
SUFFOLK UNIVERSITY LAW REVIEW

Volume XLI

2008

Number 4

A Theory of Adjudication: Law as Magic

Jessie Allen¹

Law is a "strange compound which is brewed daily in the caldron of the courts."

Hon. Benjamin N. Cardozo²

I. INTRODUCTION

At least since the Legal Realists' early twentieth-century critique, legal theorists have struggled to understand the relationship between law and reason. Other disciplines can help with that project. The longstanding trend toward economic analysis is one well-developed approach. Recent scholarship looks to both economics and psychology to analyze the law of risk.³ In this article, I use anthropological theories of ritual and magic to reconsider the role of doctrinal reasoning and formal procedure in adjudication and adjudication's role in social change. I argue that aspects of law regarded as irrational "magic" may contribute to adjudication's social effects and meaning.

The idea that law has something in common with magic is not new. In the 1920s and 1930s, the American Legal Realists expressed their critique of legal rationality by complaining that judges practice "legal magic."⁴ According to

1. Acting Assistant Professor, New York University School of Law. Many thanks to those who read various incarnations of this work and gave thoughtful comments that improved it: Anthony G. Amsterdam, Natasha Balendra, Keith Bybee, Peggy Cooper Davis, Jeffrey Fagan, Deep Gulasekaram, Suzanne Last Stone, Michael Madow, Lawrence Rosen, Peter Strauss, Susan Sturm, Jeremy Waldron, Andrew Williams, and Patricia J. Williams. Thanks also to Josh Launer and Emma Cecilia Eriksson for their editorial contributions.

2. BENJAMIN CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 10 (1921).

3. See, e.g., *BEHAVIORAL LAW AND ECONOMICS* (Cass Sunstein, ed. 2000).

4. Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 821 (1935). Across the Atlantic at around the same time, the Scandinavian Realists contended that modern legal

the Realists, legal outcomes were actually determined by judges' individual preferences and ideology. Traditional legal methods—precedential hierarchies, doctrinal formulas, and procedural rules—were nothing but “magic solving words,”⁵ “word ritual,”⁶ and “legal myth,”⁷ that obscured the real reasons for court decisions. Although the most important Realist writings were produced some seventy years ago, they exert a powerful continuing influence.⁸ Today's ascendant economic approach to legal analysis is a Realist descendent. And while little has been written about the Realists' analysis of legal magic, references to “talismanic” legal reasoning and “magic words” crop up with some regularity in case law to this day.⁹ Moreover, a few scholars have recently begun again to recognize the connections among law, magic, and ritual.¹⁰

I want to reconsider law's magical aspects in a way that both extends and critiques Realism. I accept the core view of the Realists and of today's radical legal critics and economic pragmatists that categorical doctrinal reasoning, precedent, and formal procedures do not objectively determine legal decisions.¹¹ But I reject the assumption that those features of adjudication must

practice was historically descended from magic rituals. “According to the Roman view . . . , the right of property is a mystical power over the spirit inherent in the object. This power is created, and transferred, by means of magical acts All the ancient legal acts belonging to the original Roman law were magical acts.” Karl Olivecrona, *The Legal Theories of Axel Hägerström and Vilhelm Lundstedt*, 3 SC. ST. L. 125, 133 (1959), available at <http://www.cenneth.com/sisl/pdf/3-5.pdf>.

5. Cohen, *supra* note 4, at 820.

6. Leon Green, *Duty Problem in Negligence Cases*, 28 COLUM. L. REV. 1014, 1016 (1928).

7. JEROME FRANK, *LAW AND THE MODERN MIND* 12 (2d ed. 1930).

8. “Legal realism has fundamentally altered our conceptions of legal reasoning and of the relationship between law and society All major current schools of thought are, in significant ways, products of legal realism.” Joseph Singer, *Legal Realism Now*, 76 CAL. L. REV. 465, 467 (1988) (reviewing LAURA KALMAN, *LEGAL REALISM AT YALE: 1927-1960* (1986)); see also GARY MINDA, *POSTMODERN LEGAL MOVEMENTS: LAW AND JURISPRUDENCE AT CENTURY'S END* 32 (1995) (“[M]ost law teachers today regard themselves as legal realists”).

9. A Westlaw search for cases from 1945 to 2005 with the terms “magic words” or “talismanic” generated 7,837 hits. See, e.g., *State v. Robinson*, 631 A.2d 288, 300 (Conn. 1993) (“The fact that the trial court did not utter the talismanic words that the evidence was ‘more probative than prejudicial’ does not indicate that it did not make such a determination”); *State v. Lee*, 1999 WL 19295, at *5 (Wis. Ct. App. Jan. 20, 1999) (“A trial court is not required to use ‘magic words’ in effectuating its adjudication”); *Willington Fraternal Order of Police Lodge #1 v. Bostrom*, 1999 WL 39546, at *4 (Del. Ch. Jan. 22, 1999) (“Chancery jurisdiction is not conferred by the incantation of magic words”). Scornful comparisons to magic also can be found in American case law long before the Realists' rigorous critique. See, e.g., *The President, Dirs. and Co. of the Bank of the United States v. Dandridge*, 25 U.S. 64, 113 (1827) (Marshall, J., dissenting) (describing rule that corporate directors can be distinguished from corporation and insulated from liability as “a talisman by whose magic powers the whole fabric which law has erected respecting corporations is at once dissolved”); *Sims Leffe v. Irvine*, 3 U.S. 425, 454 (1799) (“[T]here is no magic in the description of a patent”).

10. See generally OSCAR G. CHASE, *LAW CULTURE AND RITUAL: DISPUTING SYSTEMS IN CROSS-CULTURAL CONTEXT* (2005); Geoffrey P. Miller, *The Legal Function of Ritual*, 80 CHI.-KENT L. REV. 1181 (2005); Suzanne Last Stone, *Rabbinic Legal Magic: A New Look At Honi's Circle as the Construction of Law's Space*, 17 YALE J.L. & HUMAN. 97 (2005).

11. The indeterminacy of legal analysis is, of course, a central tenet of critical legal studies. See generally DUNCAN KENNEDY, *A CRITIQUE OF ADJUDICATION (FIN DE SIECLE)* (1997); Mark Tushnet, *Survey Article:*

therefore be irrational and false or superficial and unconnected to law's social effects. Legal magic may have a fruitful role to play in a legal system we conceive as helping to create the social world.

My thesis is that the Realists were right that law works like magic but wrong about how magic works. The Realists' understanding of the magic they identified in legal forms and doctrines was foreclosed by their adoption of the Victorian anthropological definition of magic as a kind of false science. Modern field anthropologists, however, revised that view observing that magic and ritual are not necessarily in tension with reason. Indeed, much of the work of twentieth-century anthropology, across a wide theoretical spectrum, re-envisions magic and ritual outside the Victorian identification of magic and primitive irrationality. Early functionalist and structuralist theories; "structural-functionalist" approaches that stress the social work of ritual; and cultural analyses that interpret magic and ritual in terms of performance, language, and symbol all reject the necessary opposition of ritual magic and reason. Viewing law as magic from these perspectives produces two important challenges to the Realist view. First, it allows us to see that magic and ritual aspects of adjudication do not necessarily conflict with rational legal decision-making. Second, it suggests some ways that the legal magic the Realists criticized might actually enhance law's legitimacy and effectiveness.

Following the Realists, however, many legal theorists today view the ideal of law as instrumental: policy decisions made by intelligent, conscientious individuals who combine clear-eyed empirical assessments with thoughtful value judgments to produce sensible and just social regulation.¹² In that paradigm, any aspects of adjudication that smack of ritual magic appear corrupt and dysfunctional. But in the model of law as socially constitutive—shaped in part by the Realists' own criticism of law's persistent failure to dispense social justice—law interacts with society in much more pervasive and complex institutional ways. In this view, law constitutes and transforms social meaning by helping to create and recreate the social situations at issue in adjudication. Ritual magic is a long-recognized mechanism of such transformations.

In law, as in ritual magic, transforming the meaning of a set of social circumstances can happen *through* common formal and performative techniques that may look like mere distractions or ways to disguise what is really going on. In fact, some functions of law in our society may depend on

Critical Legal Theory (without Modifiers) in the United States, 13 J. POL. PHIL. 99 (2005). It is also central to the approach of economic pragmatists. See generally Richard A. Posner, *Reasoning by Analogy*, 91 CORNELL L. REV. 761 (2006) (reviewing LLOYD L. WEINREB, *LEGAL REASON: THE USE OF ANALOGY IN LEGAL ARGUMENT* (2005)). Judge Posner argues that categorical doctrinal reasoning "is a surface phenomenon," a form of judicial rhetoric that "tends to obscure the policy grounds that determine the outcome of a case." POSNER, *supra*, at 765.

12. See generally BRIAN Z. TAMANAHA, *LAW AS A MEANS TO AN END: THREAT TO THE RULE OF LAW* (2006).

these techniques, not because they confer logical-rational correctness or predictability, but because they may contribute to judicial impartiality and because they may provide a mechanism through which official legal decisions take on some of the affective power of lived experience and so generate the personal and collective commitment that leads to social transformation. Particularly as the social influence of extralegal religious and community norms becomes more evident and opposed to judicial articulations of the secular “rule of law,” it seems important to consider aspects of adjudication that may elicit similar forms of social commitment.¹³

The “magic” that I mean to reference as my point of anthropological comparison is a broad category. Magic, in this sense, encompasses practices in diverse cultures that aim to achieve some kind of transformative effect through a combination of physical and verbal techniques that are distinct from ordinary technical interventions. These practices have sometimes been categorized separately as magic, sorcery, and shamanism; but, like the Realists, I shall sweep them all under the heading of “magic.”¹⁴ I will also consider some ritual practices aimed at producing transformations that even Realist skeptics might be prepared to recognize as in some sense real, such as initiation rites. Not all “ritual” is “magic,” and perhaps not all magic requires ritual, but most of my analysis will focus on the intersection of these two categories. I explore practices in other settings that are understood to transform the meaning of a set of circumstances through a combination of performative, formal, metaphoric, and temporal techniques in order to illuminate the use of similar techniques in adjudication. For instance, I argue that in some specific ways, adjudication resembles the rites conducted by Trobriand magicians to protect the yam

13. In another time of historic conflict between social beliefs and constitutional legal order, legal historian Calvin Woodard similarly pondered the social effects of what he called the “secularization” of law through our broad adoption of the Realists’ critique. See generally Calvin Woodard, *The Limits of Legal Realism: An Historical Perspective*, 54 VA. L. REV. 689 (1968).

14. These terms have had various and shifting meanings in anthropological usage over the past century and a half. Some scholars use them in taxonomic fashion to differentiate specific practices. See E.E. EVANS-PRITCHARD, *WITCHCRAFT, ORACLES, AND MAGIC AMONG THE AZANDE* 176 (abridged ed., Clarendon 1976) (1937) [hereinafter EVANS-PRITCHARD, *WITCHCRAFT*] (“Witchcraft, oracles, and magic are like three sides to a triangle. Oracles and magic are two different ways of combating witchcraft The use of magic for socially approved ends, such as combating witchcraft, is sharply distinguished by Azande from its evil and anti-social use in sorcery”); BRONISLAW MALINOWSKI, *ARGONAUTS OF THE WESTERN PACIFIC* 72-76 (Routledge 1961) (1922) [hereinafter MALINOWSKI, *ARGONAUTS*] (describing differentially sorcerers and witches against the background of general magic among the Trobriand Islanders). More recently, some scholars have suggested that these terms are analytically empty because they create false categories imposed by Western scholars on other cultures’ “intellectual universes.” D.F. Pocock, *Forward* to MARCEL MAUSS, *A GENERAL THEORY OF MAGIC* 8-9 (Robert Brain trans., Routledge & Kegan Paul 1972) (1950). As Bruce Kapferer remarks, terms like “sorcery” and “magic” are burdened by nineteenth century negative prejudices of anthropological discourse in which they were originally defined and with recent “valorization[s]” by post-modern critics and are further problematic because they group together highly diverse practices. BRUCE KAPFERER, *THE FEAST OF THE SORCERER: PRACTICES OF CONSCIOUSNESS AND POWER* 8-9 (1997) [hereinafter KAPFERER, *FEAST OF THE SORCERER*].

harvest from depletion.¹⁵

Much of what I discuss as magic might also be analyzed as aspects of religion. By speaking in terms of ritual magic I do not mean to endorse a clear objective distinction between the practices or concepts of magic and religion. Indeed, the breakdown of such an imagined boundary is part of the modern anthropological discourse I embrace here.¹⁶ By sticking with the label of magic, I mean to signal that I am considering aspects of legal practice that when recognized have generally been vilified as irrational and out of place in legitimate democratic institutions. I also mean to stress my debt to the Realist thinkers who first systematically critiqued legal magic.

This article proceeds in four parts. Part I traces the techniques that adjudication and ritual magic have in common. Both law and magic enact performances to transform reality. In law, those performances are trials, hearings, arguments, rulings—all the public processes of adjudication. These legal and magical rituals are characterized by a rigidly formal structure that diverges from everyday behavior and language and by a transgressive approach to historical time. The efficacy of both magic spells and judicial determinations partakes of the “performative” force of language, so that when judges and sorcerers speak in the proper ritual contexts, the act of saying it *does* make it so.¹⁷ And both law and magic make use of metaphors to accomplish transformations.¹⁸

In Parts II and III, I show how the Realist critique of adjudication parallels the Victorian anthropological view of magic and offer an alternative approach culled from twentieth-century anthropology. The Victorian scholars who developed the academic discipline of anthropology saw magic as false science.¹⁹ But there are other ways to conceptualize magic. Bronislaw Malinowski, for instance, observed that among the Trobriand Islanders he studied, magic worked alongside the accurate empirical observations and technical capacity needed to build seaworthy canoes and cultivate productive

15. I do *not* intend to include in my comparative category the sort of entertainments presented on Broadway, Las Vegas, or at children’s birthday parties that are unambiguously understood to be illusions even by the youngest audience members and certainly by the magicians. There may well be things to be learned from a comparison of legal proceedings and Western stage magic. See generally LAW AND MAGIC: A COLLECTION OF ESSAYS (Christine Corcos ed., 2008). In this article, however, I focus on practices that are in their own contexts regarded as effectively restorative or transformative even if they are also understood to rely partly on illusion.

16. See MARY DOUGLAS, PURITY AND DANGER: AN ANALYSIS OF THE CONCEPTS OF POLLUTION AND TABOO 18-29 (Taylor & Francis 2001) (1966) [hereinafter DOUGLAS, PURITY]; STANLEY JEYARAJA TAMBIAH, MAGIC, SCIENCE, RELIGION, AND THE SCOPE OF RATIONALITY 1-8 (1990) [hereinafter TAMBIAH, MAGIC].

17. J.L. AUSTIN, HOW TO DO THINGS WITH WORDS 7-8 (2d ed. 1975). J.L. Austin coined the term “performative” to designate utterances that simply by being spoken accomplish an act of some sort. *Id.* at 4-6.

18. Compare Cohen, *supra* note 4, at 812, (criticizing “the vivid fictions and metaphors of traditional jurisprudence”), with MALINOWSKI, ARGONAUTS, *supra* note 14, at 443-52 (observing use of metaphor in spells employed in Trobriand Magic).

19. See EDWARD B. TYLOR, PRIMITIVE CULTURE 112-15 (1889).

gardens.²⁰ The magic Trobrianders practiced over their canoes and crops, therefore, was something other than a misguided attempt to interfere with natural processes.²¹ Trobriand magic was “a special department; . . . a specific power, essentially human, autonomous and independent in its action.”²² Malinowski observed that magic had an organizing and regulating effect on activities, like gardening and Kula voyaging, that were central to the Trobriand economy. Thus, among other early field anthropologists, he opened up the possibility that instead of ineffective science, magic might be an effective social and cultural practice.²³

Part IV reconsiders legal magic through this alternative theoretical lens. First, I theorize an authentic ritual-magic mode of legal practice. Then, I propose three potential ways to re-conceptualize legal magic’s role in adjudication: (1) as a way to imbue official articulations of legal norms and decisions with the affective moral force of lived experience, (2) as an institutional practice that may enhance judicial impartiality, and (3) as a method for symbolically reversing injuries.

In this light, legal magic may contribute to a theory of *how* legal practices influence culture. Law is not just regulatory. Legal institutions not only sanction and constrain our world, they also generate and transform it. As Robert Cover expressed, law and culture together constantly create and recreate “nomos”—a normative universe of legal meaning—beyond state-enforced legal power.²⁴ This insight is not confined to highfalutin legal theorists. The “and” in the phrase “law *and* order” reflects our common understanding that there is more to law than maintaining social order. But how does law do the subtle work of cultural transformation? A well-developed body of scholarship analyzes law’s absorption of social norms and production of social meaning through the narrative structure of case law.²⁵ Outside of narrative theory, however, consideration of law as a socially constituting force mostly takes place at a high level of abstraction.²⁶ In this conceptual vagueness, law’s

20. See MALINOWSKI, ARGONAUTS, *supra* note 14, at 420, 427. “The natives realize quite well that the speed and buoyancy of a canoe are due to the knowledge and work of the constructor,” he explained, “they are well acquainted with the properties of good material and of good craftsmanship.” *Id.*

21. MALINOWSKI, ARGONAUTS, *supra* note 14, at 427.

22. MALINOWSKI, ARGONAUTS, *supra* note 14, at 427.

23. See TAMBIAH, MAGIC, *supra* note 16, at 42-64.

24. Robert M. Cover, *Nomos and Narrative*, 97 HARV. L. REV. 4, 4-10 (1983) [hereinafter Cover, *Nomos*].

25. See generally ANTHONY G. AMSTERDAM & JEROME BRUNER, MINDING THE LAW 194-216 (2000); Milner S. Ball, *Just Stories*, 12 CARDOZO STUD. L. LIT. 37 (2000); James Boyd White, *Constructing a Constitution: “Original Intention” in the Slave Cases*, 47 MD. L. REV. 239 (1987).

26. See Annelise Riles, *Representing In-Between: Law, Anthropology, and the Rhetoric of Interdisciplinarity*, 1994 U. ILL. L. REV. 597, 600 (1994) (contending both critical and classical legal scholarship operate “in the realm of grand and generalized assumptions without precise consideration of how ideas or fragments of ideas migrate across the boundary that, we believe, distinguishes law from everyday life”); cf. LAWRENCE ROSEN, THE ANTHROPOLOGY OF JUSTICE: LAW AS CULTURE IN ISLAMIC SOCIETY xiii

constitutive functions pale beside the interpretive and enforcing modes that are explored in precise terms from a variety of theoretical perspectives.²⁷ Using anthropological theories of magic, I consider how legal magic may help shape social reality in ways that are neither wholly discursive nor wholly coercive.

II. PRACTICAL SIMILARITIES OF LAW AND MAGIC

*Rattan here now, rattan here ever, O rattan
from the north-east!
Come, anchor thyself in the north-east.
. . . I shall fasten in the north-east.
My bottom is as a binabina stone, as the
old dust, as the blackened powder
My yam-house is anchored; my yam-house is as the immovable rock . . .*

Trobriand spell²⁸

I want to begin my reanalysis of legal magic by setting forth some practical ways in which adjudication resembles ritual magic. In this endeavor, I am indebted to the Realist critique of legal magic, which was often quite concrete. For instance, Felix Cohen and Jerome Frank did not merely complain that judges used “magic words” in a general sense. They focused on particular aspects of judicial language—metaphor and the use of words to “produce an action and not to describe one”—that are also found in magic.²⁹ The Realists, however, made no attempt to systematically compare the techniques of law and magic, nor did they explicitly identify techniques of legal magic as such or discuss how those techniques cut across the different aspects of adjudication—doctrinal reasoning, precedential deference, and procedural formality—that they criticized as magical.

Aided by the Realist critiques and analyses of magic and ritual in other cultural contexts, I have identified five techniques of legal magic: enacting performance, heightened formality, performativity, temporal play, and

(1989) (arguing anthropologists tend to treat formal legal proceedings as *sui generis* and thus uninteresting or opaque in terms of law/culture boundary). Legal scholars, meanwhile, avoid explicating sociolegal interactions because they regard them as irrelevant to “the course of actual legal decisionmaking” or fear reducing law to an economic, political, or psychological epiphenomenon. *Id.*

27. There are exceptions that provide excellent concrete analysis of law’s constructive techniques. See generally PATRICIA EWICK & SUSAN S. SILBEY, *THE COMMON PLACE OF LAW* 95 (1998) [hereinafter EWICK & SILBEY, *COMMON PLACE*]; Donald R. Korobkin, *Bankruptcy, Law, Ritual And Performance*, 103 COLUM. L. REV. 2124 (2003); Steven L. Winter, *Transcendental Nonsense and the Stakes, Metaphoric Reasoning and the Cognitive Stakes for Law*, 137 U. PA. L. REV. 1105 (1988).

28. I BRONISLAW MALINOWSKI, *CORAL GARDENS AND THEIR MAGIC* 221 (1965) [hereinafter MALINOWSKI, *CORAL GARDENS I*].

29. FRANK, *supra* note 7, at 85 (quoting *ENCYCLOPEDIA BRITANNICA* 308 (11th ed. 1911) (discussing “Magic”).

transformative analogy. Below, I consider the role of each technique, first in comparing a Supreme Court case to a Trobriand harvest rite, and then in greater detail in a variety of adjudicative contexts. My goal in this article, however, is not to exhaustively describe the role of each of these techniques in adjudication. I offer this categorical breakdown at the outset to identify concrete practices behind the general intuition that there is something magical about adjudication and to establish that the similarities between law and magic do not dissolve upon closer study.

All five techniques of legal magic are exemplified in the similarities between the Trobriand spell quoted at the top of this section, employed to protect the village yam harvest, and the Supreme Court decision in *Munn v. Illinois*,³⁰ holding that privately owned granaries are public warehouses subject to state regulation.³¹ Both the spell and the decision require enacting performances to transform reality. To protect a Trobriand yamhouse against depletion, the magician must appear in person to perform the spell and the rite's prescribed actions. Similarly, transforming a Chicago granary into a "public warehouse," in order to protect the stores from exorbitant storage fees, requires a public appearance where justices and others perform set gestures and utter prescribed words. Both of these performances are rigidly formalized in ways that set them apart from ordinary actions and speech. Among other things, they are extraordinarily susceptible to formal limits on time and place. Unless the magician invokes the yamhouse spell at dawn inside the empty storehouse, his words accomplish no protective effect. The transformation of the granary can only take place if the justices of the Court deliver their decision within the walls of the Supreme Court building. If instead the justices told their neighbors that the granary is a public warehouse, or even said so in the public press, their words would not change the status of the building or the grain inside.

Within the appropriate spatial and temporal contexts, however, the magic spell and the judicial opinion exhibit an unusually strong performative force. When the magician completes his yamhouse rite, the storehouse is secure. The rite itself brings about that security. Both the yamhouse spell and the majority opinion in *Munn* are semantically structured as descriptions of external reality; but it is a reality that is aimed for, merely desired, until the words effectuate it. The yamhouse "is as a *binabina* stone"; the grain elevator is "in the very gateway of [public] commerce." Like the Trobriand spell, the *Munn* opinion does not merely describe or predict a change in the building's status, it conduces it. Through association to the dense volcanic (*binabina*) rock, the yamhouse becomes heavy and "anchored," just as through association to other publicly regulated enterprises, the grain warehouse becomes "public."³² Of

30. 94 U.S. 113 (1876).

31. *Id.* (rejecting due process challenge to price ceilings for privately held granaries).

32. *Id.* at 127-32.

course, practical actions follow so that the villagers fill up the yamhouse and refrain from partaking of its stores while government agents monitor Munn's storage charges. Only the rite or adjudication itself, however, can trigger these actions, at least to the extent that a culture recognizes the power of magic or the rule of law.

In effecting their performative outcomes, both the Trobriand magician and the *Munn* Court pair the constricted real-time limits of their performances with a transgressive approach to historical time. The Trobriand spell invokes long dead ancestors.³³ Likewise, the justices in *Munn* appropriate precedential ancestors' words and explicitly name those ancestors in order to increase the weight of their own legal words.

Finally, both the yamhouse spell and the *Munn* decision transform through analogy. The Trobriand magician uses the darkness and weight of the volcanic *binabina* stone and the resilience of the rattan cane, substances traditionally invoked in other magic rites to conduce endurance and stability. Justice Waite, writing for the *Munn* majority, invokes the qualities of previously designated "public" businesses and transfers them to Munn's warehouse. Unlike metaphors in other contexts, these metaphorical associations have a kind of creative power. They transform through analogy. "Every bushel of grain for its passage," says the *Munn* majority, "'pays a toll, which is a common charge,' and therefore, according to Lord Hale, every such warehouseman 'ought to be under public regulation, viz., that he . . . take but reasonable toll.'"³⁴ When the majority brings the warehouse within the judicial ancestor's description of "public" transportation, the analogical transformation is complete.

Thus, all five techniques of legal magic work together in *Munn* to generate the transformative effect of that decision. Each of these five techniques can also be considered independently in different adjudicative contexts.

A. Enacting Performance

Though much in law depends on written words—indeed "papers" might fairly be called a legal fetish—live ritual performance remains central to adjudication as legal transformations require it.³⁵ For instance, a person's criminal act, arrest, or full confession does not make her a felon. To become a

33. Trobriand garden magic spells are largely attributed to an ancestral hero, Tudava. MALINOWSKI, CORAL GARDENS I, *supra* note 28, at 7. "The first garden magician received the spells from Tudava himself and the formulae are still handed down in the mother-line." *Id.* Tudava's name appears in a spell from a second anchoring rite that follows the one quoted here. *Id.* at 223.

34. *Munn*, 94 U.S. at 132.

35. This aspect of law has been generally underexamined in a world of legal scholarship that focuses on textual interpretation and abstract principles. There, however, are some exceptions. See generally OSCAR CHASE, LAW, CULTURE AND RITUAL: DISPUTING SYSTEMS IN CROSS-CULTURAL CONTEXT (2005); MILNER S. BALL, THE PROMISE OF AMERICAN LAW: A THEOLOGICAL, HUMANISTIC VIEW OF LEGAL PROCESS (1981); Bernard J. Hibbitts, *Making Motions: The Embodiment of Law in Gesture*, 6 J. CONTEMP. LEGAL ISSUES 51 (1995).

felon, a person must undergo a particular ceremony called a conviction that can only take place through a live, real-time enactment. The majority of those transformed from citizen to convict now bypass the elaborate performance of a trial. But even conviction through plea agreements requires at least two ceremonies—the allocution and the sentencing—both of which require the accused, a judge, and at least one attorney for “the people.” Often, subsequent appellate and post-conviction rituals take place involving even more judges and attorneys. Indeed, the fact that our criminal justice system remains stubbornly committed to live public performance, despite the shift from adversarial trials to plea bargaining, is one example of the primacy of real-time enactment in adjudication.

Against the general trend away from live performance in other areas where important social decisions are made, adjudication’s reliance on these rites becomes all the more striking. Today, many governmental functions seem to rely on more abstract, informal, and intangible methods of governance. For instance, various sorts of licensing, application, and registration processes—even voting—can now be accomplished by phone, mail, or computer. Most people rarely see a bank employee in person anymore. The exchange of very large sums of money and significant property routinely takes place electronically. Internet college courses abound. Nevertheless, adjudication remains live, real-time, and formal.

There is a sense that courtroom performance persists not merely as a matter of tradition and ceremony but rather because without ritual, there could be no adjudication.³⁶ Consider that even criminal defendants who abscond during trial cannot be convicted without the completion of the trial through the unusual device of trial *in absentia*, in which all the other legal actors involved perform their roles to completion.³⁷ Likewise, a civil defendant cannot be held liable or

36. The singularity of legal rituals is further emphasized by the way many courts continue to shrink from virtual representations. Across the country, television and even still cameras are still locked out of federal courts that insist on the quaint use of sketch artists. At the United States Supreme Court, visitors are not permitted to take notes, although one can now hear the audio recordings of Supreme Court arguments online. When I tried to obtain a tape of an argument I made in the Eleventh Circuit, however, I was informed by the court clerk that the recording was intended for the exclusive use of the judges and that no one else, including the attorneys whose words were on the tape, could obtain a copy. Much governmental work is done behind closed doors, where the press and general public are forbidden to watch. Adjudication, however, is a public ritual. The unwillingness of the key participants to allow secondary representations thus is not a matter of secrecy. It suggests both that there is something irreducible about the live ritual and that its procedures might be disrupted by reproduction.

37. See FED. R. CRIM. P. 43. Rule 43 requires a defendant’s physical presence at the arraignment, at the time of the plea, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by the rule. FED. R. CRIM. P. 43(a). “The further progress of the trial to and including the return of the verdict shall not be prevented and the defendant shall be considered to have waived the right to be present when a defendant, is voluntarily absent after the trial has begun.” FED. R. CRIM. P. 43(c). At common law, it was generally held that no valid felony conviction could be obtained without the defendant’s presence. In 1912, the U.S. Supreme Court authorized the limited exception codified in Rule 43. *Diaz v. United States*, 223 U.S. 442, 455 (1912). The Court explained that if a

deprived of property until the ceremony of adjudication is completed with all the necessary actors performing all the essential procedures.³⁸

Though legal procedure has been drastically streamlined throughout the last century, the emphasis seems to have been mainly on shortening and simplifying written pleadings, jettisoning complicated forms, and replacing them with more direct communication. Remarkably, face time in courts seems to have been only minimally affected.³⁹ Even with the increase in caseloads, trial courts still conduct trials pretty much as they always did. True, some appellate courts now hear arguments in only a minority of cases; but given their heavier caseloads, the time these courts sit to hear argument may actually have increased.⁴⁰ All in all, it seems remarkable that despite decreased live interaction in so many other professional settings—e.g., between doctors and their patients, bankers and their customers—lawyers, and particularly courts, have maintained live performances as the central and definitive aspect of their craft.

B. Heightened Formality and the Creation of Ritual Time and Space

Rigid adherence to idiosyncratic and intricate procedural forms is a hallmark of magic, which, as Annette Weiner puts it, proceeds through “a poetics that cannot be altered.”⁴¹ Legal procedure is likewise strictly formal. Moreover, the particulars of magical and legal forms contain certain points of resemblance, specifically in the way both create language sequences that can be referenced across time and that trigger complex narrative associations.

Legal and magic rituals both exhibit extraordinary sensitivity to time and place. In the judicial process, it matters enormously *when* and *where* an argument is made or a fact revealed. In most other important governmental and private decision making neither the time nor the location of an expressed idea matters much at all. There is a need to get the information to the decision-makers and a practical need for a decision at some point. But otherwise, it does not matter whether an idea is expressed in June rather than January or in a

defendant voluntarily chooses to leave his trial in progress, the absence “operates as a waiver of his right to be present, and leaves the court free to proceed with the trial in like manner and with like effect as if he were present.” *Id.* (emphasis added). More recently, the Court struck down a conviction in absentia as invalid because the defendant absconded before trial began, holding that under those circumstances Rule 43 prohibits conviction without the defendant’s actual presence. *Crosby v. United States*, 506 U.S. 255, 262 (1993).

38. I am reminded of my nephew, Reuben, whose grandparents had been part of his first five birthday celebrations. Having moved across the country during his sixth year, he was told that Grandma and Grandpa would not be attending his upcoming birthday party. This was out of the question, he explained, because without them, he could not “get six.”

39. The United States Supreme Court is an odd exception where over the past couple of decades, the caseload has decreased drastically.

40. William Glaberson, *Caseload Forcing Two-Level System for U.S. Appeals*, N.Y. TIMES, Mar. 14, 1999 at A1.

41. Annette B. Weiner, *From Words to Objects to Magic: “Hard Words” and the Boundaries of Social Interaction*, in DANGEROUS WORDS: LANGUAGE AND POLITICS IN THE PACIFIC 181 (Donald Lawrence Brenneis & Fred R. Myers eds., 1984).

coffee shop rather than an official government building.⁴² In adjudication, however, as in magic, such contextual distinctions make the difference between success or failure. Strict procedural rules about waiver, exhaustion, and preservation mean that unless lawyers present their arguments and facts at exactly the time and place determined by the legal rules, they will be ineffective, regardless of the substance.

C. Performativity

The characteristic power of legal and magical words to do things, as well as to express them, is what ordinary language philosophers call “performative” speech.⁴³ In the paradigmatic case of performative utterances, no physical or technical activity is needed; the words do the work.⁴⁴ While performatives exist in everyday speech, this type of utterance, and a focus on the performative aspect of language in general, is characteristic of both legal and magical transactions. When a Trobriand magician says “[i]t shall be anchored,” he is not just talking about the yamhouse; he is doing something with words. Likewise, when a judge says “so ordered,” her words themselves perform the act.⁴⁵

The performative power of language is extraordinarily sensitive to factors outside the speaker’s conscious intention. For example, a magician’s spell will be ineffective if she mispronounces a word, forgets to perform a gesture that is part of the associated rite, or says the words at the wrong time or place. Conversely, if a magician accurately pronounces the spell at the appropriate time and place, with the prescribed gestures, and in the proper condition, the spell becomes effective regardless of whether she intended to make it operative. Once activated, magic remains in effect until the proper countermagic is worked, even if the magician has second thoughts.

Performative words are similarly sensitive to surrounding circumstances in the legal arena. If the conditions are not properly set, the words of a judge lose their performative power. In one instance, a magistrate’s attempted exercise of his contempt power was found to be invalid because it took place in a holding

42. Legislative process also proceeds to some extent by ritual, but less so. The formal hearing process memorialized in a legislative record has a unique epistemological status in subsequent adjudication, but during the drafting of statutes, legislators remain free to draw upon any sources of information at any time they choose, within practical limits.

43. See AUSTIN, *supra* note 17, at 4-7.

44. AUSTIN, *supra* note 17, at 6-7.

45. MALINOWSKI, CORAL GARDENS I, *supra* note 28, at 224. As suggested by the examples given above, performative language in law and magic tends to concentrate on a particular kind of verbal act—namely, the transformation of some person or object from one status or identity to another. Other classic examples are when the jury foreperson announces “we find the defendant guilty,” transforming a citizen into a convict, and when a magician casts a charm or spell on an object or person with words like, “I charm thy inside of canoe.” See MALINOWSKI, ARGONAUTS, *supra* note 14, at 440.

cell that “connotes a *jail* rather than a *court*.”⁴⁶ If the conditions are right, however, judicial words take effect whether or not the judge who uttered them meant them to do so. This is the problem satirized in the tale of the sorcerer’s apprentice, famously rendered in the Disney cartoon, in which the unpracticed initiate “turns on” the wizard’s magic with a spell he has overheard in order to get supernatural assistance with his chores, but then realizes he does not know how to turn it off. The magic he has invoked has set the mops and buckets in motion, and on they will march until the spell is broken, turning the newly washed floor to watery chaos.

The unruly potential power of judicial words was brought home to me by a story related by a trial judge. One day in court, a lawyer was not responding to the judge’s instruction to cease a line of questioning during cross-examination. The judge sustained numerous objections by the opposing attorney to no avail. After admonishing the questioning lawyer to move on to other topics, still to no avail, the judge remarked, mildly as he remembered it, “You’re in contempt, you know.” Now, the judge meant this statement descriptively. As he explained it, he meant to say that the lawyer’s deliberate refusal to follow the judge’s repeated instruction was the kind of behavior that could support the judge’s holding him in contempt of court if the judge chose to do so. How the lawyer understood the judge’s words at the time, I do not know. In any case, he ceased his objectionable questions and the trial proceeded. After court had adjourned for the day, the court reporter came up to the judge and asked him if he had held the lawyer in contempt. The judge replied that he had not and thought no more about it.

It was a long trial that went on for some time after this incident and finally concluded. Years later, the judge was having lunch with one of the other attorneys who had tried the case. They were reminiscing about the trial, and discussing some other contretemps, when the judge’s lunch companion suddenly said, “Oh, yes, that was the day you held Lawyer X in contempt and then had it taken out of the record.” The judge, flabbergasted, protested that he had done no such thing. “Oh yes you did,” said the lawyer, “You said he was in contempt. We all heard it and we looked for it in the record later, but it was not there.”

Thinking back, the judge now realized what must have happened. After speaking with him that evening, the court reporter, thinking he was doing the judge a favor by conforming the record to the judge’s intention omitted the words “you’re in contempt” from the day’s transcript. The judge had meant his statement only in a denotative, or, as Austin calls it, “constative,” sense.⁴⁷ He had meant to say that he believed the lawyer’s conduct was bad enough to warrant holding him in contempt and perhaps to warn him that such a holding

46. *Thompson v. Stahl*, 346 F. Supp. 401, 404 (W.D.N.C. 1972).

47. AUSTIN, *supra* note 17, at 3.

might follow if he did not stop what he was doing. The lawyers for the other side, however, took it as a performative utterance. To them the judge's words had invoked his official power to hold the offending lawyer in contempt. In so doing, he had enacted a kind of change in the lawyer's status and his relationship to the court from which all kinds of other consequences would necessarily flow and which would require other official action to reverse. When none of those consequences were forthcoming, they checked the official record and were surprised to find that the "magic words" the judge had uttered had disappeared. The court reporter had apparently sensed an ambiguity. Being unsure whether the judge had meant to cause the transformation his words seemed to invoke, he had inquired, and upon finding that the judge had not, had taken it upon himself to remove the effective words from the trial record.

There are two interesting things here. First, there is the illustration of the performative aspect of judicial language. That is, as the lawyers understood it, by saying, "You're in contempt," the judge was not just saying something, he was doing something. His words transformed the legal and social reality. But even more interesting, I think, is the fact that faced with a conflict between the judge's intent and the conventional effect of the judge's words in context, the court reporter thought it wise to get rid of the words altogether. It is, after all, a court reporter's job to record faithfully every word spoken during a trial. Deleting something the reporter knew the judge said was an extraordinary step. Curiously, it could indicate that the reporter had either an unusually informal view of court proceedings or a highly developed sense of the conventional power of those proceedings verging on ritual magic. Taking the informal view, the reporter may have felt that the only thing that really mattered was what the judge personally intended at the time that he said, "You're in contempt." Or, even more extreme, the reporter may have thought that although the judge had originally meant to hold the lawyer in contempt at the time he made his declaration, he had apparently rethought the matter, so there was no point in leaving the original utterance in the record because the judge no longer intended to enforce it.

But notice that with this last suggestion, a bit of the magical perspective has begun to creep back into the reporter's choice. For if the words really had no force without the judge's intent behind them, then why bother to delete them? Well, you might say, in order to get rid of a needless ambiguity. Perhaps, but remember that much of what is said in court every day leads to ambiguities that will later elicit hours and pages of conflicting interpretations by lawyers. It is certainly not the reporter's job to forestall those arguments by deleting ambiguous statements. No, I cannot help but think that by striking that sentence from the record, whether consciously or not, the reporter was acknowledging the extraordinary conventional power of the judge's words. He was acting as if the words themselves, uttered in the appropriate formal context,

had the power to disrupt reality, even if the person who spoke them meant no such thing. It, therefore, was better to take the extraordinary step of removing those dangerous words from the trial record. The very existence of the words in the record created a significant enough possibility of unwanted results that the reporter thought it prudent to excise them.

Now, again, you may say that the reporter was just trying, perhaps wrong-headedly, to conform the record to what the judge had meant to say and do, and did not have any idea about performative, let alone magic, words. Moreover, if he had left the words in the transcript and the other lawyers had pointed them out, the judge could have corrected the matter himself by explaining on the record that he had not intended the words to have the effect of a ruling. But notice again the irreducible performative effect of the words and its similarity to a magic spell. For to actually undo the words' potential legal effect, the judge would have to repudiate them on the record, in open court, before both parties or their representatives—that is, in the proper ritual context. To neutralize them, he would have to invoke an equal degree of the conventional power that is only available to him during a certain kind of publicly performed ritual. The judge could privately tell every one of the parties that he had not meant the words to have the effect of a contempt citation, and he could publish his true intentions in the next day's newspaper, but such explanations would not reliably cancel the performative legal effect of the words uttered in their ritual context. In this sense, at least, the court reporter's action was reasonable, if improper.

D. Temporal Play

Both magic and law obsessively trace lineages of power, and in so doing subdue the ordinary sense of temporal order. Shamans converse with ancestors in their ritual search for cures, and judges seek guidance from men who sat on their court a hundred or more years ago: options generally unavailable to ordinary people making decisions.⁴⁸ Precedent makes judges time travelers.

In spells and judicial decisions, there are strict rules about which lines of authority count. Spells contain obligatory and formalized references to ancestors and, particularly, previous owners of the spell, which mirror the idiosyncratic adjudicative practice of authorizing legal decisions by citing

48. Moreover, the magician's forebears remain accessible and active in the ongoing use of their spells, much as judges from long ago continue to exercise power over the present through their precedential opinions.

In the chanting of spells, words and objects that absorb them must become powerful enough to activate a range of agents . . . in the physical environment; e.g., birds animals, plants, insects, and even the deceased former owners of the spells (ancestors), all of whom exist outside the daily life of social interaction.

Weiner, *supra* note 41, at 182.

binding precedent.⁴⁹ Some local forms of magic can be performed only by someone descended from the original ancestor who handed down the rites. “[T]he magic is given by one man to another, as a rule by the father to his son or by the maternal kinsman.”⁵⁰ It is not simply a matter of invoking traditional authority or relying on conventional wisdom. Nor is it a question of adopting the reasoning of someone considered to be particularly wise or trustworthy. It would be helpful if the nineteenth-century judge quoted had a reputation as a sound thinker, but in legal terms, it matters far more that he sat on the same or a higher court as the judge who invokes his words.

The doctrine of judicial precedent is generally thought of as a mechanism for constraining judges’ discretion; but by analogy to magical practices, we can see the ritual invocation of precedent as a symbol and source of judicial power. Although precedent changes and develops over time, judges reach back to appropriate the authority of their predecessors for current legal doctrine. Likewise, “each spell shows unmistakable signs of being a collection of linguistic additions from different epochs.” Apparently, like case law, magic spells contain both archaic language and contemporary phrases added in more recent usage. Thus, like a common-law rule, “a spell is constantly being remoulded as it passes through the chain of magicians, each probably leaving his mark, however small, upon it.” Nevertheless, such spells—and common law—are regarded as timeless and authorized by the ancestors who originated them.⁵¹

Adjudication’s combination of this transgressive time transcendence with rigidly constrained time limits is characteristic of the “liminal” quality of rituals. Precedents may be timeless, but if the party has rested, if the brief has been filed, if the red light on the lectern is on, then time is up. Generally, even if some important new evidence arises, it is considered “out of time.” Magic rituals are likewise strictly scheduled, with rigid orders of actions that must be accomplished at particular times and in a particular sequence to achieve the desired effects. Patricia Ewick and Susan Silbey suggest that “legality’s timeless, transcendent status as something distant and removed from everyday life is achieved not by representing it as intangible, but by associating it with specific material phenomena: buildings, courtrooms, benches, pews, tables, files, codes and prison cells.”⁵² The hyper-materialized space and sharp temporal limits on the one hand, and the sense of escape from ordinary space-time on the other, emphasize the separation of the ritual from ordinary life.

49. See *Hart v. Massanari*, 266 F.3d 1155, 1165-69 (9th Cir. 2001) (regarding the development of common law precedential practice). Arguably, the concept of precedent adds weight to judges’ language as “speech acts.” See Jessie Allen, *Just Words: No-Citation Rules in the Federal Courts of Appeals*, 29 VT. L. REV. 555, 604-10 (2005).

50. See MALINOWSKI, ARGONAUTS, *supra* note 14, at 400.

51. See MALINOWSKI, ARGONAUTS, *supra* note 14, at 428-29.

52. EWICK & SILBEY, COMMON PLACE, *supra* note 27, at 95.

E. Transformative Analogy

Anthropologists describe the language of magic as quintessentially metaphorical, imparting qualities observed in one context or object to another. As Michelle Rosaldo explains, magic creates its transformative effects by a kind of categorization. Spells invoke images from a diverse array of objects and experiences. Then, “these images, in turn, are regrouped and organized in terms of a small set of culturally significant and contextually desirable themes.”⁵³ Is that not also an apt description of the way in which doctrinal reasoning functions in law?

In both legal and magical analogies, the diversity of the source objects contributes to the power of the eventual association. It is as though the greater the distance between the objects likened to one another, the more adhesive force their eventual association carries. Like a sort of poetic law of kinetic energy, the farther apart the assimilated objects, the more force their connection generates, as though their relationship is strengthened by having overcome the gap between them.⁵⁴ The diversity of the objects and situations analogized serves to emphasize the organizing power of the legal rule or magic rite that draws them together.

Legal and magical metaphors often assimilate things from disparate realms. In particular, metaphor is used to connect human ideals and problems with concrete physical experience.⁵⁵ For instance, magic assimilates the spatial characteristic of variable length with longevity, so that a piece of twine or a line in your palm may indicate whether you will live a long time. An indentation in a person’s skin and a ball of string are not obviously similar. Their association relies on a pre-selected organizing principle that relates both to a central human concern. The problem of mortality relates the palm line and the twine as both are linear objects that vary in length and thus, may represent the hoped-for long life; but the related objects differ in more ways than they are the same.

When objects are linked in either magical or legal associations, only the

53. Michelle Z. Rosaldo, *It’s All Uphill: The Creative Metaphors of Llongot Magical Spells*, in *SOCIOCULTURAL DIMENSIONS OF LANGUAGE USE* 178 (M. Sanches & D. Blount eds., 1975).

54. William Empson makes a similar point using a mechanical, as opposed to a spatial, image. He says that the use of a metaphor generates a feeling of “resistance” to the assimilation of disparate referents in a “false identity.” Weiner, *supra* note 41, at 175 (quoting Empson). Processing the metaphor entails mentally shifting “into a higher gear, because the machinery of interpretation must be brought into play,” which then generates “a feeling of richness about the possible interpretations of the word.” *Id.*

55.

[E]ach magical system has necessarily set up categories of plants, minerals, animals, parts of the body, dividing them into groups which do or do not have special or experimental properties. On the other hand, each system has set about codifying the properties of abstract things—geometrical figures, numbers, moral qualities, death, life, luck, etc. And the two sets of categories have been made concordant.

MAUSS, *supra* note 14, at 77.

qualities the magician or judge seeks to invoke are activated. Otherwise, the world would present a vast, chaotic network of infinite correspondences and disconnects. For instance, if clay is being used as a substance that will affect some other object or person by association, the magician will concentrate only on its coolness, weight, or color, depending on the effect he seeks to create or amplify.⁵⁶ Malinowski describes the way a Trobriand canoe builder “takes his adze (ligogu) and wraps some very light and thin herbs round the blade with a piece of dried banana leaf, itself associated with the idea of lightness” before beginning to cut the canoe body out of a log.⁵⁷ Lightness is a favorable characteristic in a canoe, and it is a characteristic of the herbs and leaves used to impart that quality. The plants, however, have other qualities that are not desirable in a canoe, such as a tendency to break apart or tear easily. There are also many ways in which a canoe and some leaves and herbs seem simply unrelated. They are not objects that one would necessarily group together as sharing any essential quality without knowing about the goal of the building rite to lighten the canoe and the traditional symbolic association of the herbs and leaves with lightness.

Similarly, whether the facts of different lawsuits are analogized or distinguished depends on the legal analysis at stake. Even within a single case, whether objects and circumstances are viewed as more alike than different depends on the purpose of the comparison. When the victims of handgun violence sued gun manufacturers for alleged negligence in allowing their guns to fall into criminal hands, personal jurisdiction turned on whether different defendants’ guns were “fungible.”⁵⁸ If they were, plaintiffs could proceed without having to identify the manufacturer of each individual gun used in the numerous shooting incidents that formed the basis of their suit. A magistrate judge ruled that handguns were not sufficiently similar to be fungible for jurisdictional purposes. The district judge, however, disagreed. He noted that “the characteristic relevant to the matter at issue . . . determines whether a product is the same as and substitutable for another . . . for purposes of jurisdictional or substantive law.”⁵⁹ For example, under this functional approach, “for signaling New Year’s Eve, a blast from an auto horn and one from a saxophone may be equivalent as noise, but few would want to dance to the former.”⁶⁰ The judge explained that “[a]s a convenient killing instrument almost any handgun serves its purpose,” and the victims probably did not care what sort of gun killed them.⁶¹ But he acknowledged that other perspectives were possible and might produce different results. “Whether public policy

56. MAUSS, *supra* note 14, at 69.

57. MALINOWSKI, ARGONAUTS, *supra* note 14, at 130.

58. See *Hamilton v. Accu-Tek*, 32 F. Supp. 2d 47, 51 (E.D.N.Y. 1998).

59. *Id.*

60. *Id.* at 52.

61. *Id.*

requires consideration of fungibility from the point of view of the manufacturer, the lawful purchaser, the criminal, the victim, or some other vantage, is a question intertwined with the nature of the tort laws and policy controlling the case.”⁶²

The source materials for legal and magical analogies are thus undetermined but not limitless. At least some are recognizably more likely to be effective. Using completely novel reference points would lack the conventional power of invoking objects that are already embedded in previous incantations and opinions. Both magical and legal metaphoric associations gain power from their ability to reference chains of meaning that refer back to previous rituals and their associated real-life situations. Malinowski comments that in Trobriand spells, sometimes words are used that evoke narratives or pieces of narratives.⁶³ The opening of a spell, he writes, consists of “pithy expressions,” each of which stands “for its own cycle of ideas, for a sentence or even a whole story.”⁶⁴ He reports that the word “papapa,” or “flutter,” used in context means to “let the canoe speed so that the pandanus leaves flutter.”⁶⁵ Beyond even this expanded meaning, Malinowski remarks that such words are highly evocative of magical force for a practitioner, “in whose mind the whole context rises, when he hears or repeats” the word.⁶⁶ Compare, for example, the complicated meaning and history that arises for lawyers and judges from the use of legal terms of art such as “privity” or “equal protection.” Like the magical terms Malinowski explores, these words evoke for practitioners not only abstract concepts of rights and duties, but also rich contextual narratives of the cases and decisions through which those legal concepts have developed and the previous conflicts in which they have been deployed.

In both magic and case law, the goal of analogy is to enhance certain aspects of one thing by association with other things. So, for instance, Ilongot hunters ritually exhort their dogs to “be like” a variety of real and abstract objects: a harpoon arrow, the screeching of a hornbill bird, or a man meeting an enemy.⁶⁷ Each individual reference suggests a different characteristic the hunter seeks: e.g., the arrow embodies swiftness and accuracy, and the man confronting an adversary signifies implacability. According to Rosaldo, however, the diverse source objects are united by their common association with some kind of violence, and together, these associations build up an additional overall reference to aggressive behavior that may make the objects collectively effective as magical source materials and that is presumably desirable during

62. *Hamilton*, 32 F. Supp. 2d at 52.

63. See MALINOWSKI, ARGONAUTS, *supra* note 14, at 433-35.

64. MALINOWSKI, ARGONAUTS, *supra* note 14, at 434.

65. MALINOWSKI, ARGONAUTS, *supra* note 14, at 434.

66. MALINOWSKI, ARGONAUTS, *supra* note 14, at 435.

67. Rosaldo, *supra* note 53, at 189.

the hunt.⁶⁸

Now consider the crucial objects in a famous tort case—poison, faulty scaffolding, a “large coffee urn”—each included through the abstract characterization of “a thing of danger.”⁶⁹ What makes these objects in particular entrants to that category? Of course, it is their appearance in judicial opinions deciding previous tort cases. Like the objects the Ilongot call out as sources of hunting virtues for their dogs, they are linked through a previous symbolic association with a unifying quality that is then expanded to incorporate the target object. The coffee urn and faulty scaffolding are joined in the famous legal decision that turned a Buick into “a thing of danger,” in a process that mirrors the way the harpoon arrow and hornbill bird are united in the spell that renders Ilongot hunting dogs aggressive.⁷⁰

III. THE LEGAL REALISTS’ VICTORIAN CRITIQUE OF LAW AS MAGIC

[M]agic is a spurious system of natural law as well as a fallacious guide of conduct; it is a false science as well as an abortive art.

Sir James G. Frazer⁷¹

[M]agic words and incantations are as fatal to our science as they are to any other.

Hon. Benjamin N. Cardozo⁷²

I have said that the foregoing description of adjudication’s affinities with magic owes much to the Realists. In some of the best known Realist writings, law is repeatedly likened to magic and ritual.⁷³ Subsequent analyses of the Realist critique, however, have generally ignored the references to legal magic, perhaps dismissing them as a rhetorical device. Indeed, it has to be said that the Realists themselves seem never to consider the potential importance of the magical aspects of adjudication, though they describe them in some detail, sometimes with references to serious ethnographic studies of magic and ritual

68. Rosaldo, *supra* note 53, at 189.

69. *MacPherson v. Buick Motor Co.*, 111 N.E. 1050, 1052 (N.Y. 1916) (citing *Statler v. Ray Mfg. Co.*, 88 N.E. 1063 (N.Y. 1909); *Devlin v. Smith*, 11 Abb. N. Cas. 322 (N.Y. 1882)).

70. Compare *MacPherson*, 111 N.E. at 1053, with *supra* note 67 and accompanying text.

71. JAMES G. FRAZER, *THE GOLDEN BOUGH: A STUDY IN MAGIC AND RELIGION* 13 (abridged ed. 1996).

72. BENJAMIN N. CARDOZO, *THE GROWTH OF THE LAW* 66 (1924).

73. The Realists were not the first to make these comparisons. American judges occasionally compared legal arguments with which they disagreed to magic. For instance, a string of cases dealing with transfers of land from the government to Western pioneers reject formal documentation as the *sine qua non* of legal ownership, explaining, “There is no magic in the word ‘patent,’ or in the instrument which the word defines.” *Shaw v. Kellogg*, 170 U.S. 312, 341 (1898); see also *Burke v. S. Pac. R.R. Co.*, 234 U.S. 669, 704 (1914); *supra* note 8 (citing further examples).

in other cultures. To uncover the potential of legal magic, it is worth considering why the first systematic observers of that magic, and their subsequent interpreters, have generally overlooked that potential.

For the Realists, judges' resort to "word magic" was proof that law's claim to scientific reasoning was false because magic was definitionally defective science.⁷⁴ Although the Realists rejected the equation of law and deductive science, they assumed that legal decision-making should incorporate the empirical approach and inductive reasoning of the social sciences they championed. If magic is primitive or defective science, then magical law equals bad science equals bad law.

The basic opposition of magic and reason has a long history in Western thought, emerging clearly in the Enlightenment and arguably tracing back at least as far as Aristotle. The specific theory of magic as a fallacious precursor to modern scientific thought, however, belongs to the Victorian scholars who first developed the academic discipline of anthropology.

A. Victorian Magic

The principles of association are excellent in themselves, and indeed absolutely essential to the working of the human mind. Legitimately applied they yield science; illegitimately applied they yield magic, the bastard sister of science.

Sir James Frazer⁷⁵

Victorian anthropologists theorized magic as a primitive evolutionary phase, both logically and chronologically prior to scientific reasoning.⁷⁶ In their foundational work, the very definition of both primitiveness and irrationality rested, in part, on the practice of magic ritual. As Sir James Frazer (1854-1938) explained, it is "a truism, almost a tautology, to say that all magic is necessarily false and barren; for were it ever to become true and fruitful, it would not [sic] longer be magic but science."⁷⁷ The concept of magic as a misrepresentation or misunderstanding of the natural world was first and most influentially articulated by Sir Edward Tylor (1832-1917). For Tylor, magic was a distortion of analogical reasoning that mistook "an ideal for a real connexion."⁷⁸ Tylor's ideas, elaborated and popularized by Frazer in his

74. See Green, *supra* note 6, at 1016 (criticizing "the part which sacred words, taboo words, magic words, continue to play in our law"). Green suggests that a judge focusing on language, as opposed to policy and justice, "can only do his science ill." *Id.* at 1019.

75. FRAZER, *supra* note 71, at 57.

76. See 1 EDWARD B. TYLOR, PRIMITIVE CULTURE 112-15 (1889) [hereinafter TYLOR, PRIMITIVE CULTURE].

77. FRAZER, *supra* note 71, at 57.

78. TYLOR, PRIMITIVE CULTURE, *supra* note 76, at 116.

classic *Golden Bough*, formed the lens through which many social scientists viewed magic at the beginning of the twentieth century. Although the equation of magic and “pseudo-science” has been resoundingly rejected by virtually every field anthropologist who subsequently made a first-hand study of magical practices, it was a dominant intellectual concept when the Realists were writing, at least among English and American scholars. Outside anthropological circles, the view of magic as false science remains influential to this day.⁷⁹

The heart of the Victorian understanding of magic as an evolutionary precursor to science is magic’s reliance on automatic ritual formulas rather than empirical investigation to explain and affect the world. In the Victorian view, magic’s “fundamental conception is identical with that of modern science; underlying the whole system is a faith, implicit but real and firm, in the order and uniformity of nature.”⁸⁰ What separates magic from science is magic’s *modus operandi*. Whereas science uses empirical observation and technical intervention, magic uses symbolic words and gestures that ostensibly work automatically, without real physical interventions. As Frazer explained, “Whatever doubts science may entertain as to the possibility of action at a distance, magic has none”⁸¹

According to Tylor and Frazer, the basis of practitioners’ belief in magic’s remote effects is a confusion of subjective and objective thought. Magic takes subjective associations for real causal connections. Tylor theorized that belief in magic rested on a mistaken application of the “Association of Ideas.”⁸² Magical thinking arose from the basic human thought process of association, “a faculty,” he explained, “which lies at the very foundation of human reason, but in no small degree of human unreason also.”⁸³ Magic was based on a primitive assumption that the chain of mental associations from reality to imagination runs in both directions.⁸⁴ “Man, as yet in a low intellectual condition, having come to associate in thought those things which he found by experience to be connected in fact, proceeded erroneously to invert this action,” Tylor explained,

79. There was an important competing analysis of magic, ritual, and religion by a Victorian contemporary, Emile Durkheim. Durkheim’s theory of the primacy of social experience, as elaborated in his work on religion, is a key progenitor of all the twentieth-century theories of magic that I discuss in Part III. *See generally* EMILE DURKHEIM, *THE ELEMENTARY FORMS OF RELIGIOUS LIFE* (1965). Durkheim rejected the evolutionary division between civilized religion and primitive magic. His influence really cannot be overstated. Another important source is Marcel Mauss, whose work on magic was also original and influential. *See generally* MAUSS, *supra* note 14. Because the Realists focused on Anglo-American sources in their discussion of magic, I have omitted Mauss’s and Durkheim’s seminal works from this discussion. Their influence is pervasive in the later work of Malinowski, Evans-Pritchard, Douglas, and Turner, which I discuss in Part III.

80. FRAZER, *supra* note 71, at 56.

81. FRAZER, *supra* note 71, at 25.

82. TYLOR, *PRIMITIVE CULTURE*, *supra* note 76, at 115-16.

83. TYLOR, *PRIMITIVE CULTURE*, *supra* note 76, at 116.

84. TYLOR, *PRIMITIVE CULTURE*, *supra* note 76, at 115-16.

“and to conclude that association in thought must involve similar connexion in reality.”⁸⁵ So, according to Tylor, the primitive who notices similarities in form or quality that link various objects in his mind assumes that manipulation of one of these similar objects will cause a real world effect on another.⁸⁶ For instance, the Trobriand Islanders touch their newly made canoes with plant fronds that blow lightly in the wind in order to impart a similar quality of lightness and speed to the boats.⁸⁷ In the Victorian scheme, magic is definitively insubstantial and false. Yet, Victorian anthropologists were ambivalent about whether the source of that falsehood was mostly willful deception or naïve delusion.⁸⁸ Frazer explained that magicians “perceive how eas[y] it is to dupe their weaker brother and to play on his superstition for their own advantage.”⁸⁹ However, not every “sorcerer is always a knave and impostor; he is often sincerely convinced that he really possesses those wonderful powers which the credulity of his fellows ascribes to him.”⁹⁰ The credulity or duplicity of “savage” magic practitioners is one of the focal points of Victorian anthropology.⁹¹ In the Victorian view, however, the utter falsity of magic is unambiguous. Whether a magician fools only his observers or himself as well, magic’s objects and effects are pure illusion. Magic is empty and ineffectual—false wonders that can only distract from or cover up what is really happening.⁹²

B. *The Realist Critique of Legal Magic*

Even if the Realists had never mentioned legal magic, there would be recognizable parallels between their critique of adjudication and the Victorian theory of magic. The Victorian definition of magic as a pseudo-scientific practice that manipulates verbal formulas instead of investigating and intervening in empirical reality anticipates the central Realist attack on legal formalism as irrational, false science. The Victorian understanding of magic also suggests a particular mistake or trick the Realists attributed to doctrinal legal analysis: a distortion of analogical reasoning that mistakes “an ideal for a

85. TYLOR, *PRIMITIVE CULTURE*, *supra* note 76, at 116.

86. TYLOR, *PRIMITIVE CULTURE*, *supra* note 76, at 116 (discussing practices of burying hair and nail clippings out of fear sorcerers would use them).

87. MALINOWSKI, *ARGONAUTS*, *supra* note 14, at 129.

88. According to Tylor, “Magic has not its origin in fraud, and seems seldom practiced as an utter imposture.” TYLOR, *PRIMITIVE CULTURE*, *supra* note 76, at 116. But neither is magic an innocent mistake. The magician is “at once dupe and cheat.” *Id.*

89. FRAZER, *supra* note 71, at 52.

90. FRAZER, *supra* note 71, at 52.

91. TYLOR, *PRIMITIVE CULTURE*, *supra* note 76, at 134.

92. “The modern educated world, rejecting occult science as a contemptible superstition, has practically committed itself to the opinion that magic belongs to a lower level of civilization.” TYLOR, *PRIMITIVE CULTURE*, *supra* note 76, at 113.

real connexion.”⁹³ The Victorian idea that magic projects ideal associations onto concrete objects⁹⁴ anticipates the Realist complaint that judges substitute fictional legal concepts for relevant social facts, manipulate those concepts into patterns, and then mistake or cynically switch the patterns for reality.⁹⁵

My point is not that Victorian anthropology causally influenced the Realist critique of law—although, such a connection is possible because there are references to Frazer in Jerome Frank’s work.⁹⁶ What interests me is that for whatever reason, the Realist critique of law mirrors the Victorian view of magic as formalistic pseudo-science.⁹⁷ That similarity suggests why the Realists were disposed to see adjudication as magical in the first place. More importantly, the Realists’ Victorian view of magic suggests why they failed to consider the many practical ways adjudication resembles ritual magic as authentic, potentially useful aspects of legal practice. Classic adjudicative practice—its emphasis on precedent, doctrine, and formal procedure—was for the Realists what “primitive” magic was for the Victorians: a formalistic simulation of scientific inquiry that confused subjective and objective connections and thus was ultimately irrational and false.

1. Legal Magic Is Formalistic

No natural or social science has found its secrets in words and phrases and neither will the science of law.

Leon Green⁹⁸

The core Realist criticism of legal process is the charge of formalism. As Felix Cohen explains, judges rely on verbal formulas—“the magic ‘solving words’ of traditional jurisprudence”—to answer “legal problems” rather than asking relevant empirical and ethical questions.⁹⁹ The Realists view doctrinal

93. TYLOR, PRIMITIVE CULTURE, *supra* note 76, at 116 (arguing “magic arts” result in confusing ideals for reality).

94. See FRAZER, *supra* note 71, at 12-13, 25.

95. See Cohen, *supra* note 4, at 809-20 (surveying ways in which courts use and manipulate language).

96. See FRANK, *supra* note 7, at 158-59 n.5 (citing “the writings of Frazer”). Frank noted Frazer’s proposition that “the belief in . . . a disciplined universe is consistently acted upon only by primitive men, children, and the insane.” *Id.* But Frank also cited to later field anthropologists, including some of the structural-functionalists whose revision of the Victorian view I will discuss in Part III. Felix Cohen cites Bronislaw Malinowski’s “functional” approach to social science as a model for a rational jurisprudence. Cohen, *supra* note 4, at 831-32 nn.64-65.

97. One work that seems to have been influential for the Realists’ views of magic language was *Meaning of Meaning* by Ogden and Richards. Frank quotes from it at length, and Green also cites it for the idea that “primitive man has a deeply rooted belief that ‘a work has some power over a thing,’” that is, for the kind of automatic effect of magic words the Victorians attributed to primitive magic. See Green, *supra* note 6, at 1016 n.11; see also FRANK, *supra* note 7, at 84-86.

98. Green, *supra* note 6, at 1018.

99. Cohen, *supra* note 4, at 820.

concepts like “fair value,” “due process,” and “proximate cause” as illusory verbal symbols that mask judges’ reasoning process.¹⁰⁰ “We can scarcely realize the part which sacred words, taboo words, magic words, continue to play in our law,” warned Leon Green in an early article.¹⁰¹ According to Green, doctrinal reasoning relies on a “language technic” rather than a straightforward “judging technic” that acknowledges that men, not words, decide cases.¹⁰² This atavistic focus on verbal formulas mistakes the “machinery by which the power of thought is handled” for the power itself.¹⁰³ It is a doomed effort at transcending the necessarily imperfect and ultimately uncontrollable individual “exercise of that power we hand over to judges.”¹⁰⁴

At the heart of the Realist critiques of “word magic” is an insight that law’s doctrinal formulas have something in common with the way words are used in magic and ritual practices. As Jerome Frank explained, “A word is used by the savages when it can produce an action and not to describe one.”¹⁰⁵ For the Realists, the use of such performative language in law, as well as magic, entailed a naïve belief in intrinsic, automatic verbal effects. Like “savages[,]” formalist legal practitioners demonstrate a conviction that words have power over things, a theory of an inherent connection between symbols and things to which the symbols refer.¹⁰⁶ Frank speculated that in our legal system this kind of “magical thinking” sprang from a need for certainty, stimulated by the structure of law as (paternal) authority.¹⁰⁷ In his view, lawyers, children, and primitive cultures share a desire, and a belief, that words have a transformative power that civilized adults ascribe only to rational-technical interventions.¹⁰⁸

The Realists’ objection to the ostensible performative power of judicial words was that their consequences in the real world were not self-executing. In the Realists’ instrumental view of law—and of language—words describe situations in the world but do not change them. Resonant words like “duty” or “right” do not determine the legal outcomes.¹⁰⁹ Judges are “merely using these terms to pronounce the judgment passed. The process has been concluded in some unknown way; the result is merely being vocalized.”¹¹⁰ Likewise, for everyone else, the judges’ words are effective precisely because armed agents stand ready to enforce them. The power of judicial language inheres not in the words themselves but in the judges’ power to decide who will be subjected to

100. Cohen, *supra* note 4, at 820.

101. Green, *supra* note 6, at 1016.

102. Green, *supra* note 6, at 1016-19.

103. Green, *supra* note 6, at 1018.

104. Green, *supra* note 6, at 1020.

105. FRANK, *supra* note 7, at 85 (quotation & footnote omitted).

106. FRANK, *supra* note 7, at 85.

107. See FRANK, *supra* note 7, at 158-59.

108. See FRANK, *supra* note 7, at 158-59.

109. See Green, *supra* note 6, at 1020-21.

110. Green, *supra* note 6, at 1021.

the force of the state.

For Realists, language is enabling, not generative. “[W]ords are the machines by which the power of thought is handled,” Green declared.¹¹¹ But even that literally instrumental image may ascribe too much positive value to legal language.¹¹² Later in the same article Green muses, “[A]n opinion is but the smoke which indicates the grade of mental explosive employed. Somewhere behind the curtains of legal expression lie the laboratories of our intelligence. They are not legal. They comprise all we are.”¹¹³ Thus legal language moves from a vehicle of legal reasoning to reasoning’s ephemeral trace to a screen obscuring the real reasoning process. And note that in Green’s description, the *real* mental work hidden behind the smokescreen of legal language takes place in a scientific setting—a laboratory.

The insistence that authentic human thought processes are uniform and autonomous behind “the curtains” of expression cuts off insights that otherwise might flow from observing that ritual language is a key technique of adjudication.¹¹⁴ “Word ritual under one guise or another has always been one of the primary modes of law administration,” Green contends.¹¹⁵ But the instrumentalist view that legal language is purely a means of communicating decisions backed by force necessarily negates the transformative potential of the verbal techniques Green painstakingly tracks.

Jerome Frank made a similar analysis of formal trial court procedures and their impact on juries. Legal magic creates a “ceremonial routine,” he says, designed to instill confidence in the outcome of the trial.¹¹⁶ For instance, the “so-called ‘cautionary instructions’ to the jury—are they not, too, like debased magic spells or cabalistic formulas . . . ?”¹¹⁷ Everyone knows, says Frank, that judges’ instructions to jurors not to be affected by emotion and to stick to the evidence do not work. “If they do, why does the jury lawyer in his address to the jury not confine himself to clear and concise logical arguments based on a passionless summary of the evidence . . . ?”¹¹⁸ Because, Frank answers, jurors *are* swayed by emotional appeals. Then what purpose do the judge’s solemn exhortations serve? “These instructions are like exorcizing phrases intended to drive out evil spirits.”¹¹⁹ Perhaps, Frank suggests, the very unintelligibility of the jury charge contributes to a kind of power, like the untranslatable “tremendous words” used in medieval exorcisms.¹²⁰ For Frank, such power is

111. Green, *supra* note 6 at 1018.

112. See Green, *supra* note 6, at 1022.

113. See Green, *supra* note 6, at 1022.

114. See Green, *supra* note 6, at 1016.

115. See Green, *supra* note 6, at 1016.

116. FRANK, *supra* note 7, at 181.

117. FRANK, *supra* note 7, at 182.

118. FRANK, *supra* note 7, at 183.

119. FRANK, *supra* note 7, at 184.

120. FRANK, *supra* note 7, at 181.

an illusion. Any belief that the formal charge could improve the jury's decision-making process "smacks of child magic," employing "formulas and key-words to conquer the environment without substantial effort."¹²¹ Once again, in the Realist view, meaning and truth are opposed to form and illusion. If the formal jury charge is not substantively directive of jurors' reasoning, then it must be entirely empty and false.

2. *Legal Magic Substitutes Subjective Connections for Objective Comparisons*

Probably the most famous discussion of legal magic appears in Felix Cohen's 1935 essay, *Transcendental Nonsense and the Functional Approach*.¹²² Cohen focuses on a particular technique of judicial magic that comes close to the Victorian analysis of magic's faulty associative reasoning. For Cohen, the logical flaw in legal magic is the substitution—by design or by mistake—of ideal fictions for realities. The conventional phrases that judges manipulate stand for "thingified" abstractions that are mistakenly treated as real entities.¹²³ These magical objects are elaborated into a complicated metaphysical narrative that substitutes for policy analysis and hard ethical choices.¹²⁴ Criticizing judges' use of "magic solving words" like "fair value," "corporation," or "proximate cause" to justify their rulings, Cohen compares analogic reasoning's reliance on metaphor to a sleight of hand, an *illusion* of reason that covers up the absence of moral and practical analysis.¹²⁵ Jerome Frank likewise criticized doctrinal "word magic" as "a trick resulting from 'a confusion of the subjective and objective in the conception of things.'"¹²⁶

To exemplify this magical "thingification," Cohen criticizes Cardozo's anthropomorphic treatment of a corporation in order to find a basis for the New York court's jurisdiction over a company incorporated in Pennsylvania. "The essential thing," said Judge Cardozo, writing for a unanimous court, "is that the corporation shall have come into the State." Why this journey is *essential*, or how it is *possible*, we are not informed.¹²⁷ In Cohen's view, this sort of "supernatural" approach, whether mistaken or deliberate, treats a fictional legal concept—a corporation—like a real entity—a person who "travels about from State to State as mortal men travel."¹²⁸ Cohen finds it absurd that the question of jurisdiction should be decided, or defended, by imagining that the fictional corporate being had acted autonomously. He wants an investigation of modern

121. FRANK, *supra* note 7, at 181.

122. *See generally* Cohen, *supra* note 4.

123. *See* Cohen, *supra* note 4, at 811.

124. *See* Cohen, *supra* note 4, at 812.

125. Cohen, *supra* note 4, at 820-21.

126. FRANK, *supra* note 7, at 64.

127. Cohen, *supra* note 4, at 811 (quoting *Tauza v. Susquehanna Coal Co.*, 115 N.E. 915, 918 (N.Y. 1917)).

128. Cohen, *supra* note 4, at 811.

corporate practices and the “actual significance of the relation between a corporation and the state of its incorporation” followed by a clear value judgment about whether those activities should subject the business to suit in a given state.¹²⁹ For legal scholars, the goal should be to “substitute a realistic, rational, scientific account of legal happenings” for what Cohen calls the “theological jurisprudence of concepts” with its “legal magic and word-jugglery.”¹³⁰

Cohen’s criticism of Cardozo’s use of metaphoric associations in place of a “factual inquiry” into the “actual significance of the relationship between a corporation and the state of its incorporation” looks very much like Frazer’s explanation of “sympathetic magic,” based on the principle of similarity.¹³¹ Cohen complains that to determine personal jurisdiction over corporations, judges play out the metaphoric identifications between corporate structures and individuals, instead of inquiring empirically into real-life relationships among corporations, the jurisdictions where they are located, and the people suing them.¹³² Thus, says Cohen, the court espoused a “traditional supernatural approach to practical legal problems.”¹³³ The judges ignored or covered up the real “social forces” that shaped the decision and instead grounded their decision in “vivid fictions and metaphors.”¹³⁴ Again, it goes back to a non-instrumental, non-denotative use of words and the Realists’ belief that such magical language can only obstruct reasoning, never enhance it. As Green put it, “[t]he whole confusion comes about by the legal theology which requires substituting a *symbolic* phrase ‘determination of duty’ for the judgment required of a judge in giving or denying the protection of government to the interest involved”¹³⁵ For the Realists, symbolic doctrinal phrases always replace or hamper principled decision-making; they never facilitate it. For Cohen, determining “where” a corporation is by analogizing it to a human being absurdly reifies the metaphoric corporate “body.” Like Tylor’s savage practitioners of magic, Cardozo mistook “an ideal for a real connexion.”¹³⁶ As Jerome Frank

129. See Cohen, *supra* note 4, at 810.

130. Cohen, *supra* note 4, at 821.

131. Compare Cohen, *supra* note 4, at 810, with FRAZER, *supra* note 71, at 13. “Homeopathic magic commits the mistake of assuming that things which resemble each other are the same.” FRAZER, *supra* note 71, at 13.

132. Cohen, *supra* note 4, at 810.

133. Cohen, *supra* note 4, at 813.

134. Cohen, *supra* note 4, at 812. It is ironic that the target of Cohen’s diatribe against judicial magic is Cardozo, who, besides sharing many of Cohen’s liberal political views, was on record as a critic of systemic legal magic. See *Wood v. Lucy*, 118 N.E. 214, 214 (N.Y. 1917) (“The law has outgrown its primitive stage of formalism when the precise word was the sovereign talisman, and every slip was fatal. It takes a broader view today.”) Then again, perhaps the attack makes sense. Cohen’s discussion of Cardozo’s opinion in *Tauza* is filled with the sort of snarly contempt that is rarely directed at distant ideological enemies but reserved instead for allies who have strayed from the proper path. Cohen, *supra* note 4, at 812.

135. Green, *supra* note 6, at 1030.

136. TYLOR, *PRIMITIVE CULTURE*, *supra* note 76, at 116.

explained in remarkably Tylor-ish terms, law's doctrinal word magic is "a trick resulting from 'a confusion of subjective and objective in the conception of things.'"¹³⁷

3. Legal Magic Is False

The realist believes that there is something more "real" than these rituals, and he goes off in pursuit of that something.

Max Lerner¹³⁸

Like the Victorians, the Realists are confident that magic is essentially false, but they are ambivalent about the relationship of magic practitioners to that falsehood. According to Cohen, Realists "are in fundamental agreement in their disrespect for 'mechanical jurisprudence,' for legal magic and word-jugglery."¹³⁹ The problem is that legal magic apparently has some power to deceive even those who ordinarily see through it. Realist non-believers may have to engage in these illusionist tactics, says Cohen, when arguing before judges who refuse to acknowledge the ethical and empirical judgments inherent in their decisions. In that situation, the skeptical lawyer "will perforce bring his materials to judicial attention by sleight-of-hand."¹⁴⁰ He must use his "patter" to induce favorable judicial attitudes and to distract judicial attention from precedents and facts that look the wrong way, as the professional magician distracts his audience from the trapdoor and hidden compartment.¹⁴¹ But the Realist conjurer must take care not to be fooled by his own performance. If he starts thinking of the "vivid fictions and metaphors" he deploys as "reasons for decisions[,] . . . then the author, as well as the reader of the opinion or argument, is apt to forget the social forces which mold the law and the social ideals by which the law is to be judged."¹⁴²

While Cohen oscillates between presenting legal magicians as frauds or dupes, Jerome Frank comes down clearly on the side of self-deception. We depend on legal magic less to fool others, he suggests, than to reassure ourselves. Given the volume of existing case law, Frank points out that "a court can usually find earlier decisions which can be made to appear to justify almost any conclusion."¹⁴³ Existing precedent, therefore, cannot be the cause of a yea or nay legal outcome. In the Realist/Victorian fraud/truth dichotomy, precedential magic simply does not work. The fact that precedents are not

137. FRANK, *supra* note 7, at 64.

138. Max Lerner, *The Shadow World of Thurman Arnold*, 47 YALE L.J. 687, 695 (1938).

139. Cohen, *supra* note 4, at 821.

140. Cohen, *supra* note 4, at 841-42.

141. Cohen, *supra* note 4, at 841-42.

142. Cohen, *supra* note 4, at 812.

143. FRANK, *supra* note 7, at 152.

logically determinative of subsequent cases renders them meaningless. Far from defining judicial art, reliance on precedent can only obfuscate and detract from the true judicial practice. “The concealment has merely made the labor of the judges less effective.”¹⁴⁴ The Realists allow no inkling that post-hoc rationalization of judicial decisions reached on other grounds could be meaningful or constitute some authentic aspect of legal practice.¹⁴⁵ Frank makes no attempt to investigate, for instance, how courts’ magical use of precedent might distinguish legal practice institutionally. If precedents are not the conceptual origin of the decisions that cite them, they must be worse than useless. The illusory dependence on false precedents must inhibit judges from grappling effectively with the complex dynamic world in which they are asked to make decisions.

Like Tylor and Frazer, Frank questions why magic practitioners (here, lawyers) who observe that the system to which they adhere fails to deliver on its promises of certainty nevertheless continue to believe in it. But he never questions the premise that leads to this contradiction—namely, that in the primitive culture of adjudication, the (judicial) natives subscribe to a counterfactual, literal belief in automatic mechanisms that are obviously false and that necessarily interfere with a modern, rational approach to the problem being adjudicated.¹⁴⁶ Mirroring the Victorian view, Frank concludes that practitioners of legal magic are driven by a childish fear of “chance and change”¹⁴⁷ and a yearning for the certainty that he regards as the “basic myth” legal magic serves.¹⁴⁸

For Realists, the true belief in legal magic in no way mitigates its essential duplicity. If anything, the sincerity with which judges practice legal magic only makes it more obviously pathological. The “belief in such a disciplined universe is consistently acted upon only by primitive men, children and the insane,” says Frank.¹⁴⁹ Legal magic’s status as fraud or fancy might be

144. FRANK, *supra* note 7, at 157.

145. In contrast, Holmes, perhaps the least magical of all jurists, embraced the notion that individual case results shaped general principles rather than vice versa. “It is the merit of the common law,” he wrote, that “it decides the case first and determines the principle afterwards.” Oliver Wendell Holmes, *Codes and the Arrangement of the Law*, in 1 THE COLLECTED WORKS OF JUSTICE HOLMES: COMPLETE PUBLIC WRITINGS AND SELECTED JUDICIAL OPINIONS OF OLIVER WENDELL HOLMES 212 (Sheldon M. Novick ed., 1995).

146. Explicating his theory, Frank draws on the developmental theory of psychologist Jean Piaget, describing individual mental maturation as a process of moving from an infantile belief that one can “magically command responses on the part of the environment” to reason and acceptance of contingency. FRANK, *supra* note 7, at 14, 326 n.1. Frank also cites a number of anthropologists’ work on “primitive” magic, among them Malinowski and Frazer. FRANK, *supra* note 7, at 332 n.1, 334-35 n.9 (citing Malinowski); *id.* at 343 n.5 (citing Frazer). Cohen and Green, likewise, cite to anthropological studies, though not necessarily work on magic. Cohen, *supra* note 4, at 831 n.63, 831 n.64, 832 n.65 (citing Malinowski and Boaz); Green, *supra* note 6, at 1016 n.11.

147. FRANK, *supra* note 6, at 18.

148. FRANK, *supra* note 7, at 3.

149. FRANK, *supra* note 7, at 158-59.

ambiguous, but there is no question that its falsity is irredeemably destructive to the legal institutions it pervades.

C. Magical Realist: Thurman Arnold

The realist is ordinarily a man who is emotionally conscious of the discrepancy between the behavior of the world and the way it talks about that behavior. He is not, however, conscious of the fact that talking and writing is just as much a form of behavior as eating.

Thurmond Arnold¹⁵⁰

One contemporary of Green, Cohen, and Frank took a different view of the formal and doctrinal aspects of adjudication that the Realists called legal magic. Thurman Arnold is often counted as a Realist.¹⁵¹ Certainly, he shared the Realists' skepticism about the logical determinism of legal doctrines and procedures. "Our law schools and courts refuse to admit publicly that legal doctrine is simply a method of argument and classification of cases," Arnold wrote, "Their function is rather to keep an ideal alive."¹⁵² But Arnold critiqued the Realists' view that doctrine and formal procedure were therefore either worthless or positively harmful. His investigations of legal "symbols" incorporate, and sometimes prefigure, the functional, structural, and symbolic theories of modern anthropology that would revise the Victorian views of magic and ritual.¹⁵³

Arnold's central insight was that the symbolic and ritual aspects of legal practice were not necessarily false and corrupting despite not being grounded in empirical fact or overt value judgments. Arnold suggests that the symbolic aspects of legal practice might have a useful, even definitive, function.¹⁵⁴ In his view, "folklore" or "spiritualism" could not be expunged from our legal system without fundamentally altering its character.

Arnold argues that legal ceremonies, especially trials, work to symbolically reconcile conflicting social norms. It is precisely the symbolic nature of adjudication, he argues, that makes such reconciliation possible. The dramatic conflict of emotional trials allows us to "talk in different ways about the same problems without appearing to contradict ourselves."¹⁵⁵ "It is child's play for the realist to show that law is not what it pretends to be," says Arnold, "[and]

150. THURMOND ARNOLD, *THE SYMBOLS OF GOVERNMENT* 6 (1935) [hereinafter ARNOLD, *SYMBOLS*].

151. See e.g., JEROME FRANK, *COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE* 74 (1949) (listing Arnold in a subgroup of Realists called "fact skeptics," along with Leon Green and others).

152. ARNOLD, *SYMBOLS*, *supra* note 150, at 45.

153. See generally ARNOLD, *SYMBOLS*, *supra* note 150.

154. See ARNOLD, *SYMBOLS*, *supra* note 150, at 111, 113; see also THURMOND ARNOLD, *THE FOLKLORE OF CAPITALISM* 46-47 (1937).

155. ARNOLD, *SYMBOLS*, *supra* note 150, at 248.

that it constantly seeks escape from reality through alternate reliance on ceremony and verbal confusion.”¹⁵⁶ For Arnold, however, law’s unrealistic reliance on ceremony is “not its weakness but its greatest strength.”¹⁵⁷ Through their symbolic action legal institutions can appear coherent while “tolerating and enforcing ideals which run in all sorts of opposing directions.”¹⁵⁸

For Cohen and Frank, a symbolic reconciliation of substantively contradictory norms would be necessarily illusory and false. But Arnold sees something potentially valuable that does not necessarily conflict with rationality. Law’s enacted ceremonies of ideological conflict and reconciliation may increase society’s capacity to tolerate diverse ideologies. Thus, the symbolic aspect of legal process makes possible the pluralism characteristic of a liberal society. Likewise, ideological tolerance supports the dramatic conflict institutionalized in law. Arnold observes that “[t]he judicial system rises in power and prestige when society . . . becomes able to tolerate contradictory ideals.”¹⁵⁹

Arnold does not claim that law’s symbolic reconciliation of inconsistent values always produces just results in individual cases. In his view, norms are not determinative of substantive individual results. He notes that judges may be especially careful about following procedure with defendants they believe will be convicted. They can afford to give a blatantly guilty defendant “every protection because of the fact that these protections can do him no good.”¹⁶⁰ For Arnold, the real beneficiary of symbolic, ceremonial trial procedures is the public. Trials are a public drama, enacting two main conflicts: (1) fairness versus law enforcement,¹⁶¹ and (2) “the dignity of the State as an enforcer of law” versus “the dignity of the individual when he is an avowed opponent of the State.”¹⁶² Because these enacted conflicts foster public discussion of “all the various contradictory attitudes about crime and criminals,” they function as a “stabilizing agency.”¹⁶³

Arnold’s theory that trials symbolically reconcile conflicting social values resembles a theory of ritual and symbolism later developed by anthropologist Victor Turner.¹⁶⁴ Beyond their shared belief that ritual symbolically resolves normative conflicts, both Turner and Arnold saw ritual as a fundamental cultural phenomenon. Instead of viewing ritual as a projection of existing social organization, they saw social organization as in part the product of ritual.

156. ARNOLD, SYMBOLS, *supra* note 150, at 44.

157. ARNOLD, SYMBOLS, *supra* note 150, at 44.

158. ARNOLD, SYMBOLS, *supra* note 150, at 44.

159. ARNOLD, SYMBOLS, *supra* note 150, at 248.

160. ARNOLD, SYMBOLS, *supra* note 150, at 139.

161. ARNOLD, SYMBOLS, *supra* note 150, at 149.

162. ARNOLD, SYMBOLS, *supra* note 150, at 130.

163. ARNOLD, SYMBOLS, *supra* note 150, at 147.

164. See generally VICTOR TURNER, THE FOREST OF SYMBOLS: ASPECTS OF NDEMