Judges and Juries: Separate Moments in the Same Phenomenon

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> Trial by juries is the *Englishman's* birthright, and it is that happy way of trial, which notwithstanding all revolutions of the times, hath been continued beyond all memory to this present day; the beginning whereof no history specifies, it being contemporary with the foundations of this state, and one of the pillars of it, both as to age and consequence.[1]
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> To undermine a social order you must undermine its faith—not merely in the justice of its heroes, . . . but in the injustice of its victims which, although a little bit more difficult, is by no means an impossible feat. It has been happening, and is happening before our very eyes, and may coincide with a process we call "history."[2]

i. allegro[3]

The history of law and of fundamental legal ideas is the history of the struggle over political and economic power. The evolution of law and legal institutions has been complex. The social and intellectual struggles the law reflects are manifested on the level of symbol as well as in the material conditions of everyday life. Neither aspect of this evolution should be slighted, nor considered as separate phenomena. Though separable, perhaps, for analysis, they are better understood as different moments in the same phenomenon.[4]

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** A.B., 1979, Stanford University; J.D., 1986, University of Minnesota. Special thanks to Frances Nash for her comments and editorial suggestions in turning this manuscript into something resembling English. To think we were all educated at the same university. We would also like to thank those colleagues and teachers cited in the text for their comments and suggestions.

1. Richard Burn, The Justice of the Peace (1754), *quoted in* E.P. Thompson, *Trial By Jury*, 50 New Society 501, 502 (1979).

2. René Girard, *Disorder and Order in Mythology*, in Disorder and Order 80, 87-88 (Paisley Livingston ed. 1984).

3. "It is of no importance that what we do ends up being melodic." C. Wolff to Stockhausen, *quoted in* Jean-François Lyotard, *Energumen Capitalism*, 2 Semiotexte 11, 12 (1977).

4. *See, e.g.*, Douglas Hay, Peter Linebaugh, John Rule, E.P. Thompson & Cal

The jury, which we now treat as a sacred institution and as one measure of political legitimacy, did not emerge full-blown as an automatic response to the pressures of democracy. Instead, the institution of the jury emerged only slowly. Those taking the jury to be an unqualified good, an antidote to the rigidities of strict legalism and state power,[5] see in the extant jury and its intellectual apparatus an almost fully legitimized institution with its own strict rules and structure.[6] They do not see its unruly emergence and the deeply equivocal role that it has played historically. Most lay observers also ignore the deep and powerful distinction between the political role played by the criminal jury and that played by the civil jury. These two institutions are at most fraternal twins which have been differently treated by harsh parents.[7]

This introduction is neither a contribution to the historical scholarship, nor a comment on the historical reasons for the different development of the civil and criminal juries. Instead, it analyzes the legitimating role juries play in democratic and legal symbology. The Penn/Mead trial and *Bushell's Case* are at the root of the elevation of the jury to its vaunted place in democratic mythology. Invoking similar mythological consequences are the cases of jury nullification, for at few points in the law is the outcome ever so certain or the law reread with such finality as in the jury verdict.[8] In few places is the "reason" of the law so closely synonymous with the values of the culture.[9] The jury in the act of judging expresses the "reason" of the culture. That cultural ac-

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Winslow, Albion's Fatal Tree (1975) [hereinafter cited as Albion's Fatal Tree]; John Langbein, *Albion's Fatal Flaws*, 98 Past & Present 96 (1983); Peter Linebaugh, *(Marxist) Social History and (Conservative) Legal History: A Reply to Professor Langbein*, 60 N.Y.U. L. Rev. 212 (1985).

5. "We do not realize how large a part of our law is open to reconsideration upon a slight change in the habit of the public mind." Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 Harv. L. Rev. 457, 466 (1897).

6. This should not ignore the pressures that remain on juries. The spate of articles and opinions on "specially qualified juries," the proposals for special courts for "technical" issues, and the complaint against the "death-qualified jury" indicate that the jury as an institution is far from being completely accepted. Its role is limited, and there is something to be read in the limits imposed. *See, e.g.*, William Luneburg & Mark Nordenberg, *Specially Qualified Juries and Expert Nonjury Tribunals: Alternatives for Coping with the Complexities of Modern Civil Litigation*, 67 Va. L. Rev. 887 (1981); Welsh White, *Death-Qualified Juries: The "Prosecution-Proneness" Argument Reexamined*, 41 U. Pitt. L. Rev. 353 (1980).

7. John Phillips & Thomas Thompson, *Jurors v. Judges in Later Stuart England: The Penn/Mead Trial and "Bushell's Case,"* 4 Law & Inequality 189 (1986) (discussion of difference between criminal and civil juries).

8. *See* E.P. Thompson, Whigs and Hunters: The Origin of the Black Act (1975); Albion's Fatal Tree, *supra* note 4 (especially discussion of the use of the jury nullification in criminal prosecutions and comparison with jury nullification in the civil context).

9. *See* John Rule, *Wrecking and Coastal Plunder*, in Albion's Fatal Tree,

tion expresses both the mythology and morality of a time that may not be reflected in the positive law, but it exposes the positive law as an often distorting mirror of the culture and society that the positive law regulates.[10] Thus, the role, function, and evolution of the institution of the jury is a useful place to examine the relationship between law and culture, between the myth of democratic legality and the operation of law.

Juries arose in a nondemocratic political culture, yet the early juries were relied upon to give popular validation to the court's view of the lord's law. The early fights, therefore, were between the courts and the juries over who had the proper authority to pronounce the law.[11] Control over who could say "what the law is" was central to the legitimating function of the law as a whole.[12]

> The jury box is where the people come into the court: the judge watches them and the jury watches back. A jury is the place where the bargain is struck. The jury attends in judgment, not only upon the accused, but also upon the justice and humanity of the Law.[13]

The early jury was under the control of the courts to an extent that today would be an impermissible outrage, but it was in the context of a system which gave much wider latitude to the juries to decide questions of law and fact even if they suffered from its expression.[14] The rude procedures adopted by the judges to control the juries merely highlight the political nature of the verdict of a quasi-democratic jury[15] in a nondemocratic setting. It is also confirmed by the continuing process of screening a jury and by jury vetting, that is, packing or limiting nominations to the jury.[16]

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supra note 4, at 167; Douglas Hay, *Poaching and the Game Laws on Cannock Chase*, in *id*. at 189.

10. "The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law." Holmes, *supra* note 5, at 461.

11. Stephen Roberts, *Jury Vetting in the 17th Century*, Hist. Today 25 (Feb. 1982).

12. "By definition, there is no politics when there is agreement. In politics, choices are made that bind those that dissent. Thus, both those that exercise political power and those that are subject to it may be forced to consider questions of legitimacy." Jan Deutsch, *Harvard's View of the Supreme Court: A Response*, 57 Tex. L. Rev. 1445, 1446 (1979).

13. E.P. Thompson, *The State Versus Its 'Enemies*,' 46 New Soc'y 127, 130 (1978).

14. Phillips & Thompson, *supra* note 7, at 221-24.

15. "Quasi-democratic" was chosen because we do not want to overemphasize or pretend that the jury was an institution open to all. Instead, the early jury was limited by property qualifications intended to secure the "best of the county" to act in their "advisory" role to validate the actions of the courts. It was only when juries ceased bringing in the proper verdicts that the tension between the positive law and the political culture was highlighted. This was especially true in the more overtly "political" cases.

16. *See, e.g.*, Thompson, *supra* note 13.

In a sense, jury verdicts are anomalous.[17] They are events which leave a cultural trail, yet it is a trace with little residue. The outcome in a jury trial, like a sign,[18] has a triadic structure.[19] It represents an event to a judge and to the community, signifying and constituting the event; it represents an expression of "the law." Jury verdicts are signifiers with greater significance for non-specialists, for the community of which the lawyers and judges are merely a part. Yet their trace, for those who can read it, reveals for the specialist the path of the law.[20] Lawyers and judges are far more comfortable on paths that are clearly blazed; troubling verdicts lead to appeals, where possible, and to "modernizing" legislation, where they are not. The appellate opinion is more significant for the specialist than the jury verdict it is interpreting because it constitutes a thing, a reified form of legal cultural detritus, the "stuff" of principle: it *is* the law.

Opinions, when they are published, are mobile signifiers. The

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17. Jury decisions are anomalous to the extent that the normal process for resolving a dispute is for the disputants to put the matter before a court for the judge to decide. Take as evidence the necessity to constitutionalize the jury and the ordinary structure of judicial decision-making systems.

18. A sign is anything that stands for something else. "All thought . . . must necessarily be in signs." 5 Charles S. Peirce, Collected Papers ¶ 5.251 (Charles Hartshorne & Paul Weiss eds. 1960).

19. Every relation involving mind, cognition, or intelligence is genuinely triadic.

> A *Sign*, or *Representamen*, is a First which stands in such a genuine triadic relation to a Second, called its *Object*, as to be capable of determining a Third, called its *Interpretant*, to assume the same triadic relation to its Object in which it stands itself to the same Object.

2 *Id.* ¶ 2.274.

> First is the conception of being or existing independent of anything else. Second is the conception of being relative to, the conception of reaction with, something else. Third is the conception of mediation, whereby a first and second are brought into relation. To illustrate these ideas, I will show how they enter into those we have been considering. The origin of things, considered not as leading to anything, but in itself, contains the idea of First, the end of things that of Second, the process mediating between them that of Third. . . . Chance is First, Law is Second, the tendency to take habits is Third.

6 *Id.* ¶ 6.32.

> Firstness seems to be related to the Real, and Secondness to the Imaginary, for where Thirdness is the domain of mediated triangular relations, Secondness is ontologically the domain of the apparition of what is other, and psychologically is the domain of reaction, struggle, and duality . . . .
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> . . . We recall that, as Foucault has pointed out [in The Order of Things 57-58 (1970)], . . . the tripartite semiotic theory of the Stoics, for whom the 'sign' included the "signifier, the signified and the 'conjuncture' " . . . , was reduced to a binary relation between signifier and signified in the seventeenth century.

Anthony Wilden, System and Structure: Essays in Communication and Exchange 267-68 (1972).

20. *See* Holmes, *supra* note 5.

existence of such signifiers or reproductions is what constitutes the event as an original, which makes the opinion authentic and exposes trial transcripts, depositions, briefs, and unarticulated or "unreasoned" jury verdicts as mere imitations. An original and authentic expression of the law delineates the boundaries of justice, establishing it as something which exists in fact. Positing a source of principle implies that the law and the justice it represents can be replicated, thus defining justice as a thing in itself of which the opinions are merely the concrete expression. However, as Jacques Derrida has noted:

> [M]aintenance of the rigorous distinction . . . between the [signifier] and the [signified] . . . leaves open the possibility of thinking of a *concept signified in and of itself*, a concept simply present for thought, independent of a relationship to language, that is of a relationship to a system of signifiers. . . . [T]hough, from the moment that one questions the possibility of such a transcendental signified, and that one recognizes that every signified is also in the position of a signifier, the distinction between signified and signifier becomes problematic at its root.[21]

These "unreasoned" jury verdicts are the anomalous representation of justice, the background against which the published opinions exist and which signifies them as original and legitimate. The system of legal decision making, by cloaking itself in the whole cloth of published opinions, represents to the community the law's ability to replicate and disseminate itself as legitimate and authentic wherever it is to be found, and preserves the belief in the *reasoned justice* of the law.

