience and a deep skepticism about whether the narrative of America’s achievements comprises anything more than a self-congratulatory story masking the power of elites.<sup>200</sup>

In a world where traditional assertions of truth have lost their automatic claims to legitimacy and more narratives than ever before are given voice within the culture, the fear is that we have lost the ability to have a unified society at all. The critics discussed at the beginning of this Essay see contemporary American legal discourse as a part of this breakdown of community dialogue and consensus-building. Yet, it seems to me that our legal faith also provides us with an opportunity.

By looking at the perplexing custom of prosecuting animals, we have identified three potential cultural roles that law might fulfill. First, the legal process can help to define membership in the community and to provide a forum where individuals can both affirm that membership and reconcile themselves with the society of which they are a part. Second, the

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groups. *See generally* LEWIS A. COSER, *THE FUNCTIONS OF SOCIAL CONFLICT* (1956). I am grateful to Christopher A. Stone for suggesting the relevance of Coser’s work to my argument.

198. Flax, *supra* note 194, at 114.

199. ROSALDO, *supra* note 19, at xviii.

200. JOYCE APPLEBY ET AL., *TELLING THE TRUTH ABOUT HISTORY 1* (1994).

formal procedural rules and rationalizing language of law can provide a comforting ritual and a more abstract discourse for coming to terms with traumatic events. Third, law can provide a forum for debating various explanatory narratives and a language for encounter among differing worldviews. While it is certainly true that many, perhaps most, legal proceedings do not fulfil this potential, the important point is that the potential remains. Accordingly, instead of decrying our national tendency to debate social and political issues in legal terms, maybe we would do better to acknowledge this transformative potential and then seek ways we might use our legal heritage as a generative force.

The precise contours of such an inquiry are beyond the scope of this Essay. However, there are many policy questions that might spring from a recognition of the transformative potential of law. For example, although a truth and reconciliation commission proceeding is surely not ever going to be a run-of-the-mill legal event, we may see, even in day-to-day legal functioning, that our choice of legal rules and procedures may either encourage or discourage parties to engage in constructive discourse or become reintegrated members of the community. Thus, one international restorative justice movement has experimented with forms of mediation between victims and perpetrators as an alternative to incarceration of low-level offenders or juveniles.<sup>201</sup> Similarly, one could imagine ways in which permitting both victim and perpetrator to meet as part of a plea bargain might benefit both parties.<sup>202</sup> Perhaps an apology might be made part of the agreement,<sup>203</sup> or the victim might be given some say in sentencing. Or,

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201. See generally, e.g., TED WACHTEL, *REAL JUSTICE* (1998); see also generally, e.g., MARC UMBREIT, *VICTIM MEETS OFFENDER: THE IMPACT OF RESTORATIVE JUSTICE AND MEDIATION* (1994).

202. Some advocates of restorative justice practices have pursued this idea by advocating the use of "circle sentencing" sessions. Circle sentencing is a mediation practice in which offenders, victims, their advocates, and affected community members sit in a circle and discuss the impact of the crime. Speakers talk about the concerns of the victim, the offender's efforts at rehabilitation, the effect on public safety, the support resources available to both victim and offender, and other topics related to the crime and its psychological aftermath. At the end of the session, the members of the circle often develop a rehabilitative plan for the offender and a series of steps to help the victim and the community to heal. For further discussion of circle sentencing, see generally Gordon Bazemore, *The "Community" in Community Justice: Issues, Themes, and Questions for the New Neighborhood Sanctioning Models*, in *COMMUNITY JUSTICE: AN EMERGING FIELD* (David R. Karp ed., 1998).

203. In victim-offender reconciliation programs—programs in which victims confront offenders in the presence of a third-party mediator—victims, offenders, and community members identified apology as an especially ameliorative element of the mediation. See UMBREIT, *supra* note 201, at 15; see also Rose Ruddick, *A Court-Referred Scheme*, in *MEDIATION AND CRIMINAL JUSTICE: VICTIMS, OFFENDERS, AND COMMUNITY* (Martin Wright & Burt Galaway eds., 1989) (noting that an apology is an important element of the reparation scheme in victim-

as with the TRC proceedings, victims might perhaps be given a greater voice in both criminal and civil legal proceedings. We might ask whether alternative criminal sanctions, such as shaming, ultimately foster greater community identification and membership than does a term of incarceration.<sup>204</sup> We might decide that community service is a better punishment than prison, or we might choose instead some symbolic act of punishment that affirms the order of the community without specifically punishing the individual at all.<sup>205</sup> Alternatively, we might want lay members of the community to play a greater role in legal proceedings, whether that means granting jurors the power to ask questions,<sup>206</sup> relaxing

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offender mediation practices in Great Britain); June Veevers, *Pre-Court Diversion for Juvenile Offenders*, in *MEDIATION AND CRIMINAL JUSTICE: VICTIMS, OFFENDERS, AND COMMUNITY* (Martin Wright & Burt Galaway eds., 1989) (asserting that apologies play a key role in mediation involving juvenile offenders). For further discussion of the role of apology in law, see generally Elizabeth Latif, Note, *Apologetic Justice: Redressing Legal Offense Through Apology and Other Expressions of Remorse*, 81 B.U. L. REV. 289 (forthcoming 2001); Deborah Levi, Note, *The Role of Apology in Mediation*, 72 N.Y.U. L. REV. 1165 (1997).

204. See, e.g., Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591, 630-52 (1996) (discussing the "rediscovery of shame" as a means to enrich "our punitive vocabulary"). According to Kahan,

Shaming penalties—from bumper stickers for drunk drivers, to publicity for toxic waste dumpers, to signs or distinctive clothing for sex offenders—are on the rise in American law. Like imprisonment, these punishments convey condemnation in dramatic and unequivocal terms. They can thus be expected to 'inspire the public with sentiments of aversion' toward criminality through their effect on the forces of social influence.

Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 VA. L. REV. 349, 384-85 (1997) (quoting JEREMY BENTHAM, *AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION* (J.H. Burns & H.L.A. Hart eds., The Athlone Press 1970) (1780)).

205. See generally, Berman, *Forfeiture*, *supra* note 13, at 41-43 (suggesting that forfeiture proceedings could fulfill such a symbolic function).

206. Several scholars have argued that jurors should be permitted to participate more actively in the trial by taking notes and submitting questions for witnesses. See, e.g., Philip G. Peters, Jr., *Hindsight Bias and Tort Liability: Avoiding Premature Conclusions*, 31 ARIZ. ST. L.J. 1277 (1999); Stephen A. Saltzburg, *Improving the Quality of Jury Decisionmaking*, in *VERDICT: ASSESSING THE CIVIL JURY SYSTEM* 341, 358-60 (Robert E. Litan ed., 1993); H. Lee Sarokin & G. Thomas Munsterman, *Recent Innovations in Civil Jury Procedures*, in *VERDICT: ASSESSING THE CIVIL JURY SYSTEM* 378, 386-88 (Robert E. Litan ed., 1993); Douglas G. Smith, *Structural and Functional Aspects of the Jury, Comparative Analysis and Proposals for Reform*, 48 ALA. L. REV. 441, 451 (1997). These arguments have focused primarily on concerns about reducing juror error or bias, not on the possible intrinsic benefits of greater juror participation. Nevertheless, empirical evidence indicates that, at the very least, permitting jurors to ask questions would increase the satisfaction of the jurors themselves with the trial process. In one study, 3,800 individuals were asked their opinion concerning the ways in which the trial process could be reformed. The most frequent reform suggestion was to allow jurors to ask questions to the parties with court approval. See Franklin D. Strier, *Through the Jurors' Eyes*, 74 A.B.A. J. 78, 80 (1988). In another study, 80% of jurors questioned said they would have liked to have been able to question witnesses, and 49.5% still had questions they wanted answered at the end of the case. See JOHN GUNTHER,

the rules of evidence to include more narratives,<sup>207</sup> or requiring that members of the community at large be part of all alternative dispute resolution proceedings.<sup>208</sup>

Further, if we take seriously the idea that legal language and procedures can foster community dialogue, there are still more policy questions we may wish to consider. For example, could we harness the rhetorical power and multivocal framework of a legal trial to debate policy issues that fall outside the traditional "case or controversy" requirement? Quasi-legal bodies might be established that could serve as an effective locus for community debate about contested social issues.<sup>209</sup> Even within the traditional trial structure, we might ask: Do the rules of procedure and rules of evidence ensure the most effective expression of the various narratives at play in the trial?<sup>210</sup> Does the heightened role of lawyers inhibit the expression of nonprofessional or subversive narratives?<sup>211</sup> Will trials or judicial opinions be better able to adjudicate disputes among differing narratives if the juries and judges that author those decisions represent diverse cultural backgrounds?<sup>212</sup> Will the increased dissemination

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THE JURY IN AMERICA 310 (1988). In 1995, Arizona became the first state to make juror questions a formal part of the trial process. See Ariz. R. Civ. P. 39(p), 39(b)(10).

207. For example, critical race theorists, feminists, and others have advocated relaxing the rules of evidence to encourage narrative testimony. See, e.g., Jacqueline St. Joan, *Law and Literature: Sex, Sense, and Sensibility: Trespassing into the Culture of Domestic Abuse*, 20 HARV. WOMEN'S L.J. 263, 266 (1997) (arguing that "rules of evidence and the interrogatory format of the trial process suppress the female voice," and suggesting that a remedy to the problem lies in "broadening the scope of judicial inquiry at trial and loosening the restrictions on narrative-style testimony"); see also generally Kathryn Abrams, *Hearing the Call of Stories*, 79 CAL. L. REV. 971 (1991); Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411 (1989); Lynne N. Henderson, *Legality and Empathy*, 85 MICH. L. REV. 1574 (1987); Martha Minow, *When Difference Has Its Home: Group Homes for the Mentally Retarded, Equal Protection, and Legal Treatment of Difference*, 22 HARV. C.R.-C.L. L. REV. 111 (1987). Many other sources are collected in Barbara J. Flagg, *The Algebra of Pluralism: Subjective Experience as a Constitutional Variable*, 47 VAND. L. REV. 273 (1994).

208. See, e.g., Paul McCold, *Restorative Justice and the Role of Community*, in RESTORATIVE JUSTICE: INTERNATIONAL PERSPECTIVES (Burt Galaway & Joe Hudson eds., 1996).

209. See, e.g., Cover, *supra* note 17 (discussing the trial of the Vietnam War convened by Bertrand Russel and Jean-Paul Sartre).

210. See, e.g., EDGAR LUSTGARTEN, *THE MURDER AND THE TRIAL* 3-4 (1958) (arguing that failure of the discourse of trials to understand and account for human psychology led to an unjust conviction); William Finnegan, *Doubt*, THE NEW YORKER, Jan. 31, 1994, at 48 (expressing frustration that jurors may make incorrect judgments because rules of evidence preclude them from hearing the full story).

211. See, e.g., John Langbein, *The Criminal Trial Before the Lawyers*, 45 U. CHI. L. REV. 263, 282-83 (1978) (discussing forms of discourse prevalent in the "old Bailey" from the 1670s to the mid-1730s that were later silenced as a result of the increased role of lawyers at trial).

212. If so, then the recognition that legal proceedings construct narratives provides an additional justification for the Supreme Court's limitations on the use of peremptory challenges

of trials on television and the simultaneous increase in public awareness and debate enhance the ability of court proceedings to adjudicate national social issues? Or conversely, will televising legal proceedings remove the aura of mystery and formality necessary to preserve law's ritual functions?<sup>213</sup>

Underlying this entire discussion is the belief that, instead of bemoaning our legalistic culture, we should instead recognize the potential cultural benefits of law and then take into consideration the ways in which law might perform its cultural functions more effectively.<sup>214</sup> There are at least two reasons to pursue this avenue of inquiry. First, it seems to me that, for better or worse, we Americans are stuck with law as part of our birthright and heritage, and we are howling in the wilderness if we try to alter that constitutive aspect of the national psyche. Thus, it makes more sense to see law in all of its many aspects (including its cultural benefits) rather than insisting that its pervasive presence be curtailed. Second, we may discover, to our surprise, that there are distinct *advantages* to using law

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based on race and gender. See, e.g., *Batson v. Kentucky*, 476 U.S. 79 (1986) (forbidding prosecutors from challenging jurors solely on the basis of race); *J.E.B. v. Alabama*, 511 U.S. 127 (1994) (extending *Batson* to peremptory challenges based on gender). The discussion of this issue has generally been framed in terms of the rights either of defendants or of the excluded jurors themselves. *Id.* at 128 (“[P]otential jurors, as well as litigants, have an equal protection right to jury selection procedures that are free from state-sponsored group stereotypes.”); *Batson*, 476 U.S. at 85-86 (“[D]efendant does have the right to be tried by a jury whose members are selected pursuant to non-discriminatory patterns.”). The role of trials in constructing cultural narratives suggests, however, that a more diverse jury panel is also necessary so that the resulting narrative is the product of a diverse group of authors. For example, if the jury in the first trial of the police officers accused of beating Rodney King had been more racially integrated, it is possible that an identical verdict might have met with less community resistance. Cf. Tony Mauro, *L.A. Residents Strongly Condemn Verdict*, REUTERS NEWS SERV., May 6, 1992 (reporting telephone poll indicating that almost 70% of Los Angeles residents believed that predominantly white jury was biased in favor of police officer defendants).

213. Certainly, the practice of having judges sit higher than the other participants while wearing wigs or robes, as well as the maintenance of painstaking decorum within the courtroom, demonstrate that courts depend at least in part upon the power of theater to fulfill their social role. See Milner S. Ball, *The Play's the Thing: An Unscientific Reflection on Courts Under the Rubric of Theater*, 28 STAN. L. REV. 81, 83 (1975) (suggesting that “the design and appointment of the courtroom, enhanced by costuming and ceremony, do create a dramatic aura which has even been described in hyperbolic religious terms”). Sociologist Harold Garfinkel has also recognized the theatrical nature of trials, arguing that trials function as “status degradation rituals” that draw on the moral indignation of the community. See Harold Garfinkel, *Conditions of Successful Degradation Ceremonies*, 61 AM. J. SOC. 420, 421 (1956) (“Moral indignation serves to effect the ritual destruction of the person denounced. Unlike shame, which does not bind persons together, moral indignation may reinforce group solidarity. . . . [A] degradation ceremony must be counted as a secular form of communion.”).

214. This suggestion does not necessarily mean that, just because a particular legal rule has a symbolic value, that rule should automatically be adopted. There may be countervailing policy concerns strong enough to outweigh any possible meaning-producing role. Nevertheless, the crucial point is that the symbolic element should at least be factored into the calculus.

to resolve community dilemmas and that our legal heritage may actually be part of our strength as a people and not just our Achilles heel. Indeed, there may even be characteristics of legal discourse that are useful in building and maintaining a civil society.

Although I provide some preliminary thoughts here, it should be clear that I am not offering a systematic account of how law always or often functions, nor am I advancing detailed policy prescriptions about how our legal institutions might be altered to take advantage of these cultural roles. Rather, I wish only to offer some alternative ways of conceptualizing law's cultural impact, and to stimulate creative thinking about law's potential. Such creative thinking may ultimately help us to develop an answer to those critics who argue that law is impoverishing community discourse and values. Finally, I realize, of course, that my vision of law as a potentially transformative cultural practice is an idealistic one. And of course, legal proceedings in the everyday world often fail to live up to this ideal. Nevertheless, I think it is essential for us to look at law, not as it exists in any particular place and time, but "as a collective activity of mind and spirit, which has the possibility of goodness, of value, even of greatness."<sup>215</sup> My aim is similar to that expressed by James Boyd White:

[I]t is with the possibility, not the often lamentable current conditions, that I am concerned. Perhaps I am answering a voice, in myself or in the culture, that says that there is no such possibility; that law is only the exercise of power by one person or group over another, or only a branch of bureaucracy, or only money-making, or only instrumental; that it has no real and independent value for the person or the community. Thus I ask whether we can imagine law as an activity that in its ideal form, at least on occasions, has true intellectual, imaginative, ethical, and political worth. If we can, this would give us both something to aim for and a more workable and trustworthy ground for the criticism of what we see around us.<sup>216</sup>

In the end, rather than quibbling over whether or not law always lives up to its highest aspirations, we should instead try to celebrate those aspirations on their own terms and the potential they embody. After all, if law is a constitutive part of who we are as Americans, then it is our obligation as legal thinkers to develop ways of conceptualizing law and using legal discourse as a productive societal force. Law is, in some ways, our nation's civic religion, and in the face of increasing attacks on our faith,

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215. Milner S. Ball & James Boyd White, *A Conversation Between Milner Ball and James Boyd White*, 8 *YALE J.L. & HUMAN.* 465, 468 (1996).

216. *Id.*

it is high time that we considered seriously the transformative potential such faith might hold.