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Cultural Criticism of Law

Guyora Binder* and Robert Weisberg**

Professors Binder and Weisberg expound a "cultural criticism" of law that views law as an arena for composing, representing, and contesting identity, and that treats identity as constitutive of the interests that motivate instrumental action. They explicate this critical method by reference to "New Historicism" literary criticism, postmodern social theory, and Nietzschean aesthetics. They illustrate this method by reviewing recent scholarship of two kinds: First, they explore how legal disputes take on expressive meaning for parties and observers against the background of legal norms regulating or recognizing identities. Second, they examine "readings" of the representations of character, credit, and value in commercial and financial law that emphasize the role of the figurative imagination in the creation of markets and market society. Professors Binder and Weisberg conclude that law does not so much represent a social world of subjects that exists independent of it, as it does compose that world. Accordingly, the criticism enabled by their "cultural" account of law is more aesthetic than epistemological.

I. Introduction

William Fisher's fine contribution to this Symposium on "The Critical Use of History" assesses the critical potential for legal scholarship of current trends in historiography.1 A striking theme in his report on the state of this art is the prominent influence of literary theory in contemporary historical scholarship. Fisher describes much recent intellectual history as either "Textualist"—reflecting the semiotic focus of literary structuralism and poststructuralism—or "New Historicism"—reflecting the interest of that literary movement in the mutual influence of aesthetic and practical motivations, the cultural contingency of social order, and the dramaturgical quality of social conflict. Perhaps it is not surprising that literary method should figure prominently in an essay on historiography's "critical" potential. Doubtless one source of the popularity of the adjective "critical" in contemporary scholarship is its sly equivocation between political dissent and literary interpretation.

Readers of the Stanford Law Review will recognize that a similar literary influence has long been apparent in legal scholarship, particularly legal scholarship that purports to be in some sense "critical." Textualist approaches and

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concerns have dominated critical scholarship in law, but as this essay reveals, something like a New Historicist criticism of the law is beginning to emerge as well.

For some years, we have assessed the potential of literary method in understanding and critiquing legal texts, decisions, and institutions. We have become persuaded that the use of Textualist methods to assess the determinacy or objectivity of legal decisionmaking has less critical potential than meets the eye. This is a view we have defended and will defend elsewhere. What we will argue here is that the application of literary methods in “reading” legal events, both historically remote and recent, holds considerable promise to illuminate the place of law in culture. In so doing it may also enrich our sense of the value questions at stake in law. The works we will discuss are not primarily by professional historians, but they all treat legal phenomena as artifacts to be understood in light of an historically specific cultural context. They are less works of critical history than they are works of New Historicist criticism.

Instead of seeing the “cultural criticism of law” as simply an application of New Historicism to law, we can see both developments as aspects of the emergence of a broader interdisciplinary field of “Cultural Studies” which blurs the boundaries between the humanities and the social sciences, viewing the phenomena studied by social scientists (including historians) as social texts available for interpretation and criticism. Another aspect of this new field of inquiry is an extension of the domain of ethnographic method from the study of traditional non-Western societies to modern Western societies, thereby both expanding anthropology and raising critical questions about the cultural assumptions that have confined it in the past. The New Historicism has in essence made literary criticism the instrument of the ethnography or archaeology of modernity by treating literary texts as cultural artifacts. While the work discussed below sometimes examines imaginative literature in this way, it mostly relies on other kinds of sources, treating laws, legal arguments, legal decisions, and institutions as artifacts. But our proposal is not just that legal phenomena be viewed as cultural artifacts or “social texts” like any others; it is that legal forms and legal processes play a compositional role in modern culture. That is, cultural criticism must attend to the legal dimension of culture or remain superficial.

A familiar view of law in modern society presumes that the coercive force of the state must be justified by consent: the consent of individuals to private arrangements or the consent of populations to public policies. Legal judgment, then, polices the disputed boundaries between public and private, mine and


thine, consent and coercion. The fundamental operation of law is to identify legal persons, entitlements, and preferences; when law has identified all of these, it has fully represented society. In this view of law, authority is vested solely in human will, and it is the essentially mimetic task of law to reflect and enforce that will.

Much critical scholarship in law accepts the premise that law should mimic social will, but then argues that law either does not or cannot do so. It is argued that the lines between public and private, mine and thine, and consent and coercion are arbitrary and not based in consent. Accordingly, it is the personal interests or contestable value judgments of officials, not social will, that resolve legal disputes. The only defense against this official discretion is a system of formal rules. Yet, the argument continues, these rules yield arbitrary results. By blinding legal decision-makers to nuances of social context, rule formalism achieves results that popular will would reject as irrational; it distorts or ignores the preferences of affected parties and presents this indifference to its human consequences as a virtue.

This style of criticism courts the twin dangers of skepticism and sentimentality. Criticism is egregiously skeptical when it treats practices as presumptively illegitimate unless they rest on a foundation of epistemological certainty. Since subjective judgment and reductive formalism are both useful tools of practical reasoning, they should not by themselves discredit legal decisionmaking. Criticism is egregiously sentimental when it assumes that subjective judgment and reductive formalism, even if necessary to practical reasoning, are always inappropriate when applied to human beings. How human beings should be represented in social thought is a pressing moral question, but whether they should be represented is not. Criticism that can be dismissed as egregiously skeptical or sentimental ill serves the values that motivate it.

The dangers of skepticism and sentimentality are endemic to criticism that accepts the mimetic ideal of law as an accurate depiction of social will. But it only makes sense to criticize law for inaccurately representing individual or collective preferences if preferences have a determinate character independent of their legal representations. A more sophisticated and less fragile critique recognizes that social will is not independent of legal representation. Individual preferences depend on socially conferred identities and socially distributed resources; collective preferences depend on the method by which they are measured and the order in which alternatives are posed. Because all of these conditions affecting preferences are themselves influenced by law, law cannot simply reflect but must also help compose society and its characters.

Thus, the legal representation of social will bears little resemblance to scientific observation. It is more like the literary representation of generic themes such as "the pastoral" and "the sublime," familiar myths such as Faust and Don Juan, or stock characters such as Athena and the hard-boiled gumshoe. Like preferences, none of these entities exists independent of its representations. These representations are judged aesthetically rather than epistemologically: They are judged according to the experience they enable rather than their truth
to experience. So too can we judge law aesthetically, according to the society it forms, the identities it defines, the preferences it encourages, and the subjective experience it enables. We can "read" and criticize law as part of the making of a culture.

In this essay we expound such a cultural criticism of law. In our view, critical scholarship treats law as a dimension of culture in so far as it: (1) views law as an arena for the performance and contestation of representations of self and as an influence on the roles and identities available to groups and individuals in portraying themselves; (2) interprets self-portrayal as an endeavor that, whatever its instrumental pay-offs, also has aesthetic and expressive import; (3) treats the interests and preferences that motivate instrumental action as dependent upon the identities actors assume.

In this essay we will consider examples of cultural representation in two sorts of legal settings. First, we will review scholarship reading representations of parties in a number of disputes—the Chicago Seven trial, the Klaus Barbie war crimes trial, trials of Catholics in seventeenth-century England, the appellate case of Bowers v. Hardwick, the Mashpee Indian lands trial, and medieval Icelandic blood feuds. These disputes took on expressive meaning for various parties against a background of legal norms regulating or recognizing statuses and identities. These norms enabled actors to define themselves and one another, or to subvert those definitions.

Second, we will consider examples of the representation of character, credit, and value in commercial and financial law. The premise of this discussion is that commercial capitalism is not only a system of economics, but also a system of representation. Deploying resources for production depends upon the cultural work of representing them as commodities, while disposing of what is produced depends upon the cultural work of creating the characters who will make investment and consumption decisions. We will begin with ethnographies of exchange in a precommercial society and in a traditional society experiencing modernization. We will proceed through an account of the cultural conditions for the emergence of lending at interest and bankruptcy in early modern England, to a consideration of the cultural significance of the emergence of new forms of intangible property in nineteenth-century America. We will find that the legal forms of wealth and exchange mark the shifting, often contested boundaries between community and commerce, between intrinsic and instrumental worth.

These examples inform our conclusion that law neither reflects nor distorts a social world of subjects that exists independent of it. Instead, law helps compose the social world: It is implicated both in degrading and commodifying once-sacred spheres of cultural value, and in making new values. Law, then, is best criticized not for what it mimes or disguises or conserves or destroys, but for what it fails to create.
II. THEORETICAL SOURCES FOR CULTURAL CRITICISM OF LAW

We will begin by explicating a range of theoretical sources that can inform a cultural criticism of law. These will include Clifford Geertz's account of the emerging interdisciplinarity in the humanities and social sciences; Nietzsche's account of self-development as an aesthetic project; Foucault's account of modern individuality as a projection of institutional power; Pierre Bourdieu's accounts of practical action as cultural improvisation, and of aesthetic taste as the pursuit of "symbolic power"; and Stephen Greenblatt's treatment of artistic creativity as an "exchange" of "energy" between the economic and symbolic orders. These fragments of theory converge on an understanding of modern social order as dependent on culture; of culture as centrally concerned with the representation of persons, populations, and institutions; and of the representation of persons, populations, and institutions as a way of illuminating social and moral values. With this view of culture in mind, we hope to "read" legal representations of society critically, but neither skeptically nor sentimentally.

A. Interdisciplinarity

That law can be read as a literary text is a helpful claim only if it tells us something about law or literature we did not already know. Connecting disparate forms of discourse illuminates only when it engenders new answers by bringing different questions into view.

Our general assumption is that fertile interdisciplinary study entails discomfiture. Hailing the "blurring" of generic lines between the social sciences and humanities, Clifford Geertz has argued that the application of the methods or premises of one discipline to another seems necessarily "discomposing."

It is discomposing not only because who knows where it all will end, but because as the idiom of social explanation, its inflections and its imagery, changes, our sense of what constitutes such explanation, why we want it, and how it relates to other sorts of things we value changes as well. It is not just theory or method or subject matter that alters, but the whole point of the enterprise.4

Geertz notes that much social theory of behavior, formerly cast in causal and supposedly scientific terms, has recently been getting rewrought as game theory or dramaturgy: Society according to these interpretations is less a machine than "a serious game, a sidewalk drama, or a behavioral text."5 The aggregations of human conduct that make up the world of the social scientist—class interests, efficient markets, and the like—are, to use the ubiquitous academic platitude, "cultural constructs" that inform social action as well as social research. In discerning patterns in social behavior or cultural practice, the scholar does not misapprehend them as irreducible constraints or irresistible forces of locomotion. For Geertz, they are neither the way the world really is, nor merely regulative fictions. Rather, they are collectively invented and repro-

5. Id. at 23.
duced contexts for assuming certain social roles. By focusing on how social actors conceive of and model society, cultural analyses of society force social scientists to look back up the barrel of the microscope at themselves.

But if this sort of social/textual analysis unnerves the social scientist, it simultaneously frustrates the humanist who believes in willed and idealistic individual conduct. Reinterpreted as roleplaying, the exercise of moral choice or aesthetic sensibility is reduced to involuntary participation in ritual, or cynical posing. As Geertz says in a passage particularly relevant to the law and literature enterprise, the reconstruction of standard explanations of behavior "sits rather poorly with traditional humanistic pieties." As the fundamental assumptions of one discipline become reconstructed according to the assumptions of another, the first discipline loses some of its gravity and independence.

The lesson of Geertzian interdisciplinarity is that law and literature scholarship ought to constitute an experiment in rebuilding the aesthetic in legal terms or the legal in aesthetic terms. It might show how literary apprehensions of social or psychological reality borrow from the legal apprehension of social and psychological reality. Or, it might show some symbiosis or conspiracy between the legal control of political energy and the cultural forms of imaginative meaning-making we normally associate with the literary. Whatever the specific insights, the value of such research resides not in any confirmation of the power of a single method to subject an ever broader domain of data to a sovereign theory, but in an artful disjunction of method and data to illuminate a particular society's images of and beliefs about itself. In this way, interdisciplinary interrogation, in Geertz's terms, should not establish an interdisciplinary fraternity, but offer instead "a sea change in our notion not so much of what knowledge is but of what it is we want to know."

As New Historicist literary critic Stephen Greenblatt has said, literature functions within a culture in three ways: "as a manifestation of the concrete behavior of its particular author, as itself the expression of the codes by which behavior is shaped, and as a reflection upon those codes." If literary criticism limits itself to the analysis of any one of these functions, it risks various forms of reductionism. A reading of the first sort, for example, might deteriorate into isolated literary biography. The second sort of reading can devolve into vulgar ideological "superstructure" analysis. The third risks a drift into extreme detachment, sacrificing a sense of art's concrete role in culture in the name of dry timeless verities. Greenblatt's alternative, which he calls a "more cultural or anthropological criticism," addresses all of these functions and rests on a few basic convictions:

6. See id. at 26.
7. Id. at 25.
8. See id. at 21-22.
9. Id. at 34.
11. See Id.
12. Id.
that men are born “unfinished animals,” that the facts of life are less artless than they look, that both particular cultures and the observers of these cultures are inevitably drawn to a metaphorical grasp of reality, [and] that anthropological interpretation must address itself less to the mechanics of customs and institutions than to the interpretive constructions the members of a society apply to their experiences.\textsuperscript{13}

Thus Greenblatt strives both to avoid effacing authorial inventiveness, and to avoid idealizing that inventiveness as a quality discontinuous with practical social life. The author’s inventiveness becomes an exemplar of the inventiveness immanent in much social interaction not ordinarily distinguished as “aesthetic.” When we examine legal texts in this spirit their significance for us is not that we may see through them to underlying and prior historical principles but rather that we may interpret the interplay of their symbolic structures with those perceivable in the careers of their authors and in the larger social world as constituting a single, complex process of self-fashioning and, through this interpretation, come closer to understanding how literary and social identities were formed in this culture. That is, we are able to achieve a concrete apprehension of the consequences for human expression-for the “I”—of a specific form of power, power at once localized in particular institutions—the court, the church, the colonial administration, the patriarchal family—and diffused in ideological structures of meaning, characteristic modes of expression, recurrent narrative patterns.\textsuperscript{14}

The natural focus of such cultural criticism is imaginative literature, since “[a]mong artists the will to be the culture’s voice—to create the abstract and brief chronicles of the time—is a commonplace.”\textsuperscript{15} Nevertheless, Greenblatt notes that “the same will may extend beyond art.”\textsuperscript{16} Literature, then, “does not pretend to autonomy” because it is part of our everyday practice of representing and interpreting our social surroundings.\textsuperscript{17} This is true not only in the sense that the “construction” of a social situation requires inventiveness, but also in the sense that what we do not invent we appropriate from literary convention. Thus we “read” our social surroundings with the help of familiar plots, characters, and sensibilities.

B. Self-Creation and Cultural Criticism

Many of the major theorists of culture who dwell in the world of postmodernism owe much to Friedrich Nietzsche’s philosophy, which joins together a hermeneutic ontology, a vitalist aesthetics, and a perfectionist ethics. We can start with Nietzsche’s carefully hedged perspectivism, and his central argument that the world is sensibly viewed as a text subject to aesthetic interpretation.\textsuperscript{18}

\textsuperscript{13.} Id.
\textsuperscript{14.} Id. at 5-6.
\textsuperscript{15.} Id. at 7.
\textsuperscript{16.} Id.
\textsuperscript{17.} Id.
\textsuperscript{18.} The interpretation of Nietzsche offered here draws especially on ALEXANDER NEHAMAS, NIEZSCHE: LIFE AS LITERATURE (1985).
To describe the world as an interpreted text is not to say it has essential features that are hidden or distorted by human interpretation. Rather, according to Nietzsche's perspectivism, it is that by itself the world has no features at all, so that there is nothing to represent, rightly or wrongly. The apparent world is not distinct from reality, but is simply the world as it appears to any being that needs to survive in it and who must arrange it selectively for her own purposes. All perception is selective and aesthetic, so to try to grasp everything is to grasp nothing.\(^{19}\)

Perspectivism is not the same as relativism, which implies that multiple equally true claims can be made about the same object. Nietzsche insists that no particular point of view is epistemologically superior in the sense of affording those who occupy it a better picture of the world as it really is; but his position does not imply that all points of view are equally valuable.\(^{20}\)

For Nietzsche, the phenomenon of human will is like all other things in the world—an interpretation. Subjectivity is merely the "sum of its effects"; it is not a given or an essence but rather a fiction made of the acts of one person, or many.\(^{21}\) In this sense, to ascribe causal will or motivation—to one's self, to other persons, or to an institution or group—is to invent a literary character. Like a character in fiction or drama, a person is simply the sum of all the things she does or says. The character is related to each of her statements or actions not as substance to attribute but as whole to part. And the same is true for any person or institution to which we ascribe identity. Ascribing identity to the disparate acts of one or more persons means writing a narrative fiction, a "genealogy" that identifies a motivated character with origins and obligations, grievances and grudges, unfulfilled quests and unpaid debts.\(^{22}\)

Nietzsche called the practices and beliefs of our culture "interpretation" because every view of the world enables and is enabled by a particular kind of life and therefore presupposes and manifests particular values and interests. For Nietzsche, it is not that the world is indeterminate, but that it has a diversity of people who cannot all live by the same values. Philosophy's goal, then, is to help us become more self-conscious about our selectivity, more aware of the contingency of what we see or the way we live.\(^{23}\) The point of this self-consciousness is to place in question not the truth of what we see, but the value of that way of seeing. If one comes to see one's own sensibility as impoverished or boorish, the appropriate response is to change the way one lives. Thus, philosophy is used not to escape the perspectival limits inherent in living, but to

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19. See id. at 42 ("Facts are precisely what there is not, only interpretations.") (quoting FRIEDRICH NIETZSCHE, THE WILL TO POWER 481 (Walter Kaufman & R.J. Hollingdale trans., Vintage Press 1968) (1887)).
20. See id. at 3.
21. See id. at 74-105.
22. Id. at 103-105.
23. In noting that certain ascetic ideals are present in the lives of "all the great, fruitful, inventive spirits," Nietzsche maintains that these people do not see these ideals as duties or virtues, but rather as "the most appropriate and natural conditions of their best existence." Id. at 116 (quoting FRIEDRICH NIETZSCHE, ON THE GENEALOGY OF MORALS 8 (Walter Kaufmann & R.J. Hollingdale trans., Vintage Press 1968) (1887)).
-enhance our capacity to choose the limits within which we will live, and our responsibility for that choice. It is this self-shaping capacity that Nietzsche refers to as power.24

Much of the postmodernism and poststructuralism that derives from Nietzsche insists that just as we must challenge the assumption of a tangible world of objects that the human "subject" can examine, we must also challenge the even more basic assumption of a bounded and definable subject. As Alexander Nehamas notes, much modern thought after Nietzsche accepts this challenge, but in such a way as to underscore that the "aesthetic" project of making a consciousness for oneself is a thoroughly ethical act. For Nietzsche, aesthetics and ethics are aspects of the single enterprise of valuemaking. All normative issues ultimately translate into the question of how individuals compose themselves as subjects of their actions and experiences, a part of the more general material formation of humanity.

The quality and originality of sensibility that individuals bring to the interpretation of their world is, for Nietzsche, an urgent ethical question. This gives literature and the other imaginative arts a special ethical and political significance. First, in so far as reading literature is interpretive activity, it is one occasion for expressing and developing an interpretive sensibility.25 In this respect reading literature is continuous with the rest of life. But literature and the other imaginative arts are also ethical models for living in so far as they manifest such virtues as originality, aesthetic value, self-discipline, and artistic integrity.26 The ethical reader is obliged to compose herself in such a way as to be open to the ethical lesson literature teaches. This entails a capacity to appreciate the virtues it manifests—an emotional capacity to be inspired to emulate them and the requisite imaginative capacity to emulate the work’s originality rather than to merely imitate the work’s sensibility. This cognitive capacity required of the ethical reader includes sufficient acculturation to appreciate how an author works within generic traditions, and also the ways in which the author works with and on these traditions to articulate an original sensibility. The literary work’s role in revising or criticizing its own cultural origins provides a model for normative inventiveness in the conduct of a life. Creating new values always means critically elaborating a culture while continuing a narrative fiction. This must be done in a way that transforms what came before, yet in retrospect, seems necessary and inevitable.27

Nietzsche’s location of the artistic sensibility and the artistic work within a larger culture gives his value theory a political dimension. But in approaching Nietzsche’s politics we must avoid being misled by his celebration of “power.” For Nietzsche, “power” is not a political term at all, but an ethical and aesthetic one. Nietzschean power is personal, not interpersonal. Ceding power to others is an ethical violation; in this, Nietzsche anticipated and inspired the Sartrean

24. See, e.g., id. at 70-125.
25. See id. at 90-91.
27. See id. at 95-98, 111-13.
critique of collaboration with authority. And it perverts power to render it political.

Nietzsche's own political ideas are bound up with his understanding of the contrast between classical and modern society. In classical Greece, a harmonious and homogeneous culture provided a structured path to collective participation in virtue. Public rhetoric and theater not only taught virtue but engaged the public in its ceremonial enactment. Tragedy, in particular, authoritatively expressed what it meant to be Athenian, so that it was able to establish the collective understanding necessary for deliberating about an authentically collective good.28 This shared understanding allowed political deliberation to refine and realize the capabilities not of the individual participants but of the polity itself.

Tragedy used emotion to identify its audience with an exemplary self. The tragic hero is challenged by fate, but—with the vicarious participation of the audience—nobly maintains a stable self in the face of suffering.29 The shared public experience of contradiction evoked by tragedy, a contradiction not just of propositions but of feelings, was the source of its power to instruct, provoke, and ennoble.30 Nietzsche saw Socrates as the archenemy of this fertile antinomianism, bent on banishing the experience of contradiction to the realm of appearance and positing an invisible world of eternal verity in its place.31 In Nietzsche's eyes, this disastrous separation of philosophy from poetry purported to relieve suffering by making "reality" an escape from the apparent world, yet it diminished human life by denying the validity of passion. Platonic idealism would spawn what was, for Nietzsche, the catastrophe of Christian world denial, and start humanity down the slide from classical virtue to petty bourgeois respectability.

In modern society, Nietzsche maintained, the civic inculcation of virtue was no longer possible. The world was disenchanted, and authoritative cultural values could no longer keep or deserve the allegiance of the self-respecting. But the tragic consequence of this disenchantment was that the self could no longer gain stability through consensus and ritual. Thus the dislocations attendant upon modernization not only imposed suffering, but also stripped the self of its acculturated capacity to survive suffering. Liberalism collaborated in this spiritual atrocity, because in the name of neutrality and tolerance it relegated the self to a realm of private taste insulated from any societal concern.32 Nor could political authoritarianism substitute for the lost cultural authority of virtue: Nietzsche rejected the power politics of Bismarck precisely because Bismarck used political means to secure nonpolitical ends, and thus left the world in a state of dispirited disenchantment.33 Only art, not politics, could recover virtue in the wake of modernization.

28. See id. at 42-43.
29. See id. at 119.
30. See id.
31. See id. at 212-13.
33. See id. at 160.
The virtue attainable in modern society was, however, a different kind of virtue. Instead of being the collective achievement of a culture defined by a shared sensibility, modern virtue was the personal achievement of power, and the creative artist was its paradigm. Yet the pursuit of artistic virtue still required a conducive culture—one with rich common traditions, discerning audiences, and above all, other ambitious artists. The cultural function of art was no longer the inculcation of an authoritative and collective identity, but the provocation of others to fashion distinctive sensibilities of their own. The heroic figure of the artist replaced the tragic hero as the icon of virtue, and the aspiration to recreate the culture replaced the aspiration to exemplify it.

The political dimension of Nietzsche's value theory lies in his concern for the cultural conditions of artistic creation and hence self-creation. While virtue was no longer common, the conditions of its exercise remained a common good. By developing and expressing a powerful sensibility one contributed to the common good; remaining indifferent to the self-demeaning complacency of others detracted from it. In this sense, cultural criticism was a political obligation in modern society. The mutual provocation provided by artistic self-expression and cultural criticism was the modern equivalent of deliberative politics.

Although repulsed by authoritarianism, Nietzsche was unconcerned with the liberal problem of regulating the encounters of independent selves to minimize tyranny. From a Nietzschean perspective, this liberal project is pointless unless we have meaningful selves in the first place. The crucial question is not how to protect the self from invasion, but how to strengthen the self's capacity to define and defend its own boundaries; not how we can preserve ourselves, but what kind of selves we ought to possess.

Nietzsche's virtue-driven value theory may seem perfectionist, but the charge that he would have approved enslaving the many to produce one perfect work of art is a caricature. Nietzsche's concern was human virtue, not artistic merit—the art of living rather than the work of art. Whether human virtue is optimally distributed according to a principle of maximizing the average level of virtue in society, or the virtuousness of the most virtuous, or of the least virtuous, he neither said nor cared. Nietzsche was concerned with the "revaluation of all values," not their scaling and measurement. The accounting questions that obsess welfare economists and theorists of justice, the debates over maximean, maximin and maximax, would no doubt have struck Nietzsche as symptoms of a shopkeeper's morality.

C. Postmodern Social Theory: Discipline and Practice

Contemporary cultural criticism may be thought of as extending Nietzsche's perspectivism more fully into the social sphere, where we find collective acts of identity formation. Cultural history, then, focuses on the complex

34. Friedrich Nietzsche, Ecce Homo, in Basic Writings of Nietzsche 782 (Walter Kaufmann ed. & trans., 1968).
evolution of these social characters, viewing them as artistic creations that also provide highly pragmatic solutions to political and economic problems.

In *The Passions and the Interests*, economist Albert Hirschman reviews how early capitalist society "invented" a new human figure, the rationally "interested" man, whose preferences became the foundational elements of utilitarianism and capitalism. For Foucault, this interest-bearing person was the creature and instrument of a new disciplinary society. In *Discipline and Punish*, Foucault identifies the new "human sciences" of the modern period as "disciplines" in that they discipline both the investigator and the object of investigation. Disciplines are techniques of examining populations under controlled conditions that render them comparable, thereby defining them as objects not only of knowledge but also of evaluation and regulation. We can extend Hirschman by saying that to impose the instinct for preferences on people is to discipline them, if economically productive "interest" constrains the destructive passions. But "interest" solves another problem as well: Interest is socially useful because it ensures predictable behavior. The predictable interests of others provide a determinate social environment within which to pursue one's own interests. Thus, interest solves an epistemological problem as well as an ethical one. If modern justifications for the exercise of power impose the need to measure the social world, the concept of interest gives us something to measure. In regulating behavior, interest provides the human sciences with the controlled conditions against which interests can be measured.

To New Historians, however, Foucault's "disciplinary" account of the "interested" subject leaves out the crucial dimension of human agency. In Foucault's view, power does not exercise itself through individual human action or large state institutions, but is instead diffused through particular disciplinary mechanisms. Moreover, the disciplinary mechanisms create characters or social roles to which we now must aspire (the normal child, the healthy body, the stable and obedient mind) and other deviant personas we must vigilantly avoid. Foucault offers histories of the modes by which these social subjects have been made, by which we see the fault lines between the norms which are proper subjects and the deviations which are ruled out of order.

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36. *Id.* at 32; *see also id.* at 32-44, 48-52, 65-66.
40. *See id.* at 170-184.
For Foucault, the individuality conferred on persons by disciplinary investigation is merely a bureaucratic text—a dossier, case history, or transcript. Recognizing themselves as objects of bureaucratic knowledge, persons interpret their own experience and measure their own worth according to the generic conventions of the human sciences. They author themselves only in the sense that they sign their names to scripted confessions. As Pauline Rosenau points out, postmodernists tend to view the human subject as a mere effigy, a "construct," a linguistic invention. Foucault's discussion of power tends to omit any language of intention or purpose, while anthropomorphizing power itself. We see local manifestations of power, but this power is never held or exercised by anyone in particular. We are encouraged to assume, though never told, that behind these manifestations lies a coherent force that transcends them.

By contrast to Foucault's disciplinary analysis, the New Historicist emphasizes the role of creativity in fashioning subjectivity. In a New Historicist analysis, individuals or groups typically deploy aesthetic skill in concocting a motivated self, an identity. This character, though often treated as a fixed determinant, is in fact endlessly renegotiated to meet changing circumstances. A New Historicist approach to law would seek the act of express creation in what, for "human scientists" such as economists and policy analysts, is the mere manifestation of fixed preferences.

A more elaborate theoretical foundation for this enterprise may be sought in the anthropology of Pierre Bourdieu, who has tried to reincorporate human action into the field of social forces without reviving the notion of an "authentic" or presocial human subject. For Bourdieu, social practice is a generative, organizing scheme, an imprecise but systematic principle of selection and realization, tending, through steadily directed adjustments and corrections, to eliminate errors and to conserve even fortuitous successes.

The key to understanding human action for Bourdieu is the "habitus." The habitus consists of (1) a repertoire of behaviors and gestures developed as a result of either deliberate inculcation, imitation, or random processes of trial and error; (2) dispositions to so behave in response to certain situations; (3) the ability to interpret situations as calling for such behaviors; (4) experience deploying these behaviors with more or less success in unfamiliar situations; (5) experience modifying such behaviors in unfamiliar situations; and (6) a repertoire of goals the actor experiences as appropriate and attainable for someone like herself. The temporal urgency of action limits practice to this repertoire of familiar behaviors, ends, and strategies of adaptation. This means that there is an automatic quality even to such apparently reflective choices as undertak-

42. See MICHEL FOUCAULT, THE ORDER OF THINGS, supra note 37, at 344-45.
44. Id. at 72.
ing a feasibility study, comparison shopping, checking the weather report, or sacrificing a rook.

The habitus is the residue of an individual's experience through which she has absorbed the accumulated experience of many others.\textsuperscript{46} Practice involves bringing it to bear on a current situation for which it may be ill-adapted. "Only in imaginary experience . . . does the social world take the form of a universe of possibilities equally possible for any possible subject."\textsuperscript{47} Thus the habitus represents an individual or "subjective" factor in the analysis of social action, but the individuality consists as much in a confining quirkiness as in any freedom of maneuver. For while the habitus enables some choice and creative adaptation, it is also the repository of past socialization or "discipline."

That practical activity is organized by the habitus implies that practical intelligence may be very different from the calculating rationality that economic theory ascribes to actors. Indeed, Bourdieu argues that economic rationality should itself be seen as a habitus: a set of coping skills peculiar to certain social groups, arising only out of the requisite socializing experiences, and sustainable only in the requisite life situation. As Bourdieu explains:

Economic theory which acknowledges only the rational 'responses' of an indeterminate, interchangeable agent to 'potential opportunities' . . . converts the immanent law of the economy into a universal norm of proper economic behaviour. In so doing, it conceals the fact that the 'rational' \textit{habitus} which is the precondition for appropriate economic behaviour is the product of [a] particular economic condition, the one defined by the possession of the economic and cultural capital required in order to seize the 'potential opportunities' theoretically available to all . . . \textsuperscript{48}

Bourdieu’s practical actor may pursue any number of ends. But if there is a common motivation driving individuals along the tracks laid by socialization, it is honor rather than greed. Thus practical action is at base less reflective, more ritualistic, and more idealistic than rational choice models would suggest. In the right social milieu, however, the pursuit of esteem can certainly habituate actors to economic rationality.

Bourdieu’s focus on the decisionmaking of the practical actor gives him a more flexible model of social order than that offered by structuralists like Foucault. Since there is always a gap between the conditions under which the actor was habituated and the context which calls for urgent practical action, social orders do not function smoothly. The actor is always, to some extent, in the position of a judge trying to apply archaic rules to novel circumstances. Moreover, because all participants in a social order are in the same position, no actor can ever be sure how other actors will respond. Practical actors are habituated to cope with this uncertainty and to expect variation in both the responses of

\textsuperscript{46} \textit{See} \textit{Bourdieu}, \textit{supra} note 43, at 72 (defining "habitus" as "systems of durable, transposable dispositions, structured structures predisposed to function as structuring structures") (internal citation omitted).

\textsuperscript{47} \textit{Bourdieu}, \textit{supra} note 45, at 64.

\textsuperscript{48} \textit{Id.} at 63-64.
others and the judgments of observers as to which responses are socially appropriate.

The job of the critic, in understanding social practice, is not to "decode" its symbolism but to restore its practical necessity by relating it to the conditions of its genesis. That any choice can be accounted for retroactively does not mean perfect predictability, because even the strictest rituals leave room for strategies. Thus, social practice does not have the rulelike quality of a juridical code. Nevertheless, customary norms can order and constrain practice, because when one judges another she marshals schemes of perception and appreciation more or less operative in the habitus of other participants in the practice.

Even where the agents' habitus are perfectly harmonized and apparently predictable, outcome uncertainty remains as long as the sequence of the agents' reciprocal actions is incomplete. Bourdieu's model of the interaction that is structured but nevertheless colored with narrative uncertainty is the gift exchange.\footnote{See \textit{Bourdieu}, \textit{supra} note 43, at 4-8, \textit{supra} note 45, at 98-111, 126.} Here, the very conventions of the practice preclude an immediate and in-kind reciprocation of the gift, imposing on the recipient of a gift a perhaps unwanted discretion to choose the moment and currency of response.\footnote{See \textit{Bourdieu}, \textit{supra} note 43, at 4-8, 171-74; \textit{Bourdieu}, \textit{supra} note 45, at 98-111, 126.} This gives the practice of gift exchange a gamelike quality, in which the moves are "ruled" by strategy, not rule.\footnote{See \textit{Bourdieu}, \textit{supra} note 43, at 6.} Bourdieu's image of a social practice in which the application of rules unfolds over time, as a process involving discretion and the possibility of subversion by multiple actors, is applicable to processes of legal decision.\footnote{See \textit{Bourdieu}, \textit{supra} note 45, at 98-111.}

Indeed, Bourdieu is particularly interested in practices like law, where decision-making discretion is vested in office. By virtue of their office, particular decisionmakers exercise a personal power that, because it is not reducible to force or wealth, is "symbolic," i.e., an effect of meaning. Official authority, in other words, marks a formal boundary within a culture, a sphere of power relatively autonomous from other spheres.\footnote{See \textit{Bourdieu}, \textit{supra} note 43, at 41-42; \textit{Bourdieu}, \textit{supra} note 45, at 108-10, 238-39.} Because there exist such relatively autonomous spheres, governed by mechanisms capable of imposing their necessity on agents, those who are in a position to command these mechanisms are able to dispense with strategies aimed expressly and directly at domination. Strategies such as law, aimed at formally regulating a field of practice, "transmute 'egoistic,' private, particular interests . . . into disinterested, collective, publicly avowable, legitimate interests."\footnote{\textit{Id.} at 188.}

For Bourdieu, the role of law is to "symbolically consecrate . . . power relation[s] between groups and classes" by recording them in a form which anchors them securely to other power relations, eliminating the practical utility of perceiving them as contingent or contestable.\footnote{\textit{Id.} at 188.} Agents bind each other into simultaneously enabling and confining roles which preclude the exhibition of
naked self-interest by clothing them with the interests of office. Thus, the sym-

bolic or "legitimating" role of law is to prettify or obscure domination with the

veil of enchanted relationships.\textsuperscript{56} Of course, whether the authority of office

will be recognized on a given occasion or resisted is always a matter of sus-
pense—its exercise is always a bet. This means that authoritative decision-
makers have a strategic interest in conserving or enhancing their authority or

"symbolic capital."\textsuperscript{57}

Neither authority nor symbolic capital is confined to state officials. It is

vested in professionals by virtue of such practices as training and state certifica-
tion, and is vested less securely—because less formally—in persons of high

social status. In a rigid caste society, the social status and symbolic authority of
each person might be clear. But in more fluid societies, certainly in modern

society, social status is always at risk and always negotiable. In bourgeois soci-

ey, a struggle ensues to "distinguish" one's self as a subjectivity worthy of
decisionmaking competence by virtue of superior knowledge, refinement of
taste, or self-control. "Distinction" always places one at a distinct remove from

her origins or interests. It informs personal identity with the qualities of

office.\textsuperscript{58}

A number of propositions are implicit in Bourdieu's analysis of "symbolic

power" and "distinction." First, every social interaction has a competitive or

strategic dimension. Every interaction takes place within a general contest over
cultural authority. Second, the "disciplining" process in modern society does

not mechanically form actors but engages their active, avid participation. The

achievement of bourgeois subjectivity requires effort and luck. Third, the dis-

play of literacy, aesthetic refinement, and rhetorical skill are all means of stak-
ing a claim to "distinction," social status, and symbolic capital. The literary use

of language therefore has a practical, power-enhancing dimension.\textsuperscript{59} Fourth,

the exercise and conservation of power depend upon an aesthetic and dramatur-
gic activity of playing "characters" to an audience. Finally, the exercise of

authority is conditioned on both the social criteria for its exercise and the dis-

cretionary application of those criteria by particular social actors. In this sense,

conserving authority involves a negotiation or exchange of "symbolic capital"

with norms, institutions, and individuals.\textsuperscript{60}

Linguistic exchange . . . is also an economic exchange which is established

within a particular symbolic relation of power between a producer, endowed

with a certain linguistic capital, and a consumer (or a market), and which is

capable of procuring a certain material or symbolic profit. In other words,

utterances are not only . . . signs to be understood and deciphered; they are also

\textit{signs of wealth}, intended to be evaluated and appreciated, and \textit{signs of author-

ity}, intended to be believed and obeyed.\textsuperscript{61}

\textsuperscript{56} Id.
\textsuperscript{57} Id. at 171.
\textsuperscript{58} See id. at 187-88.
\textsuperscript{59} See id. at 186-87.
\textsuperscript{60} See id. at 171-83.
\textsuperscript{61} \textsc{Pierre Bourdieu}, \textit{Language and Symbolic Power} 66 (John B. Thompson ed., Gino Ray-

Identifying a practical, strategic dimension of meaning in all aesthetic activity, and an aesthetic dimension in all practical action, brings power and culture, law and literature, onto the same field of play.

D. New Historicism

The New Historicism is an intellectual movement that fulfills many of Geertz's criteria for cultural criticism. It is historical in the mundane sense that it studies old cultures as well as contemporary ones. It is new in that it draws on both conventional historical dimensions—most obviously political and economic history—as well as more contemporary dimensions, such as social and ethnographic history. And it is relevant to law-as-literature in at least two senses. First, in apprehending cultural forces that cut across the normal dimensions, New Historicism sees individuals and groups in the virtually dramaturgic acts of suffering, exploiting, and renegotiating the identities and interests that channel their participation in political and economic life. Second, it entertains the possibility that any social or political document can be read not only instrumentally but also aesthetically, as describing the cultural forces that underlie its production and as reinterpreting cultural forms and norms. Texts, for the New Historicists, are both socially produced and socially productive.

Like any somewhat self-described new movement, New Historicism has been prolix in its manifestoes, but citing a few key principles is helpful. The New Historicism assumes that every expressive act by an individual or group is embedded in a material network of practices; that every intellectual or political critique inevitably uses the very tools it condemns; that there is no substantial distinction between literary and nonliterary texts once they start circulating; that no discourse yields eternal truth nor discovers eternal human nature; and that any critical method under capitalism participates in the economy it critiques. The New Historicism thus may often still use such formalist techniques as analyses of allegory, irony, and mimesis. But contrary to the premises of formalist criticism, it seeks to dissolve literature back into historical complexity.

The New Historicism offers an anthropology similar to Bourdieu's. For New Historicists, art is penetrated by its institutional context, ritual gestures, patterns of relation, and shared images of authority. Even though art is demarcated from ordinary utterances, the demarcation itself is a social event and signals not the effacement of the social but its absorption into the work. Art's appeal to distant audiences does not signal its abstraction, but rather its incorporation of its social roots. Thus, art is the most fundamental trace of culture.


63. See H. Aram Veeser, Introduction to THE NEW HISTORICISM, supra note 62, at xi.


65. See, e.g., Stephen Greenblatt, SHAKESPEARIAN NEGOTIATIONS 4-5 (1988) (arguing that cultural and artistic practices are collectively produced in a society).
Yet, at the same time, we best understand a culture by treating its supposedly non-artistic products as if they were art; that is, we read all social texts in the hope of finding the traces of their enabling social conditions, the traces that instrumental forces have failed to efface entirely.

Given these traces, the method of the New Historicist is to question the usual structures of history—whether linear, cyclical, or dialectical. Indeed, she sees not so much history as *histories*, full of heterogeneity, contradiction, fragmentation, and difference. The New Historicist writes a history at once messier and more inclusive than that supplied by nationalist historiography or modernization theory, finding throughout the course of a culture endless negotiations and trade-offs of cultural currency. The New Historicism is interested in the episodic, anecdotal, contingent, exotic, abjected, uncanny pieces of history—the ones that violate rules and laws of politics and social organization. New Historicists do not seek “raw” materials as does Levi-Strauss. They seek the “cooked” ones—the hidden cultural contrivances, not just the so-designated works of art, but also related ceremonious practices that have been adduced ostensibly to illuminate works of art.

One reason why New Historicism can apply aesthetic criteria to things normally thought of as outside the realm of art is that it rejects any simple mimetic notion of art. Yet at the same time that it rejects mere mimesis, New Historicism rejects any new-critical view of the art work as self-sufficient. Rather, New Historicism considers art, like all cultural forms, as a medium for negotiating and exchanging—a point at which one cultural practice intersects with another, borrowing its forms or attempting to ward off unwelcome appropriations or pressures. Art negotiates among “a class of creators, equipped with a complex, communally shared repertoire of conventions.” Thus artists need a currency, a grammar, and a vocabulary of literary forms, each with its systematic adjustments, symbol systems, and stereotype characters. As Greenblatt notes in a list of “abjurations” for his style of criticism:

1. There can be no appeals to genius as the sole origin of the energies of great art.
2. There can be no motiveless creation.
3. There can be no transcendent or timeless or unchanging representation.
4. There can be no autonomous artifacts.
5. There can be no expression without an origin and an object, a *from* and a *for*.
6. There can be no art without social energy.
7. There can be no spontaneous generation of social energy.

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68. See Greenblatt, *supra* note 62, at 12.

69. Id.

70. See id.

CULTURAL CRITICISM

This artistic currency both draws on and contributes to the realms of religious ceremony, political argument, and economic transaction. For the New Historicist, there is no logical connection between a theory and its political consequences, or between any set of ideas and how they may be used in particular social contexts. The political valence of a theory does not inhere in the theory itself (or idea or text or practice), but is conjunctural. For our purposes, applying such a critical method to law means both that the law's supposedly prosaic, instrumental process of weighing interests and defining entitlements is a contested social process of self-definition, and that the law's literary legibility in no way implies its refinement or transcendence of venality.

Because, almost by definition, its value turns so much on the specific topics to which it applies, we can say little more about such criticism in the abstract. But we can say something about how we might fruitfully develop cultural criticism of law. An analysis of law as social text will suggest itself wherever we see legal thought as social thought. Inasmuch as jurisprudence was arguably a central tradition of Western social thought before the development of academic social science in the nineteenth century, and inasmuch as progenitors of social science such as Madison, Bentham, and Lieber also profoundly influenced American legal development, and inasmuch as legal decisionmakers in twentieth-century America have come to see themselves primarily as policy analysts, social textualists will find themselves facing a crowded docket. In virtually any dispute or transaction, they are likely to find actors construing, deploying, enacting, enforcing, or resisting representations of society.

We now proceed to consider several readings of legal interactions as social texts. We will begin with a number of studies treating legal disputes as contests over how to represent society or its parts, expressive contests of meaning rather than instrumental contests over resources. The disputes in question take on expressive meaning for the participants against the background of bodies of law that influence or recognize character, status, and identity. The criminal law, for example, may determine guilt on the basis of assessments of the character or motives of an actor. The criminal law's purposes include the shaping of behavior not only by punishing and deterring wrongdoing, but by educating the public about norms. The criminal law thereby operates to define the law-abiding as well as the criminal character. The civil law confers identity by determining who has standing to sue for a wrong, who is damaged by it, who is responsible for it. Traversing a social and moral terrain charged with legal meaning, individuals and groups can define themselves and one another by reference to legal norms. They can also attempt to challenge and subvert those definitions, and the norms that confer them. We will see actors pursuing these strategies in both criminal and civil trials, in constitutional litigation and political advocacy, and in such informal disputing behavior as the blood feud.

72. See, e.g., DONALD R. KELLEY, THE HUMAN MEASURE: SOCIAL THOUGHT IN THE WESTERN LEGAL TRADITION 252-75 (1990) (tracing how law was overpowered by philosophy and the social sciences in the nineteenth century).

73. See text accompanying notes 74-163 infra.
I. CULTURAL READINGS OF DISPUTES

A. The Drama of Civil Rites

A relatively simple example of a reading of law as a dynamic of cultural representations concerns the criminal trial. What is at stake in a criminal trial? A literary criticism of law would find more than a conventional resolution of guilt or innocence. The criminal trial is as much a social ritual as a legal instrument, valuable in part because it can affirm many values at once. Indeed, the criminal trial is perhaps the central trope of law. Half a century ago, Thurman Arnold captured this idea in an essay in his aptly titled book, *The Symbols of Government*:

For most persons, the criminal trial overshadows all other ceremonies as a dramatization of the values of our spiritual government, representing the dignity of the State as an enforcer of law, and at the same time the dignity of the individual when he is an avowed opponent of the State, a dissenter, a radical, or even a criminal. So important is the criminal trial to the whole ideological structure of government that its disappearance in favor of an efficient and speedy way of accomplishing the incarceration of persons supposed to be dangerous to the social order, is always a sign of psychological instability of a people.  

If viewed functionally, the criminal trial, Arnold argues, is inherently a failure. He asserts that the rules of evidence are a woefully inefficient tool of investigation, the definitions of criminal responsibility rarely accord with sensible psychology, and the criminal sentence often fails to serve any social purpose. But all this may be irrelevant since the only function which the criminal trial can perform is to express currently held ideals about crime and about trials. It can act as a brake against a popular hysteria which insists upon following any one of the ideals to its logical conclusion. . . . Obviously, therefore, the public administration of criminal justice is not a method of controlling crime. It is rather one of the problems which must be faced by those who desire to control crime. Without the drama of the criminal trial, it is difficult to imagine on just what institution we would hang our conflicting ideals of public morality.

How can we “read” a trial to discover the social forms, rituals, and mechanisms of meaning that underlie its apparent function? How can a trial be a social text? One excellent example of such a cultural interpretation of a legal event appears in John Murray Cuddihy’s jaunty book, *The Ordeal of Civility*. Cuddihy’s overall theme is to note the not very coincidental fact that many major modernist thinkers were Jewish. He reinterprets the works of such figures as Freud, Marx, and Levi-Strauss, not in the scientific terms in which

75. See id. at 146.
76. See id.
77. Id. at 147-48.
they were written, but rather as an expression of Jewish subversive uprising against the demands of Anglo-Saxon civility.\textsuperscript{79}

The general phenomenon of "Jewish theory" is really the spirit of misrule in the kingdom of Western thought. Whether it be Freud's id, Marx's proletariat, or Levi-Strauss's Third World culture, the discovery of the Jewish theorist is the survival of that part of the human spirit which has resisted genteel acculturation. Thus, for each of these architects of modernism, the pain of passage from traditional society to modern, from the \textit{Gemeinschaft} of the \textit{shtetl} to the \textit{Gesellschaft} of liberal society, lies not in its acknowledged costs—impersonality, loneliness, and the like—but in its supposed benefit—the dignity it confers upon the individual.\textsuperscript{80} The burden of this dignity is the ordeal of civility; the resentful response expressed in each of these spectacularly successful crashes of the lawn party of Western civilization is to violate decorum by exposing the soiled undergarments of civilization—its sexuality, materiality, savagery.\textsuperscript{81}

In that regard, one of Cuddihy's more bizarre chapters, "A Tale of Two Hoffmans: The Decorum Decision and the Bill of Rites,"\textsuperscript{82} treats the defendants in the legendary Chicago Seven trial, especially Abbie Hoffman, as pursuing an analogous strategy of calculated embarrassment. In what amounts to a dramatization of Marx's essay on the Jewish question, Abbie Hoffman, by targeting Judge Julius Hoffman, placed Judaism on both sides of the civilization divide. Hairy, unkempt, accented, irrepressible, wise-cracking, shrugging, Yiddish-talking Abbie Hoffman broadly played the \textit{shtetl}-dweller, just off the boat. Conspiratorially addressing Judge Hoffman as "Julie," he implicated the judge in the conspiracy for which he was being tried.\textsuperscript{83} By calling public attention to Judge Hoffman's Jewishness, defendant Hoffman conveyed a multiple message.

First, the decorum of the courtroom, requiring each participant to portray himself as a universal citizen, was inauthentic, and thereby an illicit condition of his rights. Second, Judge Hoffman's effort to wear an Anglo-Saxon mask had failed.\textsuperscript{84} Third, his effort to mask himself was itself a humiliating confession of inadequacy and marginality rather than a display of dignity and importance. Judge Hoffman's devotion to decorum, and indeed to law, was just the craven assimilation of a self-hating Jew. Fourth, not only Judge Hoffman's efforts to police Defendant Hoffman's courtroom behavior, but the entire prosecution, was an effort to suppress the authenticity of the \textit{shtetl} Jew and to mark his disruptive presence as un-American. Fifth, Judge Hoffman was not simply striving to "pass," but was actually collaborating in the persecution of his own people. In sum, Defendant Hoffman "argued" to Judge Hoffman, that in stifling him, the judge was attempting to stifle his own authentic self. Meanwhile,

\begin{flushright}
\textsuperscript{79} See \textit{id.} at 3-14.
\textsuperscript{80} See \textit{id.} at 10-13.
\textsuperscript{81} See \textit{id.} at 3-14.
\textsuperscript{82} \textit{Id.} at 189-202.
\textsuperscript{83} \textit{Id.} at 194.
\textsuperscript{84} See \textit{id.}
\end{flushright}
the prosecution in what he believed to be his own courtroom was in fact the judge’s own persecution.

For Cuddihy, the defendants turned their trial on conspiracy and riot charges into a wider debate on a general point of law: whether genteel decorum and bourgeois civility were constitutional conditions for the enjoyment of Anglo-Saxon civil liberties.85 The Supreme Court had eliminated racial and wealth requirements for the enjoyment of civil rights, but was there a manners requirement as well?86 Is a trial really a ceremony in which citizens win their civil liberties at the price of a ritual of obeisance and fealty? Cuddihy suggests that the provocative, jesting actions of the Chicago Seven and of similar defendants in other 1960s era trials “aimed at demonstrating that every civil right has, as hidden proviso, a bourgeois rite, and that all civil rights are alienable with the nonperformance of civic rites.”87 The defendants had rightly perceived that the true social subtext of the trial was the affirmation of a certain type of political subject—the properly civil citizen who was the rightful owner of civil rights. Their “defense” therefore, took the logically subversive form of refusing to adopt that social role, thus exposing the artificiality and superficiality of the state’s and the court’s notion of constitutional principle.

Later, at the trial of Bobby Seale and other Black Panthers, the judge demanded from the defendants an apology for misbehavior and a promise of good behavior as a condition of their remaining in the courtroom.88 Codefendant David Hilliard later bragged “he had been crafty enough to outwit the system” by making the vow insincerely.89 Cuddihy insists that the system had in fact outwitted the defendants, since it exacted from them precisely what it wanted—not true love and obedience, but mere ceremonial fealty.90 Hilliard mistakenly thought he had completed the act of deconstruction by co-opting the court’s hypocrisy. Cuddihy believes that, in fact, this was not hypocrisy in any disturbing sense at all—it was honest aesthetic artifice.91 The court happily accepted the proper “ceremonies of innocence” as the moral equivalent of civil identity. The court had subtly out-negotiated the subversives; the cooptation had been reversed.

B. Representing Nazism

Perhaps the paradigm of the legal proceeding in which the symbolic and expressive elements predominate over instrumental concerns is the war crimes trial.92 Thus, the highly publicized trial in France of Nazi war criminal Klaus Barbie was presented to the public, by press and prosecution alike, as an edifying performance, an object of interpretation. Because the outcome was a fore-

85. See id. at 196-97.
86. See id. at 197.
87. Id. at 199.
88. See id. at 197.
89. Id. at 201.
90. See id.
91. See id. at 201
92. This discussion is drawn from Guyora Binder, Representing Nazism: Advocacy and Identity at the Trial of Klaus Barbie, 98 YALE L.J. 1321 (1989).
gone conclusion, the strategic courtroom advocacy we usually read as instrumental, here organized itself into a contest over the cultural meaning of condemning an indefensible defendant whose trial seemed a scripted, sacrificial ritual.

Barbie's trial was an occasion for building group identity. Representatives of various victim groups, authorized by French criminal procedure to participate in the prosecution, vied for martyr status. Particularly charged was a debate between Jewish survivors and Resistance veterans over whether to interpret Nazism primarily as anti-Semitic genocide or as illiberal political repression. Perhaps even more controversial were the efforts of Barbie's defense attorney, Jacques Vergès, to implicate the accusers in Barbie's crimes, portraying the Nazi occupation of France as a mere instance of imperialism. Hence, it was no more genocidal or repressive than France's colonization of Algeria, or Israel's occupation of the West Bank. In this way, the Barbie trial, like the Chicago Seven trial, combined a reprise of the Jewish question with the New Left's theatrics of disruption. In exploiting the trial's opportunity to define themselves by opposition to Nazism, the victim groups ironically placed their identities en prise, hostage to Barbie's own account of the motives of his crimes.

How did Barbie's trial come to be staged as an edifying debate on the meaning of Nazism, and on the relative cultural identities of the French, the French left, and the Jews?

First, a global audience for such a performance was assembled by the news media, which portrayed Barbie as an emblematic Nazi who had deported Jewish children to death camps, murdered the left-wing Resistance leader Jean Moulin, and later served the repressive Bolivian regime that killed the chic revolutionary Che Guevara. Once captured, Barbie obligingly presented himself as an unrepentant Nazi, proclaiming continued devotion to his Nazi “ideals.” Yet he invited interpretation of his actions by refusing to explain these ideals or even to appear in court.

Second, in formulating Barbie's charges, the French judiciary invited competing representations of Nazism by making ideological motive an element of the charged offense. In order to circumvent French statutes of limitation and prohibitions on retroactive prosecution, the courts rooted "imprescriptible" liability for "crimes against humanity" in customary international law. This reliance on international custom, however, provoked the defense argument that occupying powers have customarily committed atrocities. The courts attempted to distinguish Nazi from French colonial atrocities, opening a debate on the distinctive heinousness of Nazi atrocities. Careful to retain among the charged offenses not only Barbie's participation in genocide, but his repression

93. See id. at 1339-55.
94. See id. at 1324-38.
95. See id. at 1355-62.
96. See id. at 1339-55, 1381-83.
97. See id. at 1324-28.
98. Id. at 1328-29.
of the Resistance, the courts limited crimes against humanity to atrocities committed in the service of a "state practicing a policy of ideological hegemony." Accordingly, the prosecution was obliged to prove that Barbie's offenses were motivated by "the national socialist ideology." 99

Because French procedure permits victims of a criminal offense representation at trial, victims competed for the role of Nazism's chief opponent, exemplifying the use of legal dispute as a setting for the aesthetic creation of identity. Yet the prosecution of Nazi ideology ascribes more coherence and integrity—more "identity"—to Nazi thoughts and practices than is probably warranted. The convergence of so many contending groups on the stratagem of defining themselves by contrast to Nazism reveals a contemporary crisis of cultural identity that transcends any particular group. The less confidence we feel in the coherence of our own purposes and principles, the greater the temptation to identify ourselves in contrast to a malignant ideology. Ironically, Nazism provided an identity for Germans only by ascribing "a similarly malignant coherence of purpose to Jews." 100 In representing ourselves as victims, we ascribe to the oppressor an enviable commitment and conviction that increasingly seems beyond the capacity of any morally sensitive person. 101

This contemporary crisis of cultural identity was especially visible in two particular identity crises "in evidence" at the Barbie trial, those of post-Holocaust Judaism and post-Occupation France.

The Holocaust destroyed the covental basis of Jewish theology in a divine promise of preservation and prosperity in return for fidelity. While orthodoxy had traditionally interpreted persecution and suffering as divine retribution for infidelity that could be redeemed by greater religious commitment, the devastation of the Holocaust seemed disproportionate even to the sin of modern secularism, and misdirected at the most traditional and faithful communities of Jews. The leading response to this covental crisis, enunciated at the trial by star prosecution witness Elie Wiesel, substitutes the memory of the Holocaust for fidelity to God as the fundamental commitment of Judaism, and substitutes the victims for God as the postwar Jew's covental partner. 102 Yet this effort to derive a new Jewish identity from the martyrdom of traditional Jewry may be self-defeating insofar as it assimilates Judaism to Christianity. 103

As the Holocaust for Judaism, so was the Occupation for France: the irreparable wound. The conflict it provoked between collaboration and resistance remained an internal war in which the battle lines could never be cleanly drawn. Yet the Occupation was also an integrative moment, fusing existentialist philosophy with Marxist politics to produce a Left. Like postwar Jews, prewar existentialists were disillusioned theists in search of a civil religion. The Resistance to fascism, however, provided the secular quest that could structure a moral universe. An impotent fringe before the war, the intellectual left found

99. Id. at 1337-39.
100. Id. at 1344.
101. See id. at 1344-45.
102. See id. at 1345.
103. See id.
itself at war’s end as the embodiment of a myth of universal resistance.104 The difficulty was that this myth flew in the face of tacit knowledge that quiet collaboration had been ubiquitous. The price of the intellectual left’s political power and cultural influence was collaboration in the lie that the Resistance had led a united France. The realization that they were now implicated in the very hypocrisy they opposed drove leftist intellectuals into a self-consuming critique which eventually repudiated the ideals of authenticity and moral autonomy which had originally inspired them. The structuralist pronouncements of the death of “Man” and “the Subject” were at once indictments of existentialism and extensions of its phobic obsessions with heteronomy and hypocrisy. Deconstructive critiques of languages and cultures as inherently incoherent reflected a further surrender to the inevitability of occupation.105

This context helps explain one of the great puzzles of the Barbie trial: how could Vergès, himself a Resistance veteran, visible in radical circles since the 1950s, defend a Nazi, the murderer of Jean Moulin and opponent of Che Guevara? Part of the explanation lies in his shift away from a humanist conception of political advocacy as an effort to give voice to the authentic subjectivity of a dissident client. Vergès first achieved notoriety as a defender of Algerian revolutionaries and later defended Palestinians accused of terrorism. Both of these roles expressed a sympathy with the self-determination claims of dispossessed populations once fashionable with the French left. But with the emergence of the poststructuralist critiques of identity and authenticity, the ideal of self-determination seemed incoherent. A critique of colonialism could no longer be premised on the dignity of the colonized but had to focus on the hypocrisy of the colonist.

Vergès could defend a Nazi because he no longer accepted the responsibility, or even the possibility, of identifying with the personality and politics of his client. His was an effort not to defend a client, but to hijack the prosecution. The trial, Vergès contended, “is a kind of ritual. They mean, by spilling his blood, to do like they do when killing a goat, to exorcize some evil.”106 If the function of a scapegoat is to unify society by symbolically exorcizing violence, Vergès sought to “rupture” French society by forcing it to reintegrate Barbie.107

Vergès made deliberately ironic use of his role as defense attorney to accuse France of complicity in his clients’ crime.108 Where a conventional lawyer might have sought to deflect attention from evidence incriminating his client, Vergès offered several strained procedural arguments that served only to harp on evidence of Barbie’s genocidal crimes that French authorities had long possessed and ignored. Another stratagem involved threatening to expose what he claimed was widespread collaboration with Barbie in the upper echelons of the Resistance. By threatening to undermine the trial’s propaganda function, Vergès hoped to enhance the prospect that his technical objections to Barbie’s

104. See id. at 1364-72.
105. See id. at 1355-64.
106. Id. at 1356.
107. See id. at 1356-57.
108. See id. at 1357-59.
prosecution would get a serious hearing. Moreover, by threatening scandalous revelations, Vergès drummed up an audience for his own propaganda message equating Nazism with colonialism.

Although represented by different parties at the Barbie trial, the identity crises of Judaism and of the French left are outgrowths of a common culture of despair that paralyzes moral choice in the wake of Nazi atrocities. Feeling their way in the darkness around the abyss of moral luck implied by the Holocaust, both traditions are reduced to immobility. Unfolding with bureaucratic inevitability, the Holocaust depended upon the action and inaction of millions of ordinary people. As a consequence, postwar society is permeated by an anxiety that any of its members might have participated, collaborated, or acquiesced under similar circumstances. Believing that all creeds define themselves by their antipathies, members of postwar society eschew commitment to any cause for fear of becoming complicit in future atrocities. And so, they conclude, the only relief from this moral paralysis rests in the recollection of Nazi crimes, because they constitute the only evil one can despise without fear of becoming a Nazi oneself. This was the cultural setting of the Barbie trial, a culture devoted to the contemplation of Nazi atrocity as an obscure but sacred text, a culture distinct from and yet enabling of all the cultural identities performed by its participants.

C. Policing Religious and Sexual Identity

The legal scholar and literary historian Janet Halley has explored the complex interaction between the legal regulation of conduct and the legal regulation of identity in two widely disparate contexts: the policing of religion in Renaissance England, and the policing of sexual orientation in contemporary America. These examples primarily involve criminal law, but as various parties adapt to the terrain defined by criminal law, other "legal" arenas may be affected, including religious law, civil rights law, legislative advocacy, popular protest, individual self-presentation, and even self-perception.

In *Equivocation and the Legal Conflict Over Religious Identity in Early Modern England*, Halley examines how the strategy of equivocation developed by English Jesuits facing religious persecution reshaped the landscape of available religious identities for all concerned. All the while, both institutional parties to the dispute, the English state and the Jesuit order, insisted on the stability of religious identity. Jesuits taught that Catholics could at once hide and inwardly reaffirm their religious faith without violating Catholic ethics. Jesuit priests were instructed to exploit the ambiguities of vocabulary and syntax so that they could be tech-
nically truthful to the English courts, while still avoiding answers that would condemn them.

First, [a Jesuit] could use words having more than one common meaning—for example, declaring that a priest "lyeth not in my house," and meaning that he does not tell lies there. Second, he could give only one of several possible answers to a question—for instance, declaring that he came to a friend's house to have dinner and omitting to mention a purpose to celebrate mass as well. Third, he might exploit the ambiguities of hidden gestures, unclear pronoun reference, altered pronunciation—any addition to standard usage that would create an ambiguity.113

But the strategy of "mental reservation," of silently qualifying an answer, was the most threatening to English authorities:

For the Jesuits endorsed a form of response which gave the interpreter no indication of its possible ambiguities: a Catholic in England was allowed by this doctrine to make an audible statement that would mislead the hearer, and to add to it, silently, a modification (or mental reservation) that rendered the entire sentence true. For instance: "I did not see Father Gerard [ut tibi dicam] [i.e., in order to tell you about him]."114

As Halley notes, the strategy of mental reservation enabled Jesuits to maintain a secret but authentic Catholic identity, and it threatened the state precisely because it undermined the official policy of policing identity on the basis of religious affiliation.115 Civil order, notes Halley, was equated with transparent expression;116 accurate detection of identities was an important method of state policing.117 Catholics subverted the state by constructing private selves that could pass undetected.118 To do so, they had to reject the state’s assumption that language was transparently referential and inherently confessional. They treated language instead as "multivalent, unstable, and conventional," always in dialogue with an inner voice.119

The struggle between equivocation and referential clarity manifested itself in ordeals of civility. Thus, in the trials of Guy Fawkes and the other "Gun-powder" plotters, Attorney General Coke characterized the legal struggle as one over discourse: he accused the Catholics of subverting the language with dissimulation.120 The result was a trial over "tissues" of words,121 where Fawkes insisted on his right to control the narrative of events, and Coke conceded his reciprocal entanglement by insisting that his version of the rebellion "will appear to be fact."122

113. Id. at 34-35.
114. Id. at 35 (quoting A TREATISE OF EQUIVOCATION 48-52 (David Jardine ed., 1851)).
115. See id.
116. See id.
117. See id.
118. See id. at 36.
119. Id.
120. See id. at 39.
121. Id.
122. Id.
In another trial, Anglican Dean Morton insisted that speech was always public, governed by law, and referential, while the Jesuit Parsons argued that internal speech was legally permissible and psychologically possible. For Parsons, just as writing represents speech, speech represents inner mental propositions, and so a mental statement has the same status as a spoken one. Speech could be spoken without social intercourse and still be speech. Particularly when faced with illegitimate state authority, the speaker could retreat from society and speak only to himself. Under such a view, however, privacy is not an impregnable shell, but “a social and legal relationship between the Catholic and his inquisitor.” Thus, a priest challenged to admit that his name was Peter could answer “no” (mentally reserving the full answer that he “was not Peter who was bound to reply to this judge”), because he viewed the judge as illegitimate. Whether or not the priest is Peter, then, turns on his relationship to the legal authority with whom he speaks.

By contrast, Morton held that “personal privacy is inviolable.” Underlying the inviolate self is a “constant conscience against which [the representational accuracy] of speech and writing can be tested.” The mind cannot honestly equivocate, because it cannot honestly misrepresent. A man knows his own mind before he proceeds to speak. He does not need speech to understand his own thoughts.

Morton suggests true speech is always public and relational, governed by law and custom, and all representation is subject to state control. The state has the power to interpret the meaning of the represented thought; the listener has the power to fix the speaker’s identity. As Halley notes, this is, in effect, a battle over jurisdiction. The state allows a private self, but controls all outward manifestations of selfhood. This is how the negotiation between competing notions of selfhood and conscience gets resolved. Thus, when an Irish grand jury refused to indict a Catholic who had obviously violated Anglican rules, the jurors were charged with perjury. The jurors equivocated in defense by saying that when they took the juror’s oath, they did so with the reservation that they would not act against conscience, and further claimed that

123. See id. at 41-42.
124. See id. at 41.
125. See id. at 42.
126. See id. at 43.
127. Id. at 44 (emphasis omitted).
128. Id.
129. See id.
130. Id. at 46.
131. Id.
132. See id.
133. See id.
134. See id. at 47.
135. See id.
136. See id.
137. See id. at 47-48.
the deception was in the mind of the listener—the state. The court twisted the dialectic: since it was deceived, the speakers had lied.

The mental reservation’s genius enabled one at once to avoid the sin of dissembling by silently confessing one’s Catholicism, yet manage to dissemble by enacting the Catholic identity that one denied. Dissembling came to constitute the very Catholic identity it disguised because it traduced the Anglican effort to obliterate Catholicism. The result was Catholic religious identity reconstructed in Protestant terms, as a private and internal matter. Yet the Jesuits would not go so far as to encourage or excuse participation in Anglican ritual, which they regarded as apostasy. In this way they collaborated with their Anglican opponents in polarizing the field of religious identity.

Halley resists a deconstructionist treatment of this struggle as a clash between a repressive essentialism and the free play of textuality. Such a glib reading leaves out the key element—a negotiation and reciprocity between the two sides over the common problem posed by the “church papists,” who publicly partook in Anglican worship while silently considering themselves Catholics and performing Catholic services at home. Their actions were neither subversive nor civilly disobedient. They attended Anglican church not out of begrudging compliance with the penal law, but because they honestly valued that church attendance. In doing so, church papists subverted both the Jesuit insistence on the formal manifestations that identified a Catholic and the Anglican insistence on a strict Anglican communion. In this way the church papists resisted the efforts of both Catholics and Anglicans to define the constitutive elements of religious identity, and they rejected the Manichaean dilemma imposed upon them by both sides. In their struggle to capture and identify this elusive group of church papists, Anglicans and Jesuits shared a common insistence upon orthodoxy, even as they continuously revised the constituents of orthodoxy in response to one another’s stratagems.

Much of Halley’s other legal scholarship explores the similar fluidity of sexual orthodoxy and heresy in contemporary society. Her work on sexual orientation demonstrates how the regulation of sexual conduct and of sexual identity conditions, without completely determining, the identities that people develop; and how the strategic choices actors make reshape the law’s categories and aims. According to Halley:

debates about sexual orientation require all the players to participate in the construction of their own sexual orientation identities, and to make themselves

138. See id. at 48.
139. See id. at 48-49.
140. See id. at 51.
141. See id. at 45.
142. See id. at 36.
143. Id. at 38.
144. See id. at 49-50
145. See id. at 50.
146. See id.
147. See id.
148. See id. at 51.
available for interpretation along this register by others. In debating about sexual orientation, we do not just reflect or deliberate upon it and how it shall be used to effect redistribution of social goods: we also constitute it and enroll ourselves in it. . . . The role of law in constituting persons by providing a forum for their conflicts over who they shall be understood to be is deeply material, even though it involves not physical force but the more subtle dynamics of representation.\textsuperscript{149}

In \textit{The Politics of the Closet: Towards Equal Protection for Gay, Lesbian and Bisexual Identity},\textsuperscript{150} Halley provides a complex taxonomy of sexual identity in which persecution, secrecy, and publicity once again shape identity. The point of the piece is that homophobia discourages public advocacy of the interests of homosexuals.\textsuperscript{151} Halley urges heightened equal protection scrutiny of antihomosexual discrimination in the interest of correcting the political underrepresentation of homosexuals.\textsuperscript{152} In the course of developing her argument, Halley criticizes the view that sexual preference is immutable and the theory that suspect classification analysis must be contingent on the immutability of one’s membership in a class.\textsuperscript{153}

Rather, Halley emphasizes the coercive influence on the formation of identity resulting from legal sanctions against homosexuality and legally backed social sanctions such as employment discrimination on the basis of sexual orientation.\textsuperscript{154} According to Halley, these sanctions have three significant effects. First, they reduce the number of people who identify as homosexual, by pressuring people not to manifest homoerotic feelings and by discouraging those who might otherwise choose to live as gay or lesbian for political or affectional reasons.\textsuperscript{155} Second, they reduce the number of people who publicly support or ally with the political interests of gays and lesbians, by threatening these potential supporters with the burdens suffered by those to whom homosexuality is publicly ascribed, whether or not such people consider themselves homosexual.\textsuperscript{156} Third, by intimidating most people into acquiescing in the default ascription of heterosexual identity, discriminatory sanctions turn the vast and potentially fluid margin between gay and straight into a vacant free fire-zone, a proverbial no-man’s land.\textsuperscript{157} Together, these three effects diminish the number of self-identifying homosexuals, and make them more politically insular and discretely differentiated from the rest of the population than they need be. Hence, self-identifying homosexuals are inadequately represented by ordinary interest group politics and need the legal protection suspect classification status confers.

\textsuperscript{149} Halley, \textit{supra} note 110, at 1729.
\textsuperscript{151} See id. at 970-73.
\textsuperscript{152} See id.
\textsuperscript{153} See id. at 923-63.
\textsuperscript{154} See id. at 947-56.
\textsuperscript{155} See id. at 956-58.
\textsuperscript{156} See id. at 970-71.
\textsuperscript{157} See id. at 958-59.
Halley acknowledges, but does not fully confront, one major difficulty. Given the inevitable shaping effect of law on social identity that Halley so well demonstrates, how can law’s equally inevitable influence on political discourse be critiqued as undesirably coercive? Halley’s social constructivist conception of identity seems to dictate that any argument for protecting the range of politico-sexual identities that antisodomy laws help suppress requires a substantive defense of the value of those identities.

Halley’s *Reasoning About Sodomy* offers a close reading of the *Bowers v. Hardwick* opinions in light of the earlier development of the litigation. Halley highlights the struggle of the litigants and judges over the relationship between homosexual identity and the crime of “sodomy,” generally defined in sexual-orientation-neutral terms. The Supreme Court’s narrowing of the issue to the constitutionality, under the due process clause, of punishing “homosexual sodomy” has been one of the most criticized aspects of the case. Halley argues that the imperfect fit between the conduct proscribed by antisodomy statutes and homosexual identity paradoxically magnifies the effectiveness of antisodomy statutes in superordinating heterosexual identity. By threatening everyone with prosecution, regardless of his or her sexual orientation, antisodomy laws position heterosexual identity as a valuable but conditional privilege to avoid prosecution for technically criminal behavior. The conjunction of overbroad legal proscriptions and the contingency of enforcement on cultural identity creates a powerful symbiotic tension. The potential vulnerability of heterosexuals to prosecution enhances the cultural authority of heterosexuality even as it disempowers all those individuals who must vie for uncertain protection of heterosexual status. Halley makes the even more surprising claim that the ambiguity of antisodomy prohibitions between the regulation of conduct and the regulation of identity enhances the cultural authority and stability of these prohibitions. She identifies and resists the temptation to make the “naive deconstructive claim” that the “figural” instability of the *Hardwick* decision, or the more generally prevalent rhetoric on which it relies, “undermines . . . its claims to authority.” The indeterminate object of sexual regulation paradoxically legitimates it and magnifies its effect.

159. 478 U.S. 186 (1986).
163. Id. at 1747-48.
D. Litigating Tribal Identity

In The Predicament of Culture, the intellectual historian James Clifford offers a "literary" rendering of a civil property trial over lands once owned by the Mashpee Indian tribe. In Clifford's analysis, the forms of legal procedure and the categories of legal entitlements can be read as an exercise in identifying how legal doctrine, ritual, strategic choice, and imagination interact to create group identity, tradition, and history. In an appreciative essay, Gerald Torres and Kathryn Milun develop Clifford's analysis into a normative argument for institutionalizing cultural diversity as a means of enriching what we might call the media of self-expression.

In this case, tribal affiliation is the identity in controversy. The difficulty in defining the characteristics of a tribe in Indian law implicates the wider problem of group identity—the relationship between tribe, nation, ethnic group, and culture. As the Indian witnesses in the Mashpee trial are questioned about their identification with the purported tribal group, we see how their effort to identify themselves requires them to negotiate a topography of identity not entirely within their control. At the same time, the effort to claim and conserve what the larger society will respect as "tradition" requires its invention and adaptation. The tribe's interests do not derive so much from tradition but from a shared project of constructing what society will recognize as a tradition.

The ultimate issue in Mashpee Tribe v. New Seabury Corp. was whether land had been unlawfully conveyed from the Mashpee Tribe to non-Indians in the nineteenth century. Specifically, the alienation of land had not taken place by treaty, which is the sole means permitted by the Indian Non-Intercourse Act of 1790. The decisive question, however, was the preliminary one of legal standing: whether an entity existed called the Mashpee Tribe that could be a party to a lawsuit. Of course, to own land or enjoy rights to land, one must be a person, natural or legal. The Mashpee trial raised the historically embedded question of how a group whose members' economic, religious, and political lives partially overlap can identify a common denominator that is sufficiently coherent and compelling to win recognition as a legal person. For the Indians and for their expert witnesses in anthropology, the overlap is best captured as a shifting coalition of relations, changing over time, and varying in

166. See Clifford, supra note 164, at 277, 288-99.
167. See, e.g., id. at 281, 286-86, 291-93, 310-12 (giving testimonies of various witnesses).
169. See id. at 277.
170. See Torres & Milun, supra note 165, at 663 n.25 (citing relevant provision of the Non-Intercourse Act).
171. See Clifford, supra note 164, at 278 (as opposed to, e.g., the Passamaquoddy and Penobsaot tribes).
emphasis. The law, however, imposes criteria of continuity and coherence that seem Procrustean in the face of anthropology and history.172

The disjunction between legal identity and ethnographic identity provoked this exasperated plaint from the trial judge:

I am seriously considering striking all of the definitions given by all of the experts of a Tribe and all of their opinions as to whether or not the inhabitants of Mashpee at any time could constitute a Tribe. I let it all in on the theory that there was a professionally accepted definition of Tribe within these various disciplines.

It is becoming more and more apparent that each definition is highly subjective and idiosyncratic and generated for a particular purpose not necessarily having anything to do with the Non-Intercourse Act of 1790.173

The judge ultimately instructed the jury to determine whether the Mashpee were a tribe by the legal criteria enunciated by the Supreme Court in a 1901 case also having nothing to do with the Non-Intercourse Act: "By a ‘tribe’ we understand a body of Indians of the same or a similar race, united in a community under one leadership or government, and inhabiting a particular though sometimes ill-defined territory."174 Thus, as Torres and Milun note, the judge assimilated indigenous peoples into a sort of late Victorian model of the sovereign nation-state which requires racial purity, political hierarchy, and (relative) territorial stability.175 Crucially, the judge also instructed the jury that if, at any point in the last two centuries, the Mashpee did not meet these criteria, they could never subsequently recover tribal status.176

The trial was essentially a conflict between two narratives of Indian history.177 The opposing sides held different images of tribal status, or, more generally, disparate notions of culture and social identity. The jury did not have the option of devising an equitable compromise between these visions but could only endorse one or the other. In this sense, the law follows the logic of literacy, of the historical archive, rather than the logic of changing collective memory; the shifting oral history of Mashpee had to be set in documentary stone.

The plaintiffs' experts were anthropologists relying on field work to define the concept of “tribe,” while the defendants relied more on the historians’ tool of written documentation.178 One anthropologist witness proffered five criteria for the definition of a tribe: a group of Indians, members by birth or ascription, 'a kinship network,' a clear consciousness of kind—'we' versus 'they,' a territory or homeland, and political leadership."179 He described how powwows,
although sometimes catering to outsiders and tourists, also serve social, spiritual, and educational functions which are sacred and private. Another witness rejected any such sharp doctrinal definition of tribe, portraying instead a field of family resemblances and local histories as reference points.\textsuperscript{180} When the flexibility of this witness's definition was denounced for its vagueness, the witness responded that the more formalistic definitions presume distinctions among categories—religious, political, etc.—which are antipathetic to Indian thinking.\textsuperscript{181} Thus, the "Indian" definition of a tribe is a perfect example of Greenblattian negotiation. As the witness put it: "What you are talking about is a group of people who know where they are. They may have to respond to outside pressures and adopt political structures, religious structures, or economic structures to deal with outside society."\textsuperscript{182}

Conversely, the defendants relied on written history to develop categorical definitions of what constituted a tribe. The defense purported to show that the so-called Mashpee "tribe" was not a distinct tribe at all, but in fact a loose composite of refugees from several other tribes and ethnic groups.\textsuperscript{183} Indeed, it was noted, English pilgrims had helped create the artificial society called Mashpee out of charity, establishing a "South Sea Indian Plantation" as a refuge for Indians from a variety of tribes who had converted to Christianity.\textsuperscript{184} The Christian conversion itself, of course, undercut any claim of cultural continuity for the tribe, as Christian ritual replaced traditional powwows and other "pagan" rites.\textsuperscript{185} In the defendants' view, then, any Mashpee claim to land had to rest on a "written deed and on English law rather than on any aboriginal sovereignty."\textsuperscript{186}

The defense supported their claim that the Mashpee had moved from sovereignty to legal and cultural assimilation by referencing several historical events. First, after an appeal to King George III and a series of legislative acts, the Mashpee won the right to become an incorporated town in 1870.\textsuperscript{187} As the area became commercial between 1870 and 1920, tribal governance almost completely disappeared, because Indians were too busy becoming "individual citizen-farmers, workers, and businessmen."\textsuperscript{188} Moreover, the Indian inhabitants of Mashpee not only fought with the colonists against the British in the Revolutionary War, they sided with whites in wars against other Indians.\textsuperscript{189} Furthermore, the defendants argued, the Mashpee Indians intermarried widely with other Indians and with blacks, and thus sacrificed cultural integrity in the name of expansion or assimilation.\textsuperscript{190} Finally, in the defendants' view, few

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180. See id. at 322-23.
181. See id. at 324.
182. Id. at 323.
183. See id. at 294.
184. Id. at 294-95.
185. See id. at 295.
186. Id. at 295-96.
187. See id. at 296.
188. Id. at 300.
189. See id. at 296-97.
190. See id.
current residents who claimed Indian heritage knew much about Indian ritual and tradition, and, to learn about them, those few actually had to travel to Western reservations or to take Native American Studies classes in college.\textsuperscript{191}

The plaintiffs told a very different story: acknowledging that many of the members of the putative Mashpee tribe were refugees from other groups, they argued that what had created refugee status was "precisely" the devastation wrought on tribal integrity by contact with whites.\textsuperscript{192} But rather than merely insisting that the Mashpees constituted a tribe according to conventional notions, the plaintiffs argued even more forcefully that the conception of a tribe as a stable sovereign nation is a Western concept required by the rigid categories of Western lawmaking.\textsuperscript{193} The Mashpee Indians could be viewed as sharing a coherent culture so long as the criteria of coherence could remain fluid.

On the religion issue, the plaintiffs insisted that although many Indians had become Baptists, their conversion was consistent with the general pattern of fluid identity, and specifically incorporated Indian traditions and beliefs.\textsuperscript{194} In addition, Indian preachers retained a powerful role within the Indian Christian church, often conducting bilingual services, and turning their churches into an arm of Indian culture that resisted outside influence.\textsuperscript{195} The plaintiffs argued that the Mashpee decision to fight with the colonists against other Indians was partly a matter of sheer survival and partly the perfectly conventional act of one tribe fighting another.\textsuperscript{196} The plaintiffs also argued that intermarriage in no way defeats tribal identity so long as the shifting nature of group identity is recognized.\textsuperscript{197} As Clifford notes:

Mashpee was a refuge for misfits, refugees, and marginal groups. At certain times a natural alliance against dominant white society formed between the town's Indian "survivors" and newly freed blacks. The crucial issue is whether the core Indian community absorbed the outsiders or were themselves absorbed in the Indian melting pot.\textsuperscript{198}

The plaintiffs argued that they resisted Western schemes of land tenure and town governance for as long as they could.\textsuperscript{199} The South Sea Indian leaders recognized that some formal structure for land titles such as town status was necessary to save their lands from white aggression.\textsuperscript{200} In 1834, they adopted "modified plantation status," roughly akin to reservation status, as a way of keeping collective control over land and immigration while maintaining contact with white society.\textsuperscript{201} Moreover, "[c]ontinuing entailments on land sales..."
outside the community guaranteed a flexible nineteenth-century tribalism.”

In addition, land allotments accorded with traditional Indian patterns of land use. What to the white man may have been indicia of political immaturity may have been to the Mashpee a rejection of formal township status in the name of Indian citizenship; it may have been prudent, however, to explain their position to the Massachusetts legislature in terms of progress toward conventional citizenship and proprietorship. The Mashpee claimed that only a small and unusually assimilated minority of the tribe’s members had voted for disen
tailment, and they were essentially coerced into doing so as the condition of their political enfranchisement.

Furthermore, the plaintiffs attributed the demise of tribal self-rule in the late nineteenth century to the coercive policies of the Bureau of Indian Affairs. Moreover, they questioned the assumption that tribal decisionmaking had disappeared, noting that this assumption was based on the Western custom of embodying political decisions in written records, as opposed to the Indian oral tradition. Finally, the plaintiffs noted that the Mashpee remained a powerful and coherent influence in local politics through church and town government. While many tribes sought recognition from a newly sympathetic Bureau of Indian Affairs in the 1930s, for example, the Mashpee did not have to, since an Indian majority controlled the town government.

For the plaintiffs, the Mashpee’s story was one of coercion, adaptation, and survival. For the defendants, it was a perversely congratulatory story of successful assimilation into American pluralism. In fact, the history of the Mashpee is one of stops and starts—assertions of political independence, attempts to establish tribal identity within the new structure, assimilation of other marginal groups into that structure, choices between state or federal protection and political independence, and negotiation through the maze of both coercion and enticement by white society. As Clifford puts it, “their history was a series of cultural and political transactions, not all-or-nothing conversions or resistances. Indians in Mashpee lived and acted between cultures in a series of ad hoc engagements.”

Several of the plaintiffs’ witnesses were people who moved casually, and sometimes invisibly, between Indian and non-Indian life. They might live in Mashpee and work in Boston; they might be involved in tribal affairs, but then spin off separately to administer business considered to be inconsistent

202. Id.
203. See id.
204. See id. at 298-300, 305, 307-08.
205. See id. at 309.
206. See id. at 309-10 (stating that “traditional myths and stories were told around kitchen tables”).
207. See id.
208. See id. at 300-01, 308-09.
209. Id. at 342.
210. See id. at 311 (Russell Peters’ testimony revealed that although living in Mashpee, he worked in Boston).
with Indian culture. Did that prove or disprove the coherence of the Indian identity?

Witnesses were questioned as to how often they participated in native dances or wore regalia. Teachers of Indian culture were asked why their students needed any education in being Indian if they were inherently Indian. The witnesses' and anthropologists' response, of course, was that the defendants were imposing a Procrustean notion of tribal identity. A defense witness said that though he called himself a Wampanoag Indian, he was referring to his Indian ancestry and not to any tribal affiliation. Indeed, he acknowledged, without any concession on the legal issue, that he could not define "tribe." The fetish over tribal purity was, psychologically, the problem of the Caucasian defendants. Unfortunately it became, the plaintiff's legal problem.

Clifford argues that the Mashpee have survived as a coherent people precisely because they have not conformed to white categories. Continuity is required by hybrid identity, but continuity is at war with coherence. Indeed, Clifford argues, the jury instructions, requiring that both continuity and coherence of tribal status be established as independent elements, were essentially self-contradictory. Indian politics was informal, not hierarchical; in order to file a suit in 1976, the Mashpee formed the Mashpee Wampanoag Tribal Council, Inc. to serve as the tribe’s legal arm. In effect, the tribe paid obeisance to legal form by creating a legal identity for the purpose of asserting its natural and continuous identity; it followed civil rites to assert bourgeois rights. Torres and Milun point out the paradox: "The law does not permit the Mashpee’s story to be particularized and still be legally intelligible." Yet Clifford suggests that the need to assert identity for the purpose of the lawsuit had a continuing "feedback" effect on the tribe, since it probably revived the movement for tribal independence. The lawsuit is part of the story of the tribe’s adaptation, not simply an alien imposition. Moreover, Clifford argues, in helping to shape the Mashpee’s current identity, the lawsuit altered not

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211. See id. at 293. In his testimony, John Peters was asked about the several businesses in which he had been involved. Peters “comment[ed] that the art of making money is probably inconsistent with being an Indian,” but said that all Mashpee Indians do it. See also id. at 311 (quoting the testimony of Russell Peters, who indicated that “no self-respecting tribe would become incorporated”).

212. See id. at 301.

213. See, e.g., id. at 283.

214. See id. at 313-15.

215. See id. at 317-25.

216. See id. at 330.

217. See id.

218. See id. 336-43.

219. See id. at 341-43.

220. See id.

221. See id. at 310.

222. See id. at 341-43.

223. Torres & Milun, supra note 165, at 630.

224. See CLIFFORD, supra note 164, at 341-43.

225. See id.
just the perception, but the reality of their past—a reality which is never finally settled: \[226\]

Interpreting the direction or meaning of the historical "record" always depends on present possibilities. When the future is open, so is the meaning of the past. Did Indian religion or tribal institutions disappear in the late nineteenth century? Or did they go underground? In a present context of serious revival they went underground; otherwise they disappeared. No continuous narrative or clear outcome accounts for Mashpee's deeply contested identity and direction. Nor can a single development weave together the branching paths of its past, the dead ends and hesitations that, with a newly conceived future, suddenly become prefigurations. \[227\]

At the end of the evidence, the jury deliberated on whether the proprietors of Mashpee constituted a tribe on six specific dates between 1790 and 1976. \[228\] The jury came up with an inconsistent—and therefore mildly subversive—answer which amounted to a full legal loss for the plaintiffs. Asked to apply consistent criteria of tribal existence over two centuries of intense change and disruption, the jury found that the Indians had become a tribe in the 1830s but had ceased to be one by the 1860s. \[229\]

The lesson of Mashpee may be that culture itself is a Western concept or that the Indian version of it cannot meet the test of having essential features. A "community reckoning itself among possible futures is not a finite archive." \[230\] As Clifford asks, "[W]hat if identity is conceived not as a boundary to be maintained but as a nexus of relations and transactions actively engaging a subject?" \[231\] In Clifford's estimation, tribal identity had no "sine qua non," but rather was the "contingent mix of elements" the Indians contemplated as they conceived themselves as a culture. \[232\] When a group "negotiates" its identity, it persists and patches itself together; it can lose "a central organ" and remain alive. \[233\] Language, land, blood, leadership, religion—any of these specific elements can be replaced. \[234\]

Metaphors of continuity and "survival" do not account for complex historical processes of appropriation, compromise, subversion, masking, invention, and revival. . . . The Indians at Mashpee made and remade themselves through specific alliances, negotiations, and struggles. \[235\]

Clifford depicts Mashpee culture as being created by the Indians from available cultural materials, and yet carrying on independent of their wills and haunting them with a sense of belonging, loyalty, and duty they could not al-

\[226\] See id.
\[227\] Id. at 343.
\[228\] See id. at 333.
\[229\] See id. at 333-36.
\[230\] Id. at 325.
\[231\] Id. at 344.
\[232\] Id. at 323.
\[233\] See id. at 338.
\[234\] See id.
\[235\] Id. at 338-39.
ways trace with historical or logical rigor. Their "interest" consisted of the qualities and consequences of their cultural identity, including owning the land in question, even if the purpose of ownership was to reaffirm that otherwise fragile identity. It may be that the plaintiffs, having lost control of town government, needed common land to perpetuate the viability of an Indian identity. And it may be, as Clifford suggests, that they wanted to maintain an Indian identity not so as to occupy it, but to live in the cultural space between that identity and the conventional white world. In the end, Torres and Milun endorse the plaintiffs' land claim not on the basis of its historic authenticity, but in order to preserve the diversity of identities by reference to which individuals can fashion a self.

Thus they prefer the plaintiffs' narrative of resistance and survival to the defendants' narrative of assimilation on the aesthetic ground that it enriches the expressive possibilities of culture. The difficulty that Torres and Milun duck is the same one finessed by Halley. To demand tolerance for an identity one is powerless to change is to make an appeal for compassion; but to demand the opportunity to fashion an identity one could live without is to make a more difficult and dangerous appeal for approval. Once the case for protecting minority cultures is made in aesthetic rather than mimetic terms, it must suffer the aesthetic judgment of the majority.

E. Disputing Intent and Status in a Stateless Society

In Bloodtaking and Peacemaking: Feud, Law and Society in Saga Iceland, William Miller offers an account of the linked cultural processes of law-creation and dispute resolution in Medieval Iceland. While the sources he relies on—the revenge sagas—are conventionally viewed as "literary" rather than "legal," Miller reads them as social and political documents, as keys to the code of social action. Though he conveys an infectious enthusiasm for these sources, Miller takes an approach that is frankly more archaeological than appreciative. Though he considers the authorial intentions of the anonymous scribes of the sagas, his real interest lies in the motives of the social actors depicted in the stories. Thus, Miller incorporates both the New Critical rejection of authorial subjectivity and the poststructuralist tendency to read a text largely for the traces of other texts. And here, most significantly, those other "texts" are not literary at all, but the structures of social action—the dimensions of wrong, redress, honor, and household obligation that render action meaningful. Within these traces, however, Miller reinserts agency and imaginative invention. Thus, his readings are self-consciously literary in the way we recommend: it is the aesthetic of social action he is after, the artistry of jurisgenesis by ordinary people in a stateless society where the Nietzschean obliga-

236. See id. at 336-43 (Clifford's afterthoughts about Mashpee).
237. See id.
238. See id. at 342.
239. See Torres & Milun, supra note 165, at 655-58.
tion to define and defend identity cannot be fobbed off onto the bureaucratic state.

Though Miller emphasizes the artificiality of distinguishing between law and other social norms, he demonstrates that even purely legal texts can be illuminated by a literary apprehension.241 Iceland had many remarkably detailed legal rules.242 One quoted text prescribes the proper methods for removing buried bones when a church is moved, including rules governing personnel, time of day, divisions of labor, and consecrating rituals to be performed by priests.243 From such sources, Miller infers that Icelandic law looks as if it were "abstracted from specific cases rather than deduced from disembodied principle"; that on the whole, the extent of detail suggests a highly oversanctioned society, one in which fines were assessed even for leaving portions of a meadow unmowed.244

In Miller's view, Icelandic law is of such elaborate complexity as to suggest a sheer pleasure in law's formulation for its own sake.245 Law so permeated the society that it became the subject matter for children's games,246 and funeral services included a trial to assign ghosts homes to free up space for living souls and unhaunt houses.247 The Law Rock and the Lawspeaker were central symbols of unity and continuity.248 In one sense, law suppressed violence, since there were so many legal claims that could function as channels for belligerence; aggressive counterclaiming could take the place of fighting.249 But the beginning of a lawsuit was as fraught with menace as an actual violent attack.250 Disputing was also a form of sociability in that legal actions were freely transferable and part of a legal claim included showing the ability to muster potential supporters.251 Power, legal entitlement, and reputation were exchangeable currencies.

While the sagas are works of imaginative literature, they presuppose legal norms and procedures, types of legal claims and strategies, and culturally plausible motives for invoking law and for obeying or flouting legal norms. They give us a taxonomy of legal statuses and an inventory of behaviors appropriate or inappropriate to each. While the sagas may thus serve as archaeological data, part of what they reveal about the system of disputing is its expressive possibilities—the resonances of meaning, the complexities of feeling, the sheer strategic inventiveness it enabled. To Miller it matters little whether these ex-
pressive possibilities were realized by actual disputants or merely imagined by tale-tellers—they are part of the culture to be reconstructed.

Consider Miller’s rendering of the short saga “Thorstein the Staffstruck,” set in 990 and written down around 1250.\(^{252}\) Here is the basic plot: the old man Thorarin is a poor farmer dependent on his sturdy son Thorstein. Thorstein has a fight with Thord, servant of a rich farmer Bjarni. The dispute starts out as a horse fight, but then Thord strikes Thorstein. The story is ambiguous as to whether the blow was intentional or not, and this ambiguity soon becomes critical. Thorstein retreats quietly but his father later goads him into seeking redress. He again confronts Thord, questions what his mental state with respect to the blow had been, and then strikes him dead. Bjarni is then goaded into counter-revenge by, among others, his servants, Thorhall and Thorvald. Ironically, he sends these two to attack Thorstein, who kills them, as expected. But then Bjarni’s wife prods him to seek revenge personally. Bjarni demurs at first, saying that to kill Thorstein would simply render old Thorarin dependent on him, but finally he goes off to win revenge. Bjarni and Thorstein confront each other, but then engage in a strange balletlike pretense of fighting. Each avoids killing the other, and Thorstein resolves the conflict by agreeing to become Bjarni’s servant.

The story is about honor, revenge, negotiation, and compensation. The preliminary questions are why Thord struck Thorstein and what sort of compensation must follow; in addition, Thorstein has killed three of Bjarni’s men and may have to compensate him. Hence, we enter a dizzyingly chaotic market where the currencies are honor and revenge. In a section of his essay aptly titled “The Politics of Accident,”\(^{253}\) Miller reveals that Thord’s mental state was linked to the mode of recompense.\(^{254}\) We normally think of mental state as an historical event taking place inside one person’s head, provable by inferences from behavior and words. But in the Icelandic “social market,” where the key and scarce commodity is honor, a past mental state is a function of subsequent social agreement.\(^{255}\) Thorstein must interpret the blow to determine whether there is a wrong to avenge.

Thorstein is initially willing to treat the blow as an accident. When the two servants denounce Thorstein with the offensive name Staffstruck, however, they recharacterize the blow as an insult, in effect imputing their own malice to Thord.\(^{256}\) Thord likewise resists the characterization of his actions as an accident, thereby daring the initially diffident Thorstein to press his case. Public displays of forbearance needed to be cleverly orchestrated not to seem degrading to the injured party, given the ability of the injurer and others to recharacterize claimed accidents as intentional attacks.\(^{257}\)

\(^{252}\) See id. at 52-58. The following synopsis in the text is culled from these pages.

\(^{253}\) Id.

\(^{254}\) See id. at 62.

\(^{255}\) See id. at 66. Harmful bumbling was actionable, however, if it was witnessed by five neighbors and if compensation was not paid quickly. See id. at 62. In such a case, if the bungler did not pay, he could then be punished as an outlaw. See id.

\(^{256}\) See id. at 63.

\(^{257}\) See id. at 64.
Icelandic legal culture disdained accident claims by the injured party; indeed, both sides were dishonored when a claim of accident was lodged.\textsuperscript{258} When the injured party raised the accident interpretation, it meant that he would prefer to drop the claim—a sign of weakness.\textsuperscript{259} When the wrongdoer raised accident as a defense, however, he had to offer compensation.\textsuperscript{260} To acknowledge responsibility and pay compensation implied that the injurer acted out of fear of the victim.\textsuperscript{261} Yet refusal to compensate meant that the wrong then had to be prosecuted, if at all, as intentional.\textsuperscript{262} Thus, both parties faced pressure to retroactively confer intentionality on the aggressor's acts. But the decision whether to so confer intentionality was a communal one turning on the relative popularity of the parties, their social status, and the course of their dealings with each other or with other members of the community.\textsuperscript{263}

Thus, ironically, to be the victim of accident meant dishonor as well as misfortune, but dishonor would fall on the wrongdoer as well.\textsuperscript{264} Only children, women, and the elderly had accidents.\textsuperscript{265} "Real men" struck deliberate blows.\textsuperscript{266} Consequently, so long as the burden of construction fell on the wrongdoer, the event would not be viewed as an accident at law. A master could intervene for his servant and concede that the servant's action was an accident and pay compensation, but that approach raised a whole set of questions about the social situation. In this case, no settlement was offered because Bjarni was more prestigious than Thorstein, and a breach of relations with poor, low-status people did not threaten social stability.\textsuperscript{267}

A conventional legal scholar might study this story to determine the criteria for establishing mental state and the resulting rules governing compensation. Miller, however, demonstrates that any inference of such rules depends on a construction of actors' intentions, which remain perpetually susceptible to social reinterpretation. "Accident" is not a category of human action but an interpretive stratagem; its meaning is not descriptive but performative. In reading the legal culture of Medieval Iceland to grasp the aesthetic of its legal relations, Miller's key discovery has been that the "facts" of intention and wrongdoing are a matter of creative—and coercive—interpretation that serves to confirm or alter social relations.

Bjarni's failure to seize Thorstein and put him to death brings shame on Bjarni's household.\textsuperscript{268} Bjarni's ambivalence about exercising his legal rights is a humiliating admission that he does not sufficiently value social obligation. Moreover, it is precisely his own heroic past that underscores this failure; in

\begin{flushright}
\textsuperscript{258} See id. at 66.  \\
\textsuperscript{259} See id.  \\
\textsuperscript{260} See id.  \\
\textsuperscript{261} See id. at 64-65.  \\
\textsuperscript{262} See id.  \\
\textsuperscript{263} See id. at 66-67.  \\
\textsuperscript{264} See id. at 66.  \\
\textsuperscript{265} See id. at 67.  \\
\textsuperscript{266} See id.  \\
\textsuperscript{267} See id. at 68.  \\
\textsuperscript{268} See id. at 69-70.
\end{flushright}
effect, Bjarni is a victim of his self-created social identity. Thus, when he suffers the insults of his own servants, he must have them killed to redress the insult he has brought on himself. Bjarni and Thorstein must then negotiate the demands of honor to achieve the desired settlement. They undergo a ritualized ballet of threatened physical violence and actual rhetorical finesse; their battle is a social dialogue, alternating insult and deference to establish stable reciprocal identities. This is not to say that their encounter is so ritualized as to be scripted. It is, notes Miller, a game played for keeps in which the outcome is uncertain. They have common interests but they must pick their way with utmost care to realize them. To reinvoke Bourdieu:

[A]ny really objective analysis of the exchange of gifts, words, [or] challenges ... must allow for the fact that each of these inaugural acts may misfire, and that it receives its meaning, in any case, from the response it triggers off, even if the response is a failure to reply that retrospectively removes its intended meaning.

It is not in Bjarni’s interest to take on Thorstein and his father as dependents. He has learned what a bother a servant can be, since a man of honor must defend his servants against even the consequences of their own misdeeds. But to kill Thorstein is to inherit responsibility for the elderly Thorarin, with no accrual of honor since Thorstein is the lesser man. Indeed it is somewhat demeaning for Bjarni to contend with Thorstein; yet he must do something to satisfy social demands. Nor can he accept Thorstein’s deference unless it equals or exceeds the value of the lives of the three servants he has lost.

For his part, Thorstein gains a temporary increment of honor by fighting with Bjarni but can afford neither to lose nor to win. To lose is to die, while to win is to face punishment as a murderer. The social distance between them is such that honor will never accrue to Thorstein. Thorstein’s only hope is to show enough mettle that Bjarni can afford to spare him, without so insulting Bjarni that Bjarni is obligated to kill him after all. He survives, with some measure of honor, at the price of his freedom and his father’s land. As for Thorstein’s decrepit father, Bjarni must contrive a claim against him to allow the proud old man to accede, under the appearance of duress to the settlement already achieved.

The story is fraught with Hegelian paradox: Bjarni cannot retain his honored status if he treats his retainers as worthless instruments. He must re-

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269. Bjarni’s reactions are complicated by frequent reminders of his reputation as a “kin killer,” having killed his mother’s brother. See id. at 70.
270. See id.
271. See id. at 73-74.
272. See id.
273. BOURDIEU, supra note 43, at 5.
274. See id. at 75.
275. See MILLER, supra note 240, at 75.
276. See id. at 73.
277. See id. at 72.
278. See id. at 74.
279. See id. at 75.
ciprocate their deference with at least the limited recognition that protection implies. The competition for recognition forces Bjarni and Thorstein into unwanted conflict, but it also dictates that neither can achieve his purpose by killing or even dishonoring the other. In addition to these social theoretical implications, the saga is significant as a political allegory; it renders the loss of freedom and the advent of feudalism as a tragic but inevitable bargain. A large part of Miller’s achievement lies in his demonstration that the setting for this bargain is far from a state of nature.

IV. CULTURAL READINGS OF CAPITALISM

A. Negotiating and Representing Value, Credit, and Character

Our examples of cultural criticism of law have suggested that legal disputes can be read as social texts that reflect the role of legal norms in the art of composing identities. In the remainder of this article, we consider how to read the legal forms shaping transactions in modern capitalism as essentially aesthetic instruments by which people or groups try to redeem their sense of social identity from its material origins. Our thesis is that the legal categories of modern capitalism regard economic transactions as expressions of unexaminable preferences to be regulated, balanced, constrained, negotiated with, and respected, but that an examination of the legal forms by which these preferences are recognized, and the doctrines by which they are regulated, reveals that economic actors seek to establish morally satisfying social identities as part of their career projects. Our analysis focuses on the legally recognizable forms of wealth and the legally recognizable character types of wealthholders. These two typologies blend to some extent as idealist projections of social forms and identities and can best be read as aesthetic creations designed to modify, justify, and even redeem the “purer” desire for wealth that is assumed to underlie them. We offer currency as the general metaphor for legal constructions of worth that enable individuals or groups to transcend their origins and trade away their cultural liabilities.

Capitalism is not only a system of economics and politics, it is a system of representation in which symbolic forms retain vast power over those who use or create them. Money itself becomes a cultural force, independent of the will of market actors; the aesthetics of the market thus control the actors in the market. At the same time, the ideal of an absolutely free market is itself a myth. Not only are modern markets constructed by the state definition and protection of entitlements, they depend upon the sustenance of a social and cultural order that constitutes and encumbers market actors, an order threatened by unrestricted alienability.

Thus, according to Karl Polanyi, the free market unregulated by society or government is a happy fiction.\(^280\) In the history of commerce, markets were always channeled by regulation, custom, and ceremony so as to protect culture

from degradation. Under the guild system, for example, "the relations of master, journeyman and apprentice; the terms of craft; the number of apprentices; the wages of the workers, were all regulated by the custom and rule of the guild and the town." The mercantile system simply served to make these rules uniform through England. Mercantilism insisted on commercialization as a national policy, but confined it not only within national boundaries, but within certain sectors of the economy. A prerequisite to the pursuit of this policy was the development of the merchant as a social type and social class—the carving out of a cultural space for commerce.

Polanyi describes the evolution of industrial capitalism in cultural rather than technological terms. He views capitalism as an expansion of the economic functions of the commercial sector that changed the ways in which society was articulated and represented. With the purchase of heavy equipment and the erection of factories,

Industrial production ceased to be an accessory of commerce organized by the merchant as a buying and selling proposition; it now involved long term investment with corresponding risks. Unless the continuance of production was reasonably assured such a risk was not bearable.

But the more complicated industrial production became the more numerous were the elements of industry the supply of which had to be safeguarded. Three of these, of course, were of outstanding importance: labor, land and money. In a commercial society their supply could be organized in one way only: by being made available for purchase. Hence, they would have to be organized for sale on the market—in other words, as commodities.

Before industrialization, land and labor were at least partially protected from commodification. But more significantly, they were conceived as stable components of a social order rather than economic assets. To reconceive them involved an effort of the figurative imagination because, as Polanyi puts it:

[L]abor, land and money are obviously not commodities; the postulate that anything that is bought and sold must have been produced for sale is emphatically untrue in regard to them. . . . Labor is only another name for a human activity which goes with life itself, which in its turn is not produced for sale but for entirely different reasons, nor can that activity be detached from the rest of life, be stored or mobilized; land is only another name for nature, which is not produced by man; actual money, finally, is merely a token of purchasing power which, as a rule, is not produced at all, but comes into being through the mechanism of banking or state finance. None of them is produced for sale. The commodity description of labor, land, and money is entirely fictitious.

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281. Id. at 70.
282. See id.
283. See id. at 70-71.
284. See id. at 75.
285. Id.
286. See id. at 69-70.
287. See id. at 68-71.
288. Id. at 72.
Needless to say, organizing markets in the "fictive" commodities of labor, land, and money required law to identify and define saleable interests in each. This technical work was facilitated by the cultural work of fashioning new social types. This cultural work included the creation of the banker and broker as fictive producers and the wage-worker as fictive product, and the reconstruction of the social types of gentleman and peasant so as to render them detachable from the land. Yet Polanyi argues that the representation of humanity, nature, and purchasing power as fully alienable commodities could never become a reality because of the catastrophic social consequences:

To allow the market mechanism to be the sole director of the fate of human beings and their natural environment, indeed, even of the amount and use of purchasing power, would result in the demolition of society. . . . In disposing of a man's labor power the system would, incidentally, dispose of the physical, psychological, and moral entity "man" attached to that tag. Robbed of the protective covering of cultural institutions, human beings would perish from the effects of social exposure; they would die as the victims of acute social dislocation through vice, perversion, crime, and starvation. Nature would be reduced to its elements, neighborhoods and landscapes defiled, rivers polluted, military safety jeopardized, the power to produce food and raw materials destroyed. Finally, the market administration of purchasing power would periodically liquidate business enterprise, for shortages and surfeits of money would prove as disastrous to business as floods and droughts in primitive society. . . . No society could stand the effects of such a system of crude fictions even for the shortest stretch of time unless its human and natural substance as well as its business organization was protected against the ravages of this satanic mill.

Polanyi's key thesis is that the origin of the cataclysms of this century lies in the "utopian endeavor of economic liberalism" to create the self-regulating market system he deems inimical to social existence. For Polanyi, the nineteenth century saw a virtual revolution in the history of human society—a commitment to gain as an explicit justification of everyday behavior. In this regard, Polanyi views Max Weber as the first great protestors against the effort to efface the social grounding of economic systems. For Polanyi, as for Weber, humans act to sustain their social relationships more than to safeguard their interest in material goods. Humans' greatest assets are their social claims, and material goods serve largely to secure that end.

In this sense, the processes of production and distribution are linked to social interests rather than economic interests. For Polanyi, as for Foucault, the real engine of the Industrial Revolution was behavioral psychology, not mechanical engineering. Factory legislation and social laws were required to protect industrial man from the implications of the commodity fiction; land

289. See id. at 73.
290. Id.
291. Id. at 29.
292. See id. at 30.
293. See id. at 45-46.
294. See id. at 46.
295. See id. at 40-42.
laws and agrarian tariffs to protect natural resources; and central banking and monetary regulations to prevent capitalism from killing itself through the congenital disease of overproduction. The disembedding of production from the traditional social order undermined a host of cultural identities but it did not free the economy from the demands of culture. The "demolition" of traditional society provoked the organization of new identities, especially the nationalisms that mobilized support for social welfare policies, protectionism, and public works. It also loosed the genies of fascism and militarization.

Thus, a key task of law and literature scholarship might be to read economic transactions and legal forms for the tropes and fictions which enable the formation and perpetuation of a commercial society and culture. We begin with two "ethnographic" examples. The first, Miller's rendition of exchange in medieval Iceland, provides a picture of the culturally embedded economy of a precommercial society. The second, Michael Taussig's *The Devil and Commodity Fetishism in South America*, depicts a peasant culture's representation of the commodification process as a self-alienating transaction with the devil.

**B. The Aesthetics of Exchange in Medieval Iceland**

When property gets conveyed in the medieval Icelandic sagas, the legal characterization of a transfer varies between dispute and voluntary exchange, depending on the status and identity "constructions" of the parties. This was a world where exchanges were at once ceremonial and strategic, designed to alter or confirm a social relation rather than serve any strictly economic purpose. Each mode of exchange had its own rules and vocabulary. The buy-sell relationship was viewed as a one-shot exchange with strangers or foreigners with whom one expected no continuing relation. To offer or request such a transaction was to declare one's indifference to, or possibly one's social distance in rank from, the other. A gift was different, because it gave the recipient time and room to characterize the transfer. It demanded some reciprocation in deference to the giver, but the response was left to the recipient's discretion. Indeed, narrative suspense was a constitutive feature of gift-exchange.

Gifts had to be repaid, but such repayments were fraught with difficulties. If one repaid too quickly or precisely, or in the impersonal currency of money, one transformed the gift into a sale or, worse, spurned it altogether. Thus, gift recipients were burdened by an obligation they could not discharge immediately or without risk. In a sense, the obligation could never be fully dis-

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296. See id. at 202-04.
297. See id. at 29-30.
298. See Miller, supra note 240, at 77-109.
300. See Miller, supra note 240, at 82.
301. See id. at 81-83.
302. See id. at 82.
303. See id.
304. See id. at 80-84.
305. See id. at 82.
charged, for the only equivalent response to a gift is another gift. Paradoxically, the response had to be imprecise, incommensurable, excessive, somehow unequal to count as a gift. The very discharge of the obligation conserved the imbalance, the indebtedness, and the tense ordeal of sociability initiated by the first gift.306

Some of Miller’s most interesting stories involve extra-market transfers which remained open for social interpretation even after the transfer. In an exemplary vignette, one Ospak raids the house of farmer Alf and then says of the goods: “They were not given, they were not paid to me, nor were they sold either.”307 To say they were not paid is to say that they did not represent compensation for some past grievance. But neither were they stolen, in Icelandic legal terms, since the taking was overt.308 Rather, this taking was what the Icelandics called a ran or raid—a “open, hostile taking.”309 A ran put a severe strain on the scheme of social definitions—it resembled a gift in that it admitted reciprocity, but it was the prior possessor who had to make the response and it was the raider who won the prestige.310 In such a market of symbols, the corrective justice of the blood feud becomes hard to distinguish from the allocative efficiency of commercial exchange. Most crucially, in a market where honor was the critical commodity, the social definition of the mode of transfer was more controversial than the price.311

The types of transaction in medieval Iceland included “gift-exchange, compensation awards, raids,” and “transfers in consideration of marriage.”312 These categories proved crucial tools of social interpretation because the Icelanders lacked regular commercial markets; thus, all exchanges were ad hoc and were continually subjected to flexible interpretation.313 If food was consumed at the possessor’s farm or if the visitor openly removed the host’s horse or cloak after sharing a meal, the transfer was deemed a gift.314 On the other hand, if the visitor took away unused food or provisions, or took swords or horses without having shared a meal, the parties then had to negotiate a definition of the transaction—it could have been a gift, a purchase, a raid, or a payment for a wrong.315 Moreover, retroactive definitions of the transaction could change over time.316 Thus, in one story, one Eldgrim approached one Thorleik and asked to buy some studhorses.317 Thorleik said that the horses were not for

306. See id. at 82-83.
307. Id. at 77.
308. See id at 77-78.
309. Id. at 77.
310. See id. at 83.
311. See id. at 77-81. Interestingly, dealings in land were more complex, because the impossibility of equivalent reciprocation for the conveyance of land threatened the receiving party with long-term subordination to the giver. Prospective recipients therefore often tried to shift the classification of a land-gift to a sale or expropriation category so that they could avoid dependence. See id. at 107-08.
312. Id. at 78.
313. See id. at 77-84.
314. See id. at 80-81.
315. See id. at 81.
316. See id.
317. See id. at 101.
sale, and Eldgrim treated this refusal as an arrogant act that virtually invited him to perform a ran. Once the ran was threatened, however, Thorleik agreed to negotiate the terms of combat; once Eldgrim’s “offer” was recon-structed as a threat, the parties could proceed on the basis of mutual hostility.

In another story, one Gunnar runs short of food and offers to buy hay from one Otkel. Otkel refuses to sell or to give. Gunnar chooses not to perform a ran and instead proposes to buy a slave. Later, Gunnar’s wife orders the slave to steal food from Otkel. Gunnar discovers the theft and offers to compen-sate Otkel. Otkel refuses any settlement and summons Gunnar’s wife for the theft and Gunnar for illicit use of the property. Otkel is abandoned by supporters at court; Gunnar is granted self-judgment and absolves himself of liability. The price on Otkel’s refusal is not the issue. Rather, the motivation is social—the parties fence between hostility and civility, and among idioms of gift, sale, and raid.

Otkel’s “refusal to sell or give” became for Gunnar “a challenge to take forcefully.” There was no such thing as a choice of atomized isolation. Once Gunnar initiated, Otkel had to choose a response. He did not want a sale, but knew that any refusal to sell could lead to a raid; at the same time, Otkel did not want to make a gift because it made him dependent on Gunnar’s later defi-nition. On the other hand, Otkel might have refused to sell precisely because he interpreted Gunnar’s offer as an obnoxious threat of raid, or perhaps as an implicit claim of a difference in their social status. Equals did not engage in buy-sell relations, and Otkel might have wanted to claim equality. Gunnar’s wife’s theft was like a ran because it was public; she thereby put the onus of defining the relationship back on Otkel. Gunnar offered to resolve this issue by adjudication through witnesses, but Otkel was afraid his prestige was too weak to survive such adjudication. Gunnar then offered Otkel the chance to determine the proper compensation; being at Gunnar’s behest, however, this suggestion was actually an insult to Otkel. Thus, a party’s resistance to sale exposed him to the danger of subjecting his selfhood to the market forces of prestige-currency and social interpretation.

C. Soul-Selling and Commodification in Colombia

In The Devil and Commodity Fetishism in South America, Michael Taussig draws on the Marxian notion of commodity fetishism, Polanyi’s concept of fictive commodities, and Weber’s classic study of religion and capitalism to

318. See id. at 102.
319. See id. at 101-04.
320. See id. at 84-93.
321. See id. at 84-88.
322. Id. at 88.
323. See id.
324. See id. at 91.
325. See id. at 89.
326. See id. at 90.
327. See id. at 90-91.
328. See id. at 84-88.
read the industrialization of peasant societies less as a process of disenchantment than as a totemic struggle of competing spirit worlds. For Taussig, the cultural problem confronting agricultural entrepreneurs in developing societies is aptly stated by Marshall Sahlins:

Induced to raise a cash crop, [peasants] would not react “appropriately” to market changes: as they were interested mainly in acquiring specific items of consumption, they produced that much less when crop prices rose, and that much more when prices fell off. And the introduction of new tools or plants that increased the productivity of indigenous labor might only then shorten the period of necessary work, the gains absorbed rather by an expansion of rest than of output . . . . [T]raditional domestic production . . . is production of use values, definite in its aim, so discontinuous in its activity.

As Weber argued, this eminently commonsensical attitude can only be overcome by a “long and arduous process of education,” culminating in the acceptance of accumulation as a “calling.” The aim of this process is the inculcation of a new perception of time as continuous, measurable, fungible, cumulable, and exchangeable. Measured in time, labor becomes intelligible as a fungible fictive commodity, analogous in form and function to money. The inculcation of such a new metaphysics may require or engender a new religious experience or a repopulation of the spirit world. Once peasant laborers come to experience work as time, they can make themselves reliably available to employers. By the magic of the contract, the narrative suspense surrounding gift exchange is eliminated and it becomes possible to secure the future availability of the factors of production.

In one of the milieus Taussig studies, the sugar plantations of the Cauca Valley in Colombia, the alien legal forms of currency and the wage contract were appropriated by the peasantry as metaphors. These forms represented the spiritual dialectic of disenchantment and re-enchantment, dispossession and possession that attends the coming of capitalism.

The residents of the Cauca Valley were the descendants of emancipated slaves and the inheritors of a syncretistic religious tradition, which integrated African animist elements into a Catholicism that had traditionally vilified such animism as devil worship. Taking advantage of political instability, many former slaves were able to establish themselves in the nineteenth century as allodial or collective farmers by squatting on land, driving out masters, or farming and gathering on undeveloped land. A lengthy struggle ensued to force these ex-slaves and their descendants into wage labor on plantations, by rounding them up, driving them off the land and fencing it, charging them rent in

329. See Taussig, supra note 299, at 3-38.
330. Id. at 20-21 (quoting Marshall Sahlins, Stone Age Economics 86 (1972)).
332. See id. at 48-50 (referencing Benjamin Franklin).
333. See id. at 155-83.
334. See Taussig, supra note 299, at 41-139.
335. See id. at 65.
336. See id. at 46-51.
cash or labor, or destroying their crops.\textsuperscript{337} For a century after abolition, the peasant farmers of the Cauca Valley continued to see these stratagems as attempts to restore slavery.\textsuperscript{338}

In the twentieth century, peasant farming came under new pressures.\textsuperscript{339} Population increases resulted in the subdivision of plots.\textsuperscript{340} Development loans enabled the large haciendas to purchase peasant lands and encouraged the remaining peasant farmers to shift from subsistence farming and gathering to cash crop monoculture.\textsuperscript{341} The resulting indebtedness and dependence on fluctuating prices drove many more peasants into wage labor.\textsuperscript{342} The decline of subsistence farming also eroded communal patterns of work and consumption. By the time of Taussig’s research in the 1970s, few peasants were able to support themselves on their own land.\textsuperscript{343} Most families combined peasant farming with wage labor on the plantations.\textsuperscript{344} They described wage labor as more lucrative, but intensive, to the point of destroying their health.\textsuperscript{345} Wage labor also subjected them to a level of supervision that remained identified with slavery.\textsuperscript{346}

Taussig invokes this context of social and economic change in explaining two dangerous occult rituals said to prevail within the community. The first was a rite of self-commodification leading to diabolical possession:

According to a belief that is widespread among the peasants of this region, male plantation workers sometimes make secret contracts with the devil in order to increase productivity, and hence their wage. Furthermore, it is believed that the individual who makes the contract is likely to die prematurely and in great pain. While alive, he is but a puppet in the hands of the devil, and the money obtained from such a contract is barren. It cannot serve as productive capital but has to be spent immediately on what are considered to be luxury consumer items, such as fine clothes, liquor, butter, and so on. To invest this money to produce more money—that is, to use it as capital—is to invite ruin. If one buys or rents some land, the land will not produce. If one buys a piglet to fatten for market, the animal will sicken and die. In addition, it is said that the sugarcane thus cut will not regrow. The root will die and the plantation land will not produce until exorcized, plowed over, and replanted.\textsuperscript{347}

Even though the ritual was ascribed only to the most productive and best remunerated wage workers, reports of the ritual gave voice to a critique of the entire system of wage work as demeaning, self-alienating, unhealthful, and encouraging of selfishness.\textsuperscript{348} Beyond that, the notion that the devil’s seed is

\begin{itemize}
\item \textsuperscript{337} See id. at 49-50, 55-56.
\item \textsuperscript{338} See id. at 56.
\item \textsuperscript{339} See id. at 70.
\item \textsuperscript{340} See id.
\item \textsuperscript{341} See id.
\item \textsuperscript{342} See id.
\item \textsuperscript{343} See id. at 83.
\item \textsuperscript{344} See id. at 85.
\item \textsuperscript{345} See id. at 84-85 (ditch digger relating his personal experience).
\item \textsuperscript{346} See id.
\item \textsuperscript{347} Id. at 94.
\item \textsuperscript{348} See id. at 96, 98, 101, 103.
\end{itemize}
barren expressed a perception that cash crop monoculture, both on and off the plantations, undermined the economic viability of peasant farming and the social ties it sustained. This critique was also expressed in anthropomorphic representations of both sugarcane and money as diabolical forces. Taussig evokes a long tradition in the Cauca Valley of political broadsides against the plantation owners portraying sugarcane as an evil spirit bent on enslavement. But he also reports widespread belief in, and anxiety about, the ritual of baptizing money, according to which:

[T]he godparent-to-be conceals a peso note in his or her hand during the baptism of [a] child by the Catholic priest. The peso bill is thus believed to be baptized instead of the child. When this now baptized bill enters into general monetary circulation, it is believed that the bill will continually return to its owner, with interest, enriching the owner and impoverishing the other parties to the deals transacted by the owner of the bill. The owner is now the godparent of the peso bill. The child remains unbaptized, which if known to the parents or anybody else would be a cause of great concern since the child’s soul is denied supernatural legitimacy. This practice is heavily penalized by the church and the government.

The baptized bill would receive the name of the child, and its godparent could summon the bill by name. Taussig repeats accounts of baptized bills making off with contents of cash registers and reports that payment with such a bill was a criminal offense. Anxiety about the dangers of baptized bills reflected fears of capital investment and commercial exchange as con games, enriching capitalists at others’ expense. The surreptitious appropriation of the baby’s soul and name indicates that the perceived threat of capital was not solely economic; it also critiques economic investment as the perversion of a natural principle of growth symbolized by the child and realized in peasant agriculture.

Taussig resists a reading of these rituals as quaint and prerational superstitions. For one thing, he argues, they pithily express real dynamics of impoverishment, dislocation, and dehumanization which accompany economic modernization. By contrast, he argues, these losses are unremarked and unaccounted for in the discourse of an established market society. To the peasants of the Cauca Valley, the notion that the accumulation and investment of capital enhances social welfare was a myth belied by their own experience. Instead, it reflected a perverse fetishism of commodities and currency. At the moment of economic modernization, we find not rationality triumphing over superstition, but contending mythologies reading one another.

349. See id. at 93-94.
350. See id.
351. Id. at 126.
352. See id. at 126-27.
353. See id. at 127.
354. See id. at 128-29.
355. See id. at 134-35.
356. See id.
357. See id. at 135.
358. See id. at 138-39.
D. Interest, Credit, and Character in Renaissance England

The early Renaissance development of the legal regulation of economics has been characterized as the triumph of rational market economics over the forces of feudal superstition and narrow-mindedness.\(^\text{359}\) A society that, as we shall see, viewed land as the only moral form of wealth, that denounced creditors as sinful usurers, borrowers as desperate failures, and the international trade and money market as a conspiracy of illusionists, came to view trade, abstract money, and pump-priming credit as the true sources of prosperity. This historical reading is supported by two closely related areas of legal regulation: usury law and bankruptcy law. This economic and legal transformation, however, required a huge expenditure of moral and aesthetic capital. Traces of this expenditure are discernible in the evolution of the new cultural forms of merchant vocation, moneylending at interest, currency, and credit. What follows is a "literary" reading of this transitional era in English commercial law. This reading treats technical legal developments as entwined with the creation of a type of social character who can be viewed not just as an economic stereotype but as a dramaturgic model capturing the moral norms and tensions of a society that needed a new concept of the self to accompany an emerging capitalist system.

In the early Renaissance, when England still theoretically forbade all profits on loans, court and church law distinguished *interesse* from *usura*.\(^\text{360}\) *Interesse* represented the damages a creditor could obtain for the harm caused by the debtor's failure to repay—sometimes even damages representing the loss of investment opportunity.\(^\text{361}\) By contrast, *usura* represented any pre-arranged profit or any pre-arranged liquidated damages.\(^\text{362}\) Perhaps the key to usury was that the lender had no right to arrange profit on the loan if he in no way arranged to share the risk of the debtor's activities; otherwise, he was gratuitously profiting from the debtor's labors, the supposed true source of the debtor's anticipated profits. Thus, medieval theology assumed—in a way ironically consistent with Marxism—that the legitimate source of profit was human labor, not the mere use of money.

The histories of usury detail countless legal maneuvers and restructuring devices by which lenders evaded the usury laws—most often by reconceiving the loan as a rental or mortgage on land or an annuity.\(^\text{363}\) But as late as Shakespeare's time the courts and Church were still insisting, at least in their explicit generalizations, that pre-arranged profit on loans was always illegal, regardless

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359. See, e.g., Polanyi, supra note 280, at 70 (describing the transformation from feudalism to mercantilism during the sixteenth century).
361. Id.
362. Id. at 1099.
of whether or not the lending was "biting"—i.e., cruel and exploitative to the
debtor.364

By the 1550s, however, two distinct positions had emerged in Continental
teology and law and had begun to affect England. First was an objectivist
position—holding illegal and immoral any lending with a guaranteed return
more than the value of the loan. Second was a subjectivist position—holding
that there was no reliable external measure of the morality of a loan.365

By the beginning of the seventeenth century, these parallel developments in
theology and market economics had produced in England a conflict between
two distinct conceptions of interest and usury. Whereas traditional court and
canon law defined certain loans at interest as per se usurious, the new, more
Protestant approach declined to presume usurious intent, at least for loans up to
a certain statutory rate of interest.366

In the legislative battles that led to the usury laws of 1571 and 1624, these
two views were contested and negotiated.367 Legal change was slow and err-
atic, but the law of usurious lending eventually came to reflect a compromise
between these two competing perspectives. These legal developments were ac-
accompanied by the emergence of new social imagery appropriate to the new
character type of the legitimate money merchant. This was a figure who was
morally selective in his lending, following natural equity as well as contractual
law. He never took interest from paupers, or profited more from the loan than
the borrower did. Moreover, he deliberately made some gratuitous loans to
poor debtors (whom he often forgave) and respected the statutory rate of maxi-
mum interest, and he always consulted the public good.368

Lawrence Stone offers an interesting view of the social character of the
lending class in the late Elizabethan era.369 This class, or group lies at the
transition between merchants and bureaucratic officeholders, on the one hand,
and landed gentry on the other.370 As progressively more wealth flowed into
the merchant class at the turn of the seventeenth century, the merchants and
artisans tried to absorb and sustain aristocratic values.371 For example, mem-
bers of the merchant class frequently tried to convert their money into land, not
just for security but also for status: living off rents was dignified, while living
off earned professional income was not.372

As a result of this transformation in character, the best deterrents to viola-
tion of commercial laws were the notions of honor, generosity, and temperance

364. Joyce Oldham Appleby, Economic Thought and Ideology in Seventeenth Century
365. See Benjamin Nelson, The Idea of Usury: From Tribal Brotherhood to Universal
366. See Kindleberger, supra note 363, at 41.
367. Id.; Thomas Wilson, A Discourse Upon Usury 155-69 (2d ed. 1962).
370. See id. at 6-9, 23-25, 28.
371. See id. at 23.
372. See id. at 24.
that had become paradigmatic of the social model. "Credit" remained a key concept, reflecting reputation, honesty, and solvency. As merchants found it increasingly feasible and profitable to lend at interest, the merchant character counterbalanced this questionable activity of lending for a profit.

Thus the new legislation was part of a cultural transformation which focused on the character of the properly interested moneylender, rather than the attempt to draw a line between good and bad loans. No one loan on its face could be determined to be usurious or not; the context and the character of the lender was decisive. The result was a statutory and judicial construction that was as much a charter for proper character development as an economic regulation.

The history of bankruptcy law affords a direct parallel and a more richly documented example of the collective creation of a cultural identity for a social character—the virtuous merchant or the man of commercial interest. As with the cultural advent of the good moneylender, early bankruptcy law invites a reading in cultural and aesthetic terms as dramaturgy. English society conceives a character type to express its ambivalence about early capitalist economics, and the character becomes enriched by social imagery and related legal regulation—it plays to type. But the character takes on a life of its own, adapts to and in turn changes the commercial circumstances in which it was conceived, and in turn helps induce changes in the law of bankruptcy which justify themselves on the basis of a new conception of the merchant character type.

The first English bankruptcy statute, in 1543, presupposed that debtors, "[w]here divers and soondry persones" who "consume the substaunce obtayned by credyte of other men, for theyre owne pleasure and delicate lyving, againste all reasone equity and good conscience." The law was a purely punitive device which assumed that most debtors were elusive absconders—often typed as devious Jews or Lombards. Its purpose was to give brute power to creditors to arrest the flight of the debtor and dismember his estate.

This stereotype was often identified with that of the merchant. During this period merchants were viewed as people who bought and sold goods but neither produced nor consumed them. They were elusive middlemen who insidiously manipulated the market by trading on the abstract value of goods rather than either introducing materiality into commerce or using materiality for economic productivity.

Accordingly, early bankruptcy law tried to constrain and target its brutality by applying itself only to specific debtors who met the criteria for being merchants. For example, the 1572 Elizabethan version of the so-called trader rule defined a potential bankrupt as a "merchant or other person using or exer-
cising the trade of merchandize by way of bargaining, exchange, rechange, bar-

try, chevisance, or otherwise, in gross or by retail, . . . or seeking his or her
trade of living by buying and selling.”

Underlying the law was the image of the merchant as a sly manipulator, an
exploiter of smoke and mirrors. He operated in the emerging and distrusted
world of credit, starkly contrasted with the solid values of land and artisans.
Although the emerging capitalist economy depended for its solvency and li-
quidity on these abstract market machinations, it also harbored deep moral am-

bivalence about them.

What the history of commercial law then shows, however (as the necessity
of credit markets became more evident) is the emergence of a counterpercep-
tion, or a newly conceived identity for the merchant. English law and cul-

ture by the seventeenth century began to treat credit and commerce, however
abstract, as ethereal and spiritual bonds among people and nations, the solvent
of brotherhood and the glue of international harmony. Abstract money, which
had been viewed as an elusive and insidious falsehood, was rationalized
as a sort of symbolic force of nature, not an object of devious manipulation.
Credit was imagined in ideal terms as not only desirable but inevitable—a na-

tural good—and the merchant was its secret specialist.

All the possessions [of commercial societies] consist[ed] of scattered and se-
cret securities, a few warehouses, and passive and active debts, whose true
owners are to some extent unknown, since no one knows which of them are
paid and which of them are owing . . . . The wealthy merchant, trader, banker,
etc., will always be a member of a republic. In whatever place he may live, he
will always enjoy the immunity which is inherent in the scattered and unknown
character of his property, all one can see of which is the place where business
in it is transacted. It would be useless for the authorities to try to force him to
fulfill the duties of a subject; they are obliged, in order to induce him to fit in
with their plans, to treat him as a master, and to make it worth his while to
contribute voluntarily to the public revenue.

If the “moral problem of credit lay with the image of the merchant as a
creature of pure interest, unconstrained by any traditional standards of religious
virtue or social responsibility, the solution had to lie in a justifying ideology of
self-interest” as itself virtuous. Mercantile self-interest ensured predictabil-

ity and enhanced reasonable reliance. This was “le doux commerce”—an
international utopia of mutual dependence. The very elusiveness of credit

378. Id. at 22 (quoting 13 Eliz. ch. 7 (1570)).
379. See id. at 13-16.
380. See id.
381. See text accompanying note 377 supra.
383. See id.
384. See id.
385. Id. at 18 (quoting Quesnay & Mirabeau, Extract from ‘Rural Philosophy,’ quoted in A.
Hirschman, The Passions and the Interests 94-95 (1977)).
386. Id. at 18-19.
387. See id. at 19.
388. Id.
capital shows it not to be morally barren, but a communal, public good. The fragile arms-length commercial links of the mercantile world are the links of a new utopia. Here is some of the new, positive imagery of credit:

Of all beings that have existence only in the minds of men, nothing is more fantastical and nice than Credit; it is never to be forced; it hangs upon opinion; it depends upon our passions of hope and fear; it comes many times unsought for, and often goes away without reason; and when once lost, it is hardly to be quite recovered . . . . It very much resembles . . . fame and reputation.

The new, affirmative figure of the merchant was a Weberian Protestant ethical hero whose greed was really a calling, whose self-interest was indeed a counterweight to other passions. This new notion of the merchant required a new aesthetic apprehension about the nature of economic and social life:

[Divine Providence] has not willed for everything that is needed for life to be found in the same spot. It has dispersed its gifts so that men would trade together and so that the mutual need which they have to help one another would establish ties of friendship among them. This continuous exchange of all the comforts of life constitutes commerce and this commerce makes for all the gentleness of life . . . .

The merchant was the hero of international concord—he blurred boundaries, and softened military characters. With the new appreciation of commerce in the seventeenth century, English law and culture had created a new, inverted identity for the merchant. He was viewed not as slyly manipulative, but as weak in a sense in which all humans subject to the vagaries of fate and the market will recognize. A remarkable turnabout in English bankruptcy law marked this change in perception. The merchant debtor, formerly an absconding villain who manipulated the ethereal phenomena, now was the sympathy-invoking hero of the economy, the passive, sacrificial figure who suffered the accidents of the natural and economic world in order to enhance the movement of capital.

This new identity arose from the fact that the very elements that made the trader a suspicious character also made him a sympathetic one. When, for example, in the 1705 Statute of Anne, the right of discharge was added to the law, it ratified the more positive image of the merchant and then affected construction of the trader rule. The discharge rule made it tolerable (though not quite yet very desirable) for a debtor to be the subject of a bankruptcy proceeding. As a result, the trader rule faced a new counterpressure to expand to include

389. See id.
390. See id. at 19-20.
391. Id. at 20 (quoting C. Davenant, An Essay upon the Probable Methods of Making People Gainers in the Balance of Trade, reprinted in 2 The Political and Commercial Works of Charles D'Avenant 275 (C. Whitworth ed., 1771)).
392. See id. at 19 n.52.
393. Id. at 19 n.53 (quoting I. Savary, Le Parfait Negociant 1, quoted in A. Hirschman, The Passions and the Interests 59-60 (1977)) (emphasis omitted).
394. See id. at 30.
395. See id.
deserving debtors.\textsuperscript{396} The state of being a bankrupt debtor changed from a reprehensible crime to a sympathetic commercial crisis.\textsuperscript{397} Only traders suffered losses by accident—others lost through prodigality.\textsuperscript{398} A trader's capital is uncertain and invisible—a reversal of the earlier epistemological problem.\textsuperscript{399} The uglier implications—rumor, illusion, collusion—were the corruption of the mercantile condition, not an inherent part of it.

E. \textit{Representing Wealth and Worth in American Law}

The question of what money represents has complex sociological, religious, philosophical, and even literary roots. In Medieval Europe the holy grail was the original exotic artifact, symbolizing divinity, kingship, and wealth. Like money, it was a pure floating signifier. Thus, empty of meaning, it could be the vessel of meaning, a perfect symbol of the union of the real and ideal, the earthly and the divine. The earliest grail sellers lived in trading centers, and the grail was the heart of the notion of both literary and financial symbolism that promised both wealth through credit economics and redemption for a dying aristocracy.\textsuperscript{400}

Literary critic Marc Shell also notes the long tradition of literary fascination with money as symbolic representation.\textsuperscript{401} This fascination with money arises from the puzzling symbolic ambiguities arising from inscribing meaning into a piece of dull metal or into a piece of "worthless" paper.\textsuperscript{402} For example, "when the inscription disappears from the surface of a coin, is the remaining ingot still money?"\textsuperscript{403} Or when "the ingot itself disappears leaving nothing but the inscription," is this remainder still money?\textsuperscript{404}

A coin may be both sign and intrinsically valuable, but paper money is all symbol.\textsuperscript{405} Credit money further widens the gulf between the symbolic value of money and any underlying commodities.\textsuperscript{406} Thus, with increasingly widespread use of credit, paper, and negotiable instruments, the critical significance

\begin{footnotes}
\item[396] See id. at 31.
\item[397] See id. at 32.
\item[398] See id.
\item[399] See id.
\item[400] See \textit{Marc Shell}, \textit{Money, Language, and Thought: Literary and Philosophical Economics from the Medieval to the Modern Era} 40 (1982) ("The grail was the sign of an age not only of impoverished aristocrats who, like the [sinner]fisher king, seemed to await redemption, but also of a new merchant class, which greeted graceful mercy and money . . . as its special emblems."). The royal merchant hero became a character type to replace older heroes, and the divine store sought by grail heroes was replaced by alien property sought by merchants. \textit{Cf. id.} at 45-46.
\item[401] See id. at 27-46.
\item[402] See id. at 15 ("This relationship of sign or symbol (the inscription) to substance (the ingot) is the heart of the aesthetic version of the paper money debate.").
\item[403] \textit{Id.}
\item[404] \textit{Id.}
\item[405] See id. at 19 ("While a coin may be both symbol (as inscription or type) and commodity (as metallic ingot), paper is virtually all symbolic").
\item[406] See id. ("As Marx argues, credit money (the extreme form of paper money) divorces the name entirely from what it is supposed to represent and so seems to allow an idealist transcendence, or conceptual annihilation of commodities.").
\end{footnotes}
of money to culture became enriched.407 Faust’s “Paper Money” scene is Goethe’s critique of idealist philosophy.408 Washington Irving was fascinated by the relationship between monetary inscriptions and “mere words.” Commenting on inflation during a 1720 paper money experiment, Irving said, “[p]romissory notes, interchanged between scheming individuals, are liberally discounted at the banks, which became so many mints to coin words into cash; and as the supply of words is inexhaustible, it may readily be supposed what a vast amount of promissory capital is soon in circulation.”409

As we have seen, some New Historicists portray art as a social and economic “product” that strives mightily to efface its grounding in economics. The historicist critic challenges this aesthetic, seeking to redistribute the tools of critical power. A central theme of the New Historicism, then, is the dissolution of the division between the economic and the aesthetic, the alienated and the authentic, the subjectivity of the consumer or investor and that of the romantic artist. Thus, New Historicists argue, the inner sensibility celebrated by nineteenth-century literature is also the private sphere of bourgeois life, furnished with the consumer goods that drove the Industrial Revolution.

Charlotte Gilman’s The Yellow Wallpaper, for example, describes the effort to make oneself into a site of both production and consumption—to be “self-actualized” into the market.410

Dreiser didn’t so much approve or disapprove of capitalism; he desired pretty women in little tan jackets with mother-of-pearl buttons, and he feared becoming a bum on the streets of New York. These fears and desires were themselves made available by consumer capitalism, partly because a capitalist economy made it possible for lower-class women to wear nice clothes and for middle-class men to lose their jobs, but more importantly because the logic of capitalism linked the loss of those jobs to a failure of self-representation and linked the desirability of those women to the possibility of mimesis.411 Capitalism thus creates objects of desire and then the subjects that desire them.412 Writing, like money, is an ineffable blend of the material and the ideal, and thus depicts the internal drama of characters seeking to situate themselves in a market culture.413 The artist and market actor both seek to fulfill the roles depicted in their own self-representations.414

407. See id. at 18 (“With the advent of paper money certain analogies, such as ‘paper is to gold as word is to meaning,’ came to exemplify and inform logically the discourse about language.”).

408. See id. at 102 (“The Paper Money Scene is part of a critique of the idealist philosophy that operates without material guarantees or substantial securities.”).

409. Id. at 19 n.39 (quoting Washington Irving, The Great Mississippi Bubble: A Time of Unexampled Prosperity, in The Crayon Papers 38 (1883)).


411. Id. at 19.

412. See id. at 20.

413. Cf. id. at 21 (writing is “neither material nor ideal . . . . And the drama of this internal division . . . is” an urgent artistic concern in the period between the Civil War and World War I).

414. See id. at 26-28.
A brief excursus on the Marxist notion of the fetishism of commodities is useful here.\textsuperscript{415} The critical Marxist seeks to avoid the "voluntarist" error of reducing the functional requisites of capitalism to the preferences of powerful capitalist actors.\textsuperscript{416} Thus, law may exhibit power independent of or in opposition to the will of individual capitalists or even the capitalist "class," and yet at the same time also articulate the systemic requirements of capitalism. The key example of such relative autonomy is the formal equality of status afforded equally to workers and capitalists in a liberal state, and manifested in a host of civil rights and liberties.\textsuperscript{417} Since this equal status is undermined in practice by the inequalities of political, economic and cultural power associated with class, it is merely formal.\textsuperscript{418} However, it sets limits on the power and privilege of capitalists and is, in this sense, autonomous from their will. The relative autonomy of this "legal form" from the will of actors results from what Balbus calls a "homology" between the legal form and the commodity form.\textsuperscript{419}

At the political level, individuals are homologized into the abstract identity of equal "citizens" in order to make political and economic representation of their "interests" possible. Indeed, humans become their "interests," ceasing to act like social beings, but instead merely inviting commodity-like negotiations with others' interests. The homology between commodity form and legal form threatens to become identity when we encounter anthropomorphized enterprises, legal persons that are also negotiable property interests. Individuals and inanimate enterprises then become mutually commensurable and negotiable on the plain of interests.

The development of American legal forms in the nineteenth century is largely about the evolution of a right of negotiability as a means of abstracting money from tangible property or from individual market transactions and assignments. Money became a more abstracted symbol that could float above property and contracts, though it could always be reduced to those things when necessary. For Morton Horwitz, the abstraction of property and contract into money had a "shattering effect" on contract law.\textsuperscript{420} Legislatures resisted the negotiability of private money out of fear of losing control of the money supply. Thus, law in a capitalist society controlled the meaning of social and contractual relations by controlling the ability of inscriptions of debt and value to float free of their origins, to achieve transcendent abstraction.\textsuperscript{421} But there is a more complex story to tell about the rise of commercial formalism in American law and economics, a story which oddly parallels the development of the merchant character in England.


\textsuperscript{416} See id. at 572-73.

\textsuperscript{417} See id. at 577-81.

\textsuperscript{418} See id. at 577.

\textsuperscript{419} Id. at 584-86.

\textsuperscript{420} Morton Horwitz, The Transformation of American Law 147 (1977).

\textsuperscript{421} See id. at 212-26.
1. Transcendental commerce.

It may be hard to imagine two nineteenth-century philosophers as different as Marx and Emerson. Yet Emerson was, in his own way, equally fascinated by the relation of money, commodity, symbol, and value. In imagining labor as a form of idealist endeavor, Emerson asserted that in paying for labor we should be paying for the knowledge and virtue of the laborer. In any society past the minimal barter stage, we must do so through symbols of currency that can translate knowledge and virtue into wealth and credit. Though these symbols become somewhat abstract and are therefore subject to counterfeiting, the Marxist warns us of the dangers of fetishism and alienated labor; Emerson reminds us that we need commodification to capture dynamic process in stable form. Ironically, the Emersonian idealist does not denounce commodification as much as the materialist Marxist does.

For Emerson, to denounce commodification is to implicitly make a very questionable claim for the transparency of symbolism that denies the key dynamic quality of symbols. It is to assume a rigid relation between symbol and reality, rather than to accept the endless exchange of energy between the world of symbols and the processes they represent. Commerce is not the degradation of virtue but the medium of virtue. Economic complexity and conflict may indicate that humans unfortunately misperceive value in exchange, but that does not make exchange itself immoral. For Emerson, economic forms border on the sacramental.

2. Protectionism.

An explicit legal example of the "application" of transcendentalism to legal doctrine is offered by Howard Horwitz in his boldly imaginative book, By The Law of Nature. Horwitz offers the initially improbable idea that commercial regulation in the form of trade protectionism can be read as an aspect of American transcendentalist literature. This notion finds strong support in Polanyi's argument that one of the most underrated forms of social legislation in the nineteenth century was the use of a national currency. According to this view, the original thinkers of economic liberalism considered national imprints on currency meaningless, since they viewed money as a pure medium of exchange. Yet governments, recognizing money as a political tool and a purchasing asset, turned monetary nationalism into a major form of social protectionism, which, according to Polanyi, was even more important than labor legislation, social security, or land use controls.

As Horwitz argues, both protectionism and transcendentalism sought to reform the internal economy (national and individual) to perfect American char-

423. Cf. id. at 76 ("the commodity, like nature, is a hieroglyph intimating the divine").
424. Id.
425. See id. at 57.
426. See POLANYI, supra note 280, at 24-25.
427. See id. at 231-32.
428. See id.
acter so that property could become an instrument to higher ends.\textsuperscript{429} What protectionism protected was the individual and the nation from the volatility of markets. It encouraged the kind of self-reliance which harmonized with universal will, as opposed to purely free trade which promoted a vulgar variant of individualism, selfishness. Protectionism was to enlarge citizens' consciousness of their interdependence with capital, labor, farmers, and merchants. Free trade, on the other hand, was viewed as a false, negative freedom, in which the merchant essentially enslaves individual labor to foreign commercial intermediaries and degrades men into machines. Under protectionism, one can flexibly choose the market in which one competes. And by protecting the home market, protectionism would lead to a perfecting of world markets and ultimately render itself unnecessary. The good commercial character would become a universal.\textsuperscript{430}

3. \textit{Natural money}.

Walter Benn Michaels's view of money in the nineteenth century captures this haunting quality and its role as currency of identity.\textsuperscript{431} For Michaels, capitalism creates both its objects and its subjects; it creates the desires for the commodities it creates. Money both has value and no value, as it is both a real thing and a representation, and bourgeois art endlessly plays on this relationship.\textsuperscript{432} Like money, bourgeois art is neither ideal nor material. That is, it is not ideal in so far as it has cash value, and it is not material insofar as its value is a function of its meaning. After all, a thing can be sold many times at once and in different places. In Michaels', critical history, the goal of Naturalist literature was to end representation—to capture the thing itself, and so the rhetoric of money as representation helps us appreciate the moral aesthetics of certain legal forms.\textsuperscript{433} Some forms of practical writing are avowedly part of the market. While more refined types purport to transcend vulgar market effects or origins, all writing is indeed ultimately part of commerce. Michaels shows through the example of the Naturalists how literature is indeed part of the market.\textsuperscript{434}

A perfectly representative character for Michaels is Frank Cowperwood, of Dreiser's \textit{The Financier}. For Cowperwood, the actual commodities he could acquire were not real enough because they were not mental enough. Money could flout ordinary conceptions of identity, "producing its own harvests and determining the value of products whose worth it was intended only to symbolize."\textsuperscript{435}

The characters in Naturalist novels look to the storehouse of legal forms to produce those representations of wealth that can help them forestall the self-

\textsuperscript{429} See Horwitz, \textit{supra} note 422, at 57-61.
\textsuperscript{430} See id. 61.
\textsuperscript{431} See note 410 \textit{supra} and accompanying text.
\textsuperscript{432} See Michaels, \textit{supra} note 410, at 156-59.
\textsuperscript{433} See id. at 156-61.
\textsuperscript{434} See id. at 137-80.
\textsuperscript{435} Id. at 68.
CULTURAL CRITICISM

destructive dangers of capitalist logic—excessive production or excessive consumption—to create an everlasting identity for themselves. Money and corporate form provide continuity of personal identity. The person needs a permanent impersonal form, and the impersonal form needs a personal identity, so the person takes on the role of owner or guardian of the fortune.

Michaels traces the parallel worries of writers and legal scholars as to whether a corporation is “real” and notes the non sequitur that reality is somehow associated with personhood. A corporation, however artificial and different from a natural person, can be as “real” as an artificial lake. As Michaels notes, the early finance capitalists, like Dreiser himself, were less concerned with the distinction between the infinite “verbal” and the finite “physical” than we might have supposed. Rather, these early financiers were more disposed to see the infinite power of language not as a threat to capitalism but as an essential part of its technology. It is the purpose of artificial legal bodies to immortalize desires and to govern and express interests.

Capitalists like Cowperwood produce legal forms like the futures contract, the corporation, and the trust to arrest the volatile dynamism of the market. In the untrammelled market, commerce can destroy itself by overproducing, ironically flouting human intentions. The human endeavor to produce leads to unintended panics, and nature replaces work as a force of the economy. Art, of course, is supposed to reflect timeless truth and beauty that escape the market. Capitalists like Cowperwood express this hope by converting art into a form of wealth which they hope merely to accumulate, not sell. The perverse result is that art becomes too much like a commodity, dependent on acceptance for value. Lacking absolute value, it ends up looking just like money.

Thus, as Michaels plays out the bizarre permutations of the real and the represented, avarice is just another form of aesthetic retreat that strives but fails to escape the market. Does one want money to have the unused power to buy? Does one buy for the pleasure of buying, not owning? The spendthrift enjoys buying nothing, while the miser wants to stay out of the market by using money to buy money. If the value of gold depends on its scarcity, then it depends on the value it would have if it were not money. Those who love the inherent value-beauty of gold treat its value as aesthetic, as representational. We do not desire things in themselves—we want representations, or, more perversely, we want real things that look like representations. Art is neither merely formal nor an illusionistic image of something else. It marks the potential discrepancy between material and identity, the discrepancy that makes

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436. See id. at 188-206.
437. See id. at 203.
438. Id. at 200-13.
439. See id.
440. For Michaels’ inquiry into the historical perception of currency, see id. at 139-46.
441. See id. at 146.
money, painting and people possible. As Michaels says, misers love gold because to them it represents money.442

The relevance of this literary history to law is that the advent of a money culture inspires legal and aesthetic efforts to create forms which express and contain the dynamic forces of market capitalism. Rather than see such forms as the negotiable instrument as suppressing the true social relations underlying economic transactions,443 a literary approach to these forms sees them as more complex aesthetic vehicles. Ideological and legal battles over money are bizarre, because the legal actors fail to realize that the conditions under which these conflicts occur really create the subjects of the conflicts. It may be a perverse fallacy that economies can be subjects and have desires, but it is a fallacy that makes an economy possible and accommodates our tendency to view natural objects as if they were human. For Michaels, souls living under capitalism know what they do and why they do it, but not what they do does. These souls cannot comprehend the connection between individual acts and the whole economy. Personification of the economy, and smaller personifications of economic forces in legal forms, are efforts to ease the anguish of this uncertainty.

4. The corporation.

For Michaels, the corporation represents the eternal capitalist life, the form of commerce that transcends the vagaries of commerce.444 A corporation is usually viewed as "a fictitious artificial person composed of natural persons, created by the state, existing only in contemplation of law, invisible, soulless, immortal."445 What is fictitious is the attribution to corporations of personhood, and yet this fiction may be intrinsic to the prevailing concept of person, which, in turn, implicitly explains the acts of individuals by reference to such mysterious spectral entities as the will or the soul.446 Since the corporation is imaginary, it is easy to impute human desire or other qualities to it and this imputation, in turn, reflects the way we imagine ourselves. Likewise, people, at least as commercial actors, may be constructed corporate fictions.

The corporation is a figure of ravenous desire, conceived as a mere agent of distribution but ending up as the great consumer of value. It is the answer to the wonderful question of capitalism that Michaels poses: How do rich people who seem to have all that a person could want manage to keep on wanting?447 A person has to have a limited body and hence a limited appetite, but the corporation can transcend these limits. Just as the corporation, saviorlike, takes upon itself the liability of its investors, it also takes on their desires and keeps them

442. See id.
443. Horwitz, supra note 420, at 231.
445. Arthur W. Machen, Jr., Corporate Personality, 24 Harv. L. Rev. 253, 265 (1911) (noting that the entity which is personified by the corporate fiction is itself no fiction).
446. See id. at 256-58.
447. Id. at 205-06.
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And if a corporation has no essential personality, we are wholly free to impute to it anything we want. This is the ironic essence of literary Naturalism, reducing both things and persons to personifications of supposedly biological or material forces. Capitalism, like nature, has a weird purposiveness. The same human mind that can create an epic poem by conceiving and depicting the great monstrous purposive forces of physical and human nature can conceive of the corporation as the formal embodiment of such forces.

5. The monopoly trust.

So long, however, as the corporation enjoyed and suffered the legal rights and responsibilities of a “person,” it was subject to attack under anti-monopoly laws because it was seen as a willful market agent. Howard Horwitz uses aesthetic criteria to “read” the monopoly trust, a bizarre late nineteenth century legal instrument, as the solution to this legal (and cultural) problem.

According to Horwitz the trust form was designed to circumvent laws that prohibited interstate ownership, and to bring order to competitive chaos through vertical and horizontal integration. Corporate directors abdicated control to trustees, and stockholders turned their shares into trust certificates. Thus, the trustees ran the businesses, not the shareholders or directors whom the corporation supposedly embodied. Hence, the trust represented a “decapitation of the corporation,” a viciously clever device to erase any traces of individual agency or will in commercial transactions so as to evade conventional legal responsibility for torts or breaches of contract. As such, the trust went much farther than the corporation in dissolving the individualist ego into a higher spirit that is both the end of and the apotheosis of American individualism. The trust transgressed and at the same time enhanced individualism.

Horwitz asks the intriguing question: What is the relationship between the monopoly trust and transcendentalism? Was the first John D. Rockefeller a transcendentalist? Was he the Emersonian man? Was Frank Cowperwood, the hero of Dreiser’s The Financier, the Nietzschean man? Horwitz draws on Emersonian aesthetics to help us understand how the “robber barons” of that era altered the corporate entity in a manner that reflected the nineteenth century American cultural struggle over the role of individualism. The great irony of the big corporation was that it crushed the individual under the weight of abstract commercial power while also reflecting the triumph of voluntarism and of a disembodied will freed from the constraining particularity of the empirical individual or social group.

448. See id. at 187-88.
449. See id. at 200-03.
450. See id. at 182-83
451. See Horwitz, supra note 422, at 171-91.
452. See id. at 182-83.
453. See id.
454. See id. at 171-72.
455. See id. at 181-86.
456. See id. at 172.
If we believe that individual will is the original and only proper ground for moral judgment, then the character of the trust threatens that belief. Dreiser's Cowperwood says: "A man ... must never be an agent ... acting for himself or others" because to represent is to introduce the possibility of misrepresenting. The trust enables the superman to appear to be the mere medium of transcendent forces.

In that sense, corporate practice and literary practice are "affiliated cultural formations." For all their differences, Emerson and Rockefeller use the same logic; "the morality of action is justified by the transcendence of personal agency. Emersonian self-reliance, epitomized in the famous transparent eyeball figure, seeks virtue and self-perfection in self-eradication." And "the financer's immorality was obscured in the shadow of the institution he spawned."

The key to Rockefeller's success was his skill in getting confidential information—his skill was not occult, but highly strategic. For Emerson's visionary compact between mind and nature, self and other, the harmony is never a balanced negotiation but an endless exchange and appropriation. The poet's integrative faculty draws the concrete into the public and the universal. Rockefeller's faculty is the subtle eye for collecting information. But it is a rapacious and imperialistic mind that does the integrating. Mere commodities take on universal, transcendent significance when purified through the self, and visible form is no longer essence. As in politics, purporting to merely be the medium through which plural wills or a collective will speaks may merely sublimate the most arrogant expression of power. This is consonant with Darwinian notions of capitalism: Carnegie's view that there is a "special talent" intrinsic to the self and independent of material circumstances that causes wealth.

Through the monopoly trust, the corporation gave up "mean egotism" and agency to an "autotelic" figure. Commercial exchanges were no longer interest-driven transactions but traces of natural market forces merely represented in the passive medium of the trusteeship. In this ironic separation of ownership and control, the trust was an invisible non-entity; it had no legal form and filed no reports. It could not be found because it was pure illusion and elusion. The trustees claimed not to be agents of real principals, but rather the "actualizers" of market forces. No formal traces of agency were ever left. No contracts were drawn, but parallel transactions occurred in natural harmony. The trust was "sheer form." It "did nothing." It was dressed up in utopian justifications as an ideal universal democracy, blurring the public and private.

457. THEDORE DREISER, THE FINANCIER 44 (1912).
458. Horwitz, supra note 422, at 172.
459. Id.
460. See Michaels, supra note 410, at 173-74.
461. See id. at 174.
462. Id. at 179.
463. Horwitz, supra note 422, at 184.
464. Id.
465. Id. at 189.
6. The family trustee.

A final example of the cultural aesthetics of legal form is a logical extension of the monopoly trust—the family trustee or fiduciary. As described by the sociologist George Marcus, a fiduciary is a catalytic character who converts interests into disinterestedness. He is a negotiator among social and cultural norms, economic forces, and wealth. The fiduciary serving as a trustee for family wealth translates the rapacious and often conflicting self-interests of the heirs of a patriarchal financial dynasty into a rational collective unit, one whose collective interest in self-perpetuation requires transcendence over the individual interests of the members. On the one hand, individual rapacity, the force of selfish agency, is transformed into the self-less, transcendent interest of the family. At the same time, the warmth, loyalty, commitment, and sentiments of family life are transformed into a cold impersonal monolith. The cultural instrument to achieve this negotiation is a legal form—the family trust in its various guises. A fiduciary is the perfect figure of the person who transcends interests by effacing his own agency. He acts for and in the interests of others. In so doing he also purifies those interests by embodying them in the person of a disinterested fiduciary.

The trust is a form of social discipline of capitalist energy: while the classical story of modernization sees labor as undergoing discipline to be able to participate in rationalized production processes, the trust form performs the same role for capital itself. Capital especially requires discipline when the children of the great patriarchal estates become sufficiently tempted by anomic consumption interests to threaten dissolution of the estate. As the family ages into patrician and noblesse oblige status it also becomes weak, such that it must create a transcendent, controlling emblem of itself to ensure cohesion and reputation. The phenomenon of the dynasty is an aberration in a democratic culture and yet, as an icon of upward mobility, an object of veneration in a culture no less devoted to opportunity. The dynasty’s emblematic qualities come not from the individual commitments of heirs to their common lineage, but from the law and work of fiduciaries. In so far as the dynasty is an emblem of upward mobility it represents individual opportunity that, because

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466. Id.
468. See id. at 72.
469. See id.
470. See id. at 71-72.
471. See generally id. (describing the role of the fiduciary in American family dynasties, and emphasizing the importance of disinterest, rationality, and stewardship).
472. See id. at 54-56.
473. See id. at 54-55.
474. See id. at 55.
475. See id. at 55-56.
476. Id. at 55.
of its multigenerationality, holds forth the promise of an endless future of ever-greater wealth and achievement. No matter how lowly and humble, any individual can aspire to eventual transcendence through his posterity, since there is no formal boundary of blood and lineage restricting entry into the American aristocracy.

One specific type of trustee, which Marcus calls the insider-outsider, is a very refined sort of cultural-legal artist. He is close enough to the family to occasionally consult on familial disputes, but the family understands that he must maintain neutrality and distance if he is to help the family negotiate its self-transcendence. This fiduciary injects the dynastic interest into diffuse, volatile family relations, and monitors the linkages of family and property through their gradual, anticipated decoupling. A good trustee monitors the dynamic processes of money transformation into an apparently static form that allows the holders of the wealth to appear as passive beneficiaries. Under capitalism, fiduciaries are especially vital because wealth is a dynamic abstraction and depends on "a coordinating human intermediary to perform these transformations."

The trustee is thus a subtle director for this social drama. "The fiduciary," Marcus claims, "is interested in money and values as abstractions within the conventions of investment institutions," for the family members, he is a legal specialist carrying out plans, explaining their rights and duties by translating events into a legal calculus, sometimes demystifying the reified nature of family wealth—sometimes re-reifying it to prevent members from dismembering the corpus. As he performs the technical tasks of fending off taxes and regulations, the trustee helps construct the family's wealth for different purposes, using alternative images or abstract forms to serve various needs.

For Marcus, the disinterested fiduciary can act for those who are interested yet remain above suspicion himself, since his stewardship is not of any individual interest, but of the family as a whole. Ironically, the technical servant of the family is also the morally superior preacher to it, performing the tasks that members cannot do themselves and often would, individually, prefer not to see done at all. The fiduciary is "rational" in a complex way: He carries out and embodies the rational self-interest of the family, but must synthesize it out of the possibly irrational appetites of the individual members. Thus, he is an artist of legal forms and cultural norms, whose working material is the conceptual currency of law and business.

In its quest for a noble cultural identity, the family projects an ideal representation of itself and then subordinates itself to that representation. The fiduciary was both the creator and protector of that representation, thus saving the

477. Id.
478. See id. at 72.
479. See id.
480. Id. at 57.
481. Id. at 72.
482. See id. at 69.
483. See id. at 68.
484. See id. at 62-70.
family from itself. The foundation became a superior fiduciary product; institutional donations replaced individual merchants’ donations.\textsuperscript{485} As a result, American philanthropy came to depend on the beneficiaries of the patriarchal donors, the people whose “job” was to enjoy rather than to consume capital.\textsuperscript{486}

This group includes charitable institutions that receive money and spend it according to fiduciary norms. Of course this often means cultural institutions—such as museums, universities, and libraries—so that we bring aesthetic transcendence full circle. Beyond these trusted managers of philanthropic capital stand the brigades of cultural service workers they support—the artists, authors, musicians, curators, librarians, and academics who complete the cultural laundering and embroidery of capital.\textsuperscript{487}

The fiduciary ensured the optimal set of donations—though this may have been more or less than the maximum sum of those individuals. Organized dynasties dissolve after a few generations, but their enduring legacy is a fiduciary-managed trust of patrimonial capital. In the effort to create a timeless entity, the trust must circumvent such explicitly time-bound laws as the rule against perpetuities—hence the notion of the perpetual charitable foundation, the permanent agent of disinterestedness.\textsuperscript{488} The trustee-artist finesses the tension between the demands of money management and the dynamics of family sentiment, though his actions are likely to constrain and distort the latter to serve the former.\textsuperscript{489}

The family does not pressure the fiduciary to resolve family disputes—indeed, the family may even recruit ad hoc consultants for that job. “The transcendence of the fiduciary is thus mutually sustained by the fiduciary and those he serves.”\textsuperscript{490} The fiduciary might be partly independent of the family, but his own life is at the edge between the two forces he balances.

As Georg Simmel noted in \textit{The Philosophy of Money}: “The ideal purpose of money, as well as of the law, is to be a measure of things without being measured itself, a purpose that can be realized fully only by an endless development.”\textsuperscript{491} Hence the fiduciary is a “human incarnation of the abstract functioning of law and money,”\textsuperscript{492} the authoritative interpreter in a legal and capitalist idiom of a rich family’s constitution and development, seen by family members themselves less rationally and holistically. The trust is a reified phenomenon replacing patriarchal authority.\textsuperscript{493} Family members “trust” not family feelings but cold abstraction. The fiduciary helps interpret family life without exposing itself to interpretation beyond the mere affirmation of its authority. Thus, in capitalism, a form of lineage and dynasty finds strength in a

\begin{itemize}
\item \textsuperscript{485} See \textit{id.} at 57-58.
\item \textsuperscript{486} See \textit{id.} at 58-59.
\item \textsuperscript{487} See \textit{id.} at 69.
\item \textsuperscript{488} See \textit{id.} at 57-58.
\item \textsuperscript{489} See \textit{id.} at 58-59.
\item \textsuperscript{490} \textit{Id.} at 69.
\item \textsuperscript{491} GEORG SIMMEL, \textit{THE PHILOSOPHY OF MONEY} 511 (Tom Bottomore & David Frisby trans., 1978); see also MARCUS, \textit{ supra} note 467, at 70.
\item \textsuperscript{492} MARCUS, \textit{ supra} note 467, at 70.
\item \textsuperscript{493} See \textit{id.} at 70.
\end{itemize}
mechanism defined by a rationality that is "alien to the mix of sentiment and self-interest which we think motivates family relations." 494

An interesting aspect of the fiduciary profession is that it is anthropologically self-conscious, using such revealing criteria to describe itself as "disinterestedness, stewardship, and rationality." 495 The profession assumes that social relations are driven by self-interest, and that families are odd mixtures of competition and cooperation. Family loyalty always comes dynamically mixed with individual greed. The job of the trustee is to harness and balance those energies, 496 but also to offer the world—and the family itself—a better interpretation of these family dynamics.

The family's capital and identity achieve ultimate transcendence of interest with the foundation of a philanthropic trust for the support of the arts or the disinterested pursuit of knowledge. 497 To preserve itself accumulated capital must work itself free of interestedness, so that the abstraction of legal form proves to be a logic of transcendence as well as commodification—a double movement of alienation of the material from the human and of the anthropomorphosis and apotheosis of the material. The accumulation of capital is accompanied by a constant effort of the imagination, reconstructing an always ephemeral region of the sacred, temporarily just beyond the bounds of commodification, but always on the verge of profanation and obsolescence.

7. Postmodernism and commercial form.

The Emersonian view of commercial form finds a fascinating echo in contemporary critical theory. Postmodernist scholars like David Harvey have discerned that poststructuralist form is exemplified by the contemporary commodification of money, reduced to (or exalted to) electronic international blips that defy normal constraints of space and time. 498 Money symbolism, in the pop culture-criticism of this era, becomes the art of the 1990s. "Swap" transactions 499 and electronic manipulations of the Eurodollar market 500 have become the abstract impressionism of contemporary commerce. Indeed, if there were deconstructionists writing for the Wall Street Journal, they would say that we cannot control our representations because they end up implicating all the other representations of which they are a network. In a postmodernist culture of symbolic inflation, all styles at once are on display, a circulation of diverse and contradictory cultural elites. We are suffering, implies Harvey, a crisis of representation, a readjustment of our sense of time and space in politics, economics, and culture. A whole recent issue of the literary journal

494. Id.
495. Id. at 71.
496. See id. at 71-72.
497. See id. at 69.
500. Harvey, supra note 498, at 163-64.
Diacritics addressed how crises in representation are simultaneously aesthetic and financial.\textsuperscript{501}

Marx had called money the lubricant of community, but money has become the "real" community of international relations, the International Monetary Fund the institutional embodiment of globalization that the United Nations pretends to be. To perform the commodity function, money must be replaced by symbols of itself—in credit instruments. If, in a Marxist view, the bourgeoisie cannot survive without endless revolutions in the technology of commodification, without sped-up turnover time and liquidity of capital, to exacerbate the insecurity and so maintain the availability of workers, capitalist money production must be in an endless state of revolution. And now we can say that money is truly fictitious capital—all investment is a credit bet either on production not yet realized or others' misperception of the value of what has been or will be realized. Possibility masquerades as currency. Thus to the postmodernist cultural critic, economic policy is cultural policy. But government policy therefore has to control the fluid and open spaces of money markets—to contest within its borders the effects of widespread individualism and ephemerality, and to carve out islands of fantasy amidst the tempests of currency—since if currency is the only medium of self-expression, there can no longer be any self-interest to pursue.

Post-modernist pronouncements of the death of subjectivity to the contrary, we are probably far from such a predicament. The particular representations of subjectivity most recently venerated will follow the inevitable logic of commodification and profanation, but they will be replaced by others. The work of culture in market society is not the preservation of existing identities from alienation. It is the imaginative work of constantly fashioning new identities and new institutional forms that briefly embody them before turning into "pods." For better or worse, the very rapidity of commodification remarked by post-modernists engenders a corresponding speed up in cultural innovation. Legal disputing, transacting, enacting, and planning are implicated in that constant, Sysiphean effort of imagination. It follows that the literary dimension of law is not lost in some remote Arcadian past when politics was virtue, when work was craft, when exchange was fraternity. Instead, the literary imagination is inherent in the law of modern society, simply because law is both the means by which we continuously refashion society and one of the media in which we represent and critique what we have fashioned.

Does law's participation in the work of humanizing the market make law inherently redemptive? Yes, so long as we understand redemption as an aspect of the functioning of a market economy rather than an escape from it—a balm for civilization's discontents rather than a cure. The cultural redemption of capitalism, like the abatement of pollution and the disposal of waste, paradoxically conserves the conditions of its own necessity. To identify law as redemp-

\textsuperscript{501} See generally Diacritics, Summer 1988 (reviewing various articles on economics and real property).
tive in this sense is to portray it less as an antidote to alienation than as a co-
dependent.

But the imaginative work of law involves much more than the cosmetic
ornamentation of market society. The fictions and figures of law are the very
architecture of not only the diverse markets, but all the other institutions that
compose society. These institutions have no necessary pattern or purpose to
which culture must conform. The institutions we establish, the roles those
institutions constitute, the dramas of dispute and transaction those roles enable,
the institutional changes those dramas bring about—these are neither con-
straints on culture nor causes of culture. They are culture itself.

V. Conclusion

It follows that reading and criticizing the fictions, figures, and stratagems of
law is indispensable to cultural criticism. George Marcus and Michael Fischer
have observed that twentieth-century cultural criticism has typically taken one
of two forms: "First, at its most philosophical, cultural critique has posed as an
epistemological critique of analytic reason . . . grounded in the sociology of
knowledge . . . . The effect of this style of cultural critique is demystification . . . ." While noting that demystification has been an aim of Nietzschean,
Marxist, and Weberian cultural critique, Marcus and Fischer add that epistem-
ological criticism is most recently associated with poststructuralist semiotics.
A second style of cultural criticism, also drawing on Nietzsche, Marx, and Weber,
has emphasized the "romantic" critique of modernization: "It worries about the
fullness and authenticity of modern life and idealizes the satisfactions of com-
munal experience. Behind the growth of the market, bureaucracies, large cor-
porations, and professional social services, it sees a decline of community and
of . . . individual self-worth . . . ." Victims of their own success, both of
these forms of cultural criticism have lost their capacity to shock or inform:
"[a]s rhetorical strategies they have become exhausted." It is now under-
stood that the particular enchantments of traditional society are lost forever, and
that they have been replaced not by transparent rationality, but by other en-
chantments. Accordingly, we have argued throughout this article that criticism
is no longer well-served by the familiar rhetorical attitudes of skepticism and
sentimentality. But there is a third model of cultural critique derivable from the
classic critics of modernity, Nietzsche especially. The aim of such criticism is
not to recover virtues of the heroic age but to fashion new ones. Thus con-

502. For example, while Polanyi, Balbus, and Taussig argue that the formation of "capitalism"
involves inculcating belief in fictive commodities, one may equally portray the analytic category of
"capitalism" itself as an imaginative construct, since its three defining features—commodity production,
capital accumulation, and free labor—have no necessary connection or determinate meaning. See Ro-
the difficulty in determining the key concepts of capitalism); Binder, What's Left, supra note 2, at 2002-
08.

503. George E. Marcus & Michael M.J. Fischer, Anthropology as Cultural Critique: An
Experimental Moment in the Human Sciences 114 (1986).

504. Id.

505. Id. at 115.
ceived, the cultural criticism of law is part of the work—at once political and aesthetic—of choosing what kind of culture we hope to have and what kind of identities we hope to foster.