One characteristic of modernity, especially prevalent in law, is the belief that legitimacy has been lost.[22] We preserve opinions as the signs of the past to maintain (or to capture) our link to legitimacy. To analogize and paraphrase from a passage in Dean MacCannell's *The Tourist*,[23] the Supreme Court makes the notion of justice seem legitimate. The court of appeals makes the Supreme Court seem legitimate. The trial court makes the appellate system seem legitimate. The jury makes the trial court seem

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21. Jacques Derrida, Positions 19-20 (Alan Bass trans. 1981).

22. *See generally* Karl Löwith, Meaning in History (1949). *But see* Hans Blumenberg, The Legitimacy of the Modern Age (Robert Wallace trans. 1983). For discussion and analysis of the Löwith/Blumenberg debate, see Robert Wallace, *Progress, Secularization and Modernity: The Löwith/Blumenberg Debate*, New German Critique 63 (Winter 1981). On questions of legitimacy in a specifically legal context, see Deutsch, *supra* note 12; The Politics of Law: A Progressive Critique (D. Kairys ed. 1982). *See also* Jan Deutsch, *Corporate Law as the Ideology of Capitalism*, 93 Yale L.J. 395 (1983) (book review of Kairys, *id.*).

23. Dean MacCannell, The Tourist (1976).

legitimate.[24] And, of course, it is finality which gives legitimacy to the expressions of both the jury and the Supreme Court. Both are rooted in and derive their legitimacy from our political and cultural past which they justify and rewrite.

The identification of the material and symbolic content of the jury process reveals it as a compelling semiotic event. The more the jury system is discussed, dissected, analyzed, and memorialized in law review articles, the more the original event, which these opinions mark, is held out, signified, and highlighted as legitimate and authentic, producing in the community a desire (and not only a legal obligation) to participate in and maintain the signified of which these opinions are signifiers. Yet, even those sophisticated critics who rail at the ignorance and "bad" decisions that are said to suffuse the jury system[25] fail to understand how jury verdicts function as signifiers which reaffirm the judicial system itself as original and legitimate.

The jury then functions on the level of both icon and symbol. There is an important distinction between those two functions. The icon is the receptacle of the past, "[i]t exists only as an image in the mind."[26] It is thought of as the thing which preserves our liberty by wresting "the law" from the experts, from the scientists who manipulate it.[27] The symbol, in the Peircean taxonomy, has its being in the future.[28] "A symbol is essentially a purpose, that is to say, a representation that seeks to make itself definite or seeks to produce an interpretant more definite than itself."[29] These categories are not necessarily stable, however.

Michael Thompson suggests one way of understanding how things move between the categories suggested by Charles Peirce as well as how the value of institutions is intimately connected to the social and political roles they play. In *Rubbish Theory: The Creation and Destruction of Value*,[30] Thompson posits two broad categories into which every society places the cultural objects it

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24. *Id.* at 155.

25. *See* Thompson, *supra* notes 1, 13; Hay, *supra* note 9; Langbein, *supra* note 4; Peter Linebaugh, *The Tyburn Riot Against the Surgeons*, in Albion's Fatal Tree, *supra* note 4, at 65; Linebaugh, *supra* note 4.

26. 4 Peirce, *supra* note 18, at ¶ 4.447.

27. Richard Harvey Brown, *From Legalism to Delegitimation: Nineteenth-Century Solutions and Twentieth-Century Crises in Law and Social Change—A Commentary*, 17 New Literary Hist. 249 (1986). "[T]he law which, though a science requiring years of specialized training, is also an art requiring an almost sacred hermeneutic." *Id.* at 252-53.

28. See *infra* notes 39-40 for a discussion of precedent.

29. 4 Charles S. Peirce, New Elements of Mathematics 261 (C. Eisele ed. 1976).

30. Michael Thompson, Rubbish Theory: The Creation and Destruction of Value (1979).

manufactures, consumes, and maintains: the *transient* and the *durable*. Objects placed in the transient class are consumed rather than preserved. The transient is observed as having a finite lifespan, decreasing in value over its useful life. The development of a sociopolitical aesthetic determines the category into which any given cultural artifact is placed rather than the categorization being dependent upon any superficial or inherent physical characteristics. In this process, durable objects are more desirable and valuable than transient objects. The sociopolitical is introduced by the struggle of opposed and competing societal elements to keep its objects of interest in the durable class and force competing objects into and maintain them in the transient. Thompson's inquiry is into the possibility, and the dynamics, of change within such a process:

> [T]he two overt categories which I have isolated, the durable and the transient, do not exhaust the universe of objects. There are some objects (those of zero and unchanging value) which do not fall into either of these two categories and these constitute a third covert category: rubbish.
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> My hypothesis is that this covert rubbish category is not subject to the control mechanism (which is concerned primarily with the overt part of the system, the valuable and socially significant objects) and so is able to provide the path for the seemingly impossible transfer of an object from transience to durability.[31]

Transient objects decrease in value until they become rubbish without value. These objects exist in the realm of the consumed and the used up, existing only as shadows at the outer margins, awaiting their chance at discovery and the subsequent apotheosis as a durable object. Rubbish, at this point, is in the realm of Firstness—the possibility that some quality may be abstracted or isolated in the future. What is observed is not an orderly and logical progression of value but the capricious cycles of fashion and power. We observe not the transient, but rubbish, as that which eventually endures as the durable.

Rubbish thus becomes the point of intersection in the struggle between opposed and competing elements in society. Rubbish can either be discarded to make room for progress (purportedly, and in the guise of, the new and the improved—tomorrow's major-

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31. *Id.* at 9 (emphasis omitted). "True Burkean conservatism knows what is to be conserved only after it *has been* conserved." James Boyle, *The Politics of Reason: Critical Legal Theory and Local Social Thought*, 133 U. Pa. L. Rev. 685, 737 n.153 (1985) (emphasis in original). Perhaps the first account of the relationship between *kitsch* (trash or artistic rubbish) and politics can be found in Clement Greenberg, *Avant-Garde and Kitsch* (1939), *reprinted in* Art and Culture: Critical Essays 3 (1961). *See generally* Gillo Dorfles, Kitsch: The World of Bad Taste (1969).

ity) or else retained, reused, or rebuilt as durable (in the guise of tradition—yesterday's majority). These struggles over rubbish, which are readily observable in our daily lives,[32] are thus coded struggles[33] to determine which objects will become transient and which will become durable in a society. In these struggles, the tensions provoked by the fundamental disparities of power, the lack of consensus inherent in the competing processes of value formation, and the central position the category of rubbish comes to occupy are apparent, for we observe a struggle that is impossible to mediate: there is no compromise.[34] There is a dialectical opposition between the two fundamentally incompatible processes of value formation, and the political struggles (in the broad sense of the term "the political") will force a decision for one side or the other, upholding the process and the authority and legitimacy of the victors.

There is an illusion here that the law could be known and applied and a community formed in terms of it. This is impossible,

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32. See, e.g., zoning struggles and the controversies surrounding the preservation of historic buildings. Thompson, *supra* note 30, at 35. See especially the discussion of the dispute over the Isaac Rice mansion in New York City in John Costonis, *Law and Aesthetics: A Critique and a Reformulation of the Dilemmas*, 80 Mich. L. Rev. 355, 386-91 (1982) ("[A]ccounts of the proceedings leave little doubt that Board No. 7's concern for the Mansion's preservation was secondary to its apprehension about how a thirty-story tower might change the West Side's land use and socioeconomic character."). For a discussion of the literature on the semiotic properties of the built and natural environments and their theoretical applications to law, see Costonis, *supra*, at 392 n.116. *See also* Jonathan Culler, *Junk and Rubbish: A Semiotic Approach*, Diacritics 2 (Fall 1985). This issue can also be seen in the context of cultural legitimation. *See supra* text accompanying note 22.

33. Jean-François Lyotard would refer to these struggles as competing narratives. Jean-François Lyotard, The Postmodern Condition: A Report on Knowledge 15-17 (Geoff Bennington & Brian Massumi trans. 1984); *see also* Michael Foucault, Power/Knowledge (1980); Nancy Jean Holland, A Theory of Meaning After the End of Philosophy (1982) (both discuss problems associated with ways of knowing and the impact of structuralism on theories of meaning); Gillian Rose, Dialectic of Nihilism: Post-Structuralism and Law (1984) (focuses specifically on the jurisprudential impact of structuralism and modern linguistic theory).

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> To be accepted, a principle—whether a judicial precedent, a legislative enactment, or an administrative rule—must be sufficiently general and coherent to represent something the polity believes can be identified despite the changes the future will bring. Any workable consensus, moreover, must also meet the political requirement of being at least minimally acceptable to the various groups and individuals involved. When this consensus is unanimous, tradition and progress coalesce, thus vitiating the problem of legitimacy. When agreement is something less than unamimous, however, there will be arguments, and they may be formulated in terms of legitimacy.

Deutsch, *supra* note 12, at 1447.

"an infatuation and absolute injustice, in point of fact."[35] When the law is known, legitimacy is no longer presented as a fact, and the consequences of knowing the law and that a community or group is justified in imposing it are always serious: "The ability of the mind to set up, by means of acts of judgment, formally coherent structures is never denied, but the ontological or epistemological authority of the resulting systems, like that of texts, escapes determination."[36] Thus, this authority is always under stress because valuation and order are unstable.[37] They are expressions of cultural evolution which, through the mask of stability, create the illusion of permanence and security. This foundation of felt security is the basis for innovation and change and, in fact, is a principal element of change. As Yi-Fu Tuan has noted:

> It is a mistake to think that human beings always seek stability and order. Anyone who is open to experience must recognize that order is transient. . . . [Life] is change or it is not life at all. Because change occurs and is inevitable, we become anxious. Anxiety drives us to seek security, or, on the contrary, adventure—that is, we turn curious. The study of fear is therefore not limited to the study of withdrawal and retrenchment; at least implicitly, it also seeks to understand growth, daring, and adventure.[38]

With our culture in thrall to the system of transience, rubbish has come to be important since it is at a crucial intersection in the process through which the transient can become durable. The jury system as one source of this legal "rubbish" becomes an essential form of canon expression for the legal system. Many examples suggest that rubbish holds the key for opening up the possibilities

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35. Jean-François Lyotard & Jean-Loup Thébaud, Just Gaming 99 (Wlad Godzich trans. 1985).

36. Paul de Man, *The Timid God*, 29 Georgia Rev. 533, 550 (1975).

37. "[H]uman works are vulnerable . . . . They are subject to change and decay . . . in a mental sense. Even if their existence continues they are in constant danger of losing their meaning. Their reality is symbolic, not physical; and such reality never ceases to require interpretation and reinterpretation." Ernst Cassirer, An Essay on Man 184-85 (1944).

38. Yi-Fu Tuan, Landscapes of Fear 10 (1979). Thus, despair itself may be seen as a sign of progress, a form of critical optimism, not in spite of but because of the sorrow it feels and expresses:

> Everything goes past like a river and the changing taste and the various shapes of men make the whole game uncertain and delusive. Where do I find fixed points in nature, which can not be moved by man, and where I can indicate the markers by the shore to which he ought to adhere?

8 Immanuel Kant, Sammtliche Werke 625 (Gustav Hartenstein ed. 1868), *quoted in* Paul Arthur Schilpp, Kant's Pre-Critical Ethics 73 (2d ed. 1960). *But cf.* Paul D. Carrington, Of Law and the River, 34 J. Legal Educ. 222 (1984) (discussing the ethical duties of law teachers by analogy to Mark Twain, Life on the Mississippi (1902)).

for change in the legal system.[39] In the context of a legal order where taboo is anachronistic and where convention and custom have made it difficult to facilitate change by merely breaking rules, the possibilities for change may lie in the transformative potential of the system's rubbish. This dynamic content is revealed through the processes by which the functional elements in the transient, that remain as the transient, become rubbish and can be discovered and made durable.[40] The jury rewrites cultural codes within a framework that both legitimizes the jury's authority and, through specialized convention, limits its scope. The jury "instruction," the rules of evidence, and the interpretation of law versus the finding of fact all limit the scope of the jury's legitimate function. Yet, it is beyond the narrow conventional function where the jury itself validates and exposes the limitations of the positive law.[41] It is a resort to the "other" law, to the humane law.[42] The durable "truth" emerges as a political validation.

ii. intermezzo

[Law is really a report on power. It is not the only way in which social power is expressed in our culture, yet it seems the most legitimate both because it is the most articulate and because it appears to be the most open to criticism aimed at change. As the previous discussion has indicated, the law and its institutions cannot be understood in isolation. The rhetoric justifying legal institutions, for example, often participates in the language of power which pervades other social relations. Feminism, in many ways,

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39. *See* Thompson, *supra* note 8; *see also* Douglas Hay, *Property, Authority and the Criminal Law* in Albion's Fatal Tree, *supra* note 4, at 17. We do not address, although it seems appropriate, the process by which decisions become precedent. Since, theoretically, every decision has precedential value, why is it that only some come to stand for the principles of the law and the rest are discarded as "rubbish" while others reside in limbo waiting to be "discovered"?

40. For sophisticated discussions of precedent, see, e.g., Jan Deutsch, *Precedent and Adjudication*, 83 Yale L.J. 1553 (1974); Jan Deutsch, *Perlman v. Feldmann: A Case Study in Contemporary Corporate Legal History*, 8 U. Mich. J.L. Ref. 1 (1974); Jan Deutsch, *Panzirer v. Wolf: A Study in Doctrinal Exegesis*, 10 Sec. Reg. L.J. 160 (1982); Jan Deutsch, *Zapata Corporation v. Maldonado: Assessing a Precedent*, 5 Corp. L. Rev. 40 (1982); Jan Deutsch, *Law as Metaphor: A Structural Analysis of Legal Process*, 66 Geo. L.J. 1339 (1978).

41. Revolution, in this context, can be defined as the point at which a given political system has failed. Revolution, which signifies the loss of legitimacy, occurs whenever enough individuals are sufficiently dissatisfied that the desire for replacement of choices embodied in the present system outweighs concern over the potentially unsatisfactory consequences of new choices.

Deutsch, *supra* note 12, at 1448.

42. "The law is the witness and external deposit of our moral life. Its history is the history of the moral development of the race." Holmes, *supra* note 5, at 459.

has provided the most thorough investigation of visible and invisible social control. That paradigm is explored in the following dialogue. The dialogue does not make a direct analogy to the experiential content of women's lives, but instead it explores the epistemological dynamic involved in the ideological feminization of institutions. It is important to remember that the voices to which power responds must be those that it can hear.]

DB: Isn't the jury really something unrestrained, spontaneous, and communal? Doesn't it threaten to break into the carefully structured system and transform it?

GT: The jury is an ever present threat to the reality established by the rest of the system. To demonstrate that let me suggest some of the qualities which are conventionally used to characterize juries:

1. They are capricious and unpredictable.

2. They are easily swayed by emotion and are thus not given to hard logical thinking. They operate by "feel" or intuition.

3. They are incapable of distinguishing which facts are truly important. They do, however, seem to have access to mysterious sources of folk wisdom and possess a mysterious ability to judge character and assess blame.

4. This access to the well of the folk, however, must be "controlled," "instructed," and often even "directed."

DB: Oh come on, those are the same tired and invalid stereotypes commonly used to characterize women. One of the problems, you see, is that the invalidity of those stereotypes has only begun to affect their legitimacy.

GT: Exactly, which is why we should read the common literature or conventional wisdom as a feminist. We must become "a resisting rather than an assenting reader and, by this refusal to assent, to begin the process of exorcizing the male mind that has been implanted in us."[43] For instance, let's examine why juries play the feminine stereotype to the patriarchal law represented by the judge . . .[44]

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43. Judith Fetterley, The Resisting Reader: A Feminist Approach to Fiction xxii (1978).

44. Carrie J. Menkel-Meadow, *Portia in a Different Voice: Speculations on A Women's Lawyering Process*, 1 Berk. Women's L.J. 39, 49 (1985) ("[C]an we glimpse enclaves of another set of values within some existing legal structures? Is the judge 'male,' the jury 'female'?"). Menkel-Meadow notes that "in this enterprise of labeling by gender [there is] a danger of creating further polarization rather than integration. Some polarization may be necessary before we can integrate, and indeed we are already situated in a world with more polarization than efforts to integrate." *Id.* at n.62.

DB: Wait a minute! I expected a better response from you, and I resist this analogy because the content of women's oppression is characterized by violence and coercion in ways that make your analogy facile. There is always a danger in using gendered stereotypes. Why take the risk? Female, male, masculine, and feminine are equally socially constructed, although they are not constructed socially equal.

GT: I recognize that danger, but I want you to understand that defining things in masculine or feminine terms is not to practice a form of biological reductionism or essentialism, although some people who use those terms do.

DB: That is exactly my point, many people do. Gender characterizations must be understood as socially constructed categories that have important material as well as symbolic consequences. For example, those categories make things like marital rape legally incoherent. You can't separate the material impact of those stereotypes from their symbolic use. I resist the relativity of the comparison. The coercion of women seems to me deeper, more permanent, and more profound.

GT: We don't disagree. Those characterizations exist as part of the epistemological structure of our culture, and they operate to explain as well as to oppress.[45] I recognize the material and symbolic nature of the judge and jury and of the masculine and feminine. *Bushell's Case*, for example, reflects the concrete imposition

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45. *See* Robert Paul Wolff, Barrington Moore, Jr. & Herbert Marcuse, A Critique of Pure Tolerance (1965):

> This is, prior to all expression and communication, a matter of semantics: the blocking of effective dissent . . . . The meaning of words is rigidly stabilized. Rational persuasion, persuasion to the opposite is all but precluded. The avenues of entrance are closed to the meaning of words and ideas other than the established one—established by the publicity of the powers that be, and verified in their practices. . . . Thus the process of reflection ends where it started: in the given conditions and relations. Self-validating, the argument of the discussion repels the contradiction because the antithesis is redefined in terms of the thesis. . . .
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> Impartiality to the utmost, equal treatment of competing and conflicting issues is indeed a basic requirement for decision-making in the democratic process—it is an equally basic requirement for defining the limits of tolerance. But in a democracy with totalitarian organization, objectivity may fulfill a very different function, namely, to foster a mental attitude which tends to obliterate the difference between true and false, information and indoctrination, right and wrong. In fact, the decision between opposed opinions has been made before the presentation and discussion get under way—made, not by a conspiracy or a sponsor or a publisher, not by any dictatorship, but rather by the "normal course of events," which is the course of administered events, and by the mentality shaped in this course.

Marcuse, *Repressive Tolerance*, in *id.* at 95-97. One might also look as well to George Orwell, 1984 (1948).

of the judge's will on an unruly juror. Bushell was jailed after all. It would be a mistake, therefore, to underestimate the oppressiveness of the tactics used to coerce the jury into adopting not only the analytical approach, but, more important, the result the court wished to impose. That said, I must acknowledge that however different the content of jurors' and women's oppression may be, I can better understand the pervasiveness of women's marginalization by considering the ways in which the politically powerful feminize those they wish to dominate. Epistemologically, the threat posed by the jury to the order composed by the law is necessary. To define the masculine, one must have its other, the feminine:[46] for part of the legal system to be "principled," something else must be "unprincipled," otherwise the distinction would disappear.[47] If the feminine element were not projected outward onto the jury, where it can be controlled, it might emerge from the judges themselves:[48] it would compromise the role the law has created for the judge.

DB: Let me get this straight. When you say you reject biological reductionism or essentialism, are you suggesting that the male and the female are more than their biological attributes? Or, are you suggesting, as Professor MacKinnon put it, and I think it applies equally well for "the female": "Male is a social and political concept, not a biological attribute. As I use it, it has *nothing whatever* to do with inherency, preexistence, nature, inevitability, or body as such. It is more epistemological than ontological . . . ."[49] In other words, are you saying that the projection of traditionally stereotypic feminine characteristics onto the jury is descriptive of

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46. *See, e.g.*, David Cole, *Getting There: Reflections on Trashing From Feminist Jurisprudence and Critical Theory*, 8 Harv. Women's L.J. 59, 79-80 (1985) ("Our culture denies the feminine an independent voice and defines the feminine as other to man's one, as object to man's subject."); *see also* Catharine A. MacKinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence*, 8 Signs 635 (1983) (defines feminist analysis and applies it to traditional areas of the law in order to reveal the male point of view as the epistemological perspective of the law generally).

47. Ellen C. DuBois, Mary C. Dunlap, Carol J. Gilligan, Catharine A. MacKinnon & Carrie J. Menkel-Meadow, *Feminist Discourse, Moral Values, and the Law—A Conversation*, 34 Buff. L. Rev. 11 (1985) [hereinafter cited as *Feminist Discourse*]. MacKinnon stated:

> [I]t makes a lot of sense that women might have a somewhat distinctive perspective on social life. We may or may not speak in a different voice—I think that the voice that we have been said to speak in is in fact large part the "feminine" voice, the voice of the victim speaking without consciousness.

Id. at 27.

48. *See* MacKinnon, *supra* note 46.

49. *Id.* at 636 n.3.

the epistemology of male legal ideology as characteristic of different parts of the legal system?

GT: Oh, you bet. That is why the occasionally "willful" judge, that is, the judge who is acting like a jury, in imposing an idiosyncratic brand of justice on "the law," is thought to be an abomination of the system. The Realists, for example, were pilloried for suggesting that, occasionally, something other than "reason" or "principle" lay behind a particular decision.[50]

DB: Let's see then. The ideological structure of the projection of these characteristics onto juries is essentially self-protective?

GT: Right. As usual, only by creating an "other" can the self be shielded from disturbing impulses. Yet, the judge envies the jury's spontaneous power to do justice and must guard against the dangerous impulse to be jury-like. The judge must impose instructions on the jury to make it more judge-like. The judge must tell the jury what it can know. The jury's understanding must be made to conform to what the law says it can understand.

DB: Then it is perhaps no coincidence that the jury is also the source of extra-legal community within the legal system. It is the jury which represents the judgment of the community, which speaks for the people and not for the legal hierarchy except to the extent that it is controlled or that it has internalized the hierarchy. Juries are not to be trusted because they react emotionally rather than logically; without judicial instruction, they cannot grasp the reality of the case before them. Just as women resist their subordination through feminism, so jurors resist their subordination through nullification. In neither instance does the resistance appear as anything but exceptional. Sexism can claim that feminism proves we live in a gender-neutral society, just as jury nullification is claimed to prove the jury's autonomy. The system needs the assent of the community to function. It needs the public expression of consent for legitimacy, and yet it fears to give the community real power.

GT: Right. Historically, the jury in this system, if I may stretch a conceit, had to be *courted*, but that just means controlled through a form of ritual in which the courted assents, but over which the courted has no real control other than outright refusal to participate, and yet even that refusal is problematic.[51] Remem-

50. Grant Gilmore, The Ages of American Law 74-91 (1977).

51. *See, e.g.*, Jane Austen, Pride and Prejudice 94-98 (Oxford World's Classics Ed. 1980).

"Almost as soon as I entered the house I singled you out as the com-

ber that both consent and assent are problematic and only make sense, in this context, from the perspective of one who has no *authority* to originate the ritual.[52] Assent, then, has to appear to be freely given to be legitimate, yet it can't be freely made.[53] The irony is that control must wear the mask of freedom.

iii. rondo

The symbol of democratic legitimacy, relief from a world "of laws and not of men"[54] is one of the central functions of the jury

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panion of my future life. But before I am run away with by my feelings on this subject, perhaps it will be advisable for me to state my reasons for marrying—and moreover for coming into Hertfordshire with the design of selecting a wife, as I certainly did."

The idea of Mr. Collins, with all his solemn composure, being run away with by his feelings, made Elizabeth so near laughing that she could not use the short pause he allowed in any attempt to stop him farther, and he continued:

. . . .

It was absolutely necessary to interrupt him now.

"You are too hasty, Sir," she cried. "You forget that I have made no answer. Let me do it without farther loss of time. Accept my thanks for the compliment you are paying me. I am very sensible to the honor of your proposals, but it is impossible for me to do otherwise than decline them."

"I am not now to learn," replied Mr. Collins, with a formal wave of the hand, "that it is usual with young ladies to reject the addresses of the man whom they secretly mean to accept, when he first applies for their favour; and that sometimes the refusal is repeated a second or even a third time. I am therefore by no means discouraged by what you have just said, and shall hope to lead you to the altar ere long.

Id. *See also* Catharine A. MacKinnon, Sexual Harassment of Working Women (1979) (especially the Introduction and Chapter 3).

52. *See* Fetterley, *supra* note 43, at xxii.

53. This section was suggested by my colleague Dan Farber who should not be held responsible for its final form, but should be held at least partially responsible for the content. For further discussion of these distinctions between masculine and feminine ways of thinking, compare *Feminist Discourse*, *supra* note 47, at 27, 73-76 (exchange between Gilligan and MacKinnon over the explanatory power of the "feminine voice" hypothesis) with Suzanna Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 Va. L. Rev. (forthcoming 1986); Suzanna Sherry, *The Gender of Judges*, 4 Law & Inequality 159 (1986) (feminine perspective independent of the existence of gender discrimination).

If the jury has been feminized, other conventions demand investigation. For example, since antiquity hanging has been considered a "feminine," or female, form of suicide and criminal execution (an "infamous" death) and a symbol of shame. Could the term "hung jury" be a code of the court to remind the jury of the shame of feminine symbolic death and to come back with a "correct" verdict? *See* Eva Cantarella, *Dangling Virgins: Myth, Ritual and the Place of Women in Ancient Greece*, 6 Poetics Today 91 (1985), *reprinted in* The Female Body in Western Culture: Contemporary Perspectives 57 (Susan Rubin Suleiman ed. 1986); *see also* Jean-François Lyotard, *One of the Things at Stake in Women's Struggles*, 20 Sub-Stance 9, 10 (1978) ("Sexual theory and practice of men includes the threat of death: or: sexuality makes no sense without a signifier.").

54. *Novanglus*, Boston Gazette, March 6, 1775 (pseudonym of John Adams), *reprinted in* Novanglus and Massachusettensis; or Political Essays 84 (Boston 1819);

because it reinforces our belief in the law by reminding us of its source.[55] The jury verdict is also the representation of the law as practice rather than as object.[56] The verdict pronounced by the jury enters the law as the single product of a dynamic process that is replicated in content only to the extent that it represents a moment in the transformation of legal culture.[57] It is not like the judge's ruling, which enters the legal culture as a local rule or as an object in the form of a written opinion. That process is part of the myth-creating structure of democratic legal ideology. The practice of jury decision making is part of the structure of the myth without which it would have no authority:[58] "Myth is not an independent or separate element in man's social and cultural life; it is only the correlate and counterpart of rite. It has an explanatory function, but its principal task is not to explain physical phenomena but human actions."[59] The jury and the myth it contains explain and locate our situation and give comfort as they create the felt sense of solidarity. Jury service is a kind of participation that exists as a disjunction from everyday life and is one that throws the quotidian into stark relief even as the matter to be constructed is made from life's most ordinary of elements.

The order of law is contained in the sense of justice that it yields.[60] Law does not yield complete justice; it can't.[61] The truth

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see also Boddie v. Connecticut, 401 U.S. 371, 393 (1971) (Black, J., dissenting) ("government of men, not the government of laws.").

55. "The first requirement of a sound body of law is, that it should correspond with the actual feelings and demands of the community . . . ." Oliver Wendell Holmes, Jr., The Common Law 36 (Mark DeWolfe Howe ed. 1963) (chapter on criminal law).

56. "Verdicts are not 'administered': they are *found*." Thompson, *supra* note 13, at 130 (emphasis in original).

57. "[The jury's] function is to suggest a rule of conduct." Holmes, *supra* note 55, at 120.

58. "Revolution can thus be defined (in terms of the individual) as the replacement of habitual by spontaneous political behavior. Spontaneous political behavior in this sense is perceived by the individual as a free act, although it is, of course, capable of being rationalized." Deutsch, *supra* note 12, at 1448.

59. Symbol, Myth, and Culture: Essays and lectures of Ernst Cassirer, 1935-1945, at 248 (Donald Phillip Verene ed. 1979) [hereinafter cited as Symbol].

60. A "sense of justice contains the order of the law" because it is the cultural framework within which the law and its workings may be perceived as "just." It is part of the

> "spontaneous philosophy" which is proper to everybody. This philosophy is contained in: 1. language itself, which is a totality of determined notions and concepts and not just of words grammatically devoid of content; 2. "common sense" [conventional wisdom] and "good sense" [empirical knowledge]; 3. popular religion and, therefore, also in the entire system of beliefs, superstitions, opinions, ways of seeing things and of acting, which are collectively bundled together under the name of "folklore."

T.J. Jackson Lears, *The Concept of Cultural Hegemony: Problems and Possibilities*,

of the jury verdict is an experience felt on the part of those who sit in judgment and in the finality of the trace that it leaves. It is clear in this context that justice is not an analytic term, but expresses that part of law that does not yield to analysis. Justice is neither a term of explanation nor of classification, but of experience. That experience is validated by the quality of the process which constructs social truth out of received values and insight.[62] The extraordinary facts, which result in a trial, only bring the ordinary into focus or else reveal the very ordinariness of the facts which form the basis of the case at bar. Facts, that which the jury is totally empowered to find, merely reflect the construction that the law tries to put on them as well as "the previous agreements within a community about the consequences of a certain event."[63] Justice may be very well served either through jury nullification or through a kangaroo court,[64] but the mythmaking job of the jury can only be done within the context of the law.

Thus, John Phillips and Thomas Thompson are right when they say about the Penn/Mead trial:

> These "not guilty" verdicts could not be rejected or altered by the bench, and the resulting euphoria among the working orders helped perpetuate the very potent counter-revolutionary myth that English law was the guarantor of Englishmen's rights. Why would Englishmen need a revolution to set them free? The mob could be convinced that the law, of which it understood very little, made all Englishmen free and equal. In reality, of course, it did no such thing, but what chance has truth against myth? Myths, like that generated by the Penn/Mead trial itself, have frequently proven politically omnipotent. Could the law survive otherwise?[65]

The jury performed the mythmaking function by creating a way of ascertaining the truth which is socially determined and not, there-

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90 Am. Hist. Rev. 567, 570 (1985) (discussing the problems raised by the work of Antonio Gramsci, especially his Prison Notebooks 1929-1935).

61. Legal discourse often confuses the issue of whether a belief is justified with the issue of whether it is true.

> If we have a Deweyan conception of knowledge, as what we are justified in believing, then we will not imagine that there are enduring constraints on what can count as knowledge, since we will see "justification" as a social phenomenon rather than a transaction between "the knowing subject" and "reality."

Richard Rorty, Philosophy and the Mirror of Nature 9 (1979).

62. *See* John Dewey, Art as Experience 130 (1934).

63. Richard Rorty, *Texts and Lumps*, 17 New Literary Hist. 1, 3 (1985).

64. While there is much confusion over the derivation of the term "kangaroo court," the principal attribute of this "court" is the way it apes the procedures of the real thing, validating its actions, however lawless, by reference to and use of the symbolism of the legal system.

65. Phillips & Thompson, *supra* note 7, at 229-30.

fore, subject to the whim or caprice or bias of a single individual.[66] The deference the law gives to the jury as a guardian of our liberties and as a protector against the state's excesses reflects its majesty. A jury accepts power from the state in order to control the power of the state. The jury's decision affirms the state's authority even as it may flout the law the state's code represents. The system of knowing, which defines the jury/lawmaking/law-reading function, is a powerful tool for reaffirming the character of a culture and the values of a people that is more profound than the momentary consensus it yields.[67]

66. "[T]o make single individuals absolute judges of truth is most pernicious." 5 Peirce, *supra* note 18, at ¶ 5.265. "Man feels a deep mistrust in himself and in his individual abilities. But on the other hand he has an extravagant trust in the power of collective wishes and actions." Symbol, *supra* note 59, at 250.

67. "In retrospect, therefore, successful revolutions are perceived as spontaneous acts rather than rationalizations of manipulations that have succeeded in achieving undisclosed political ends." Deutsch, *supra* note 12, at 1448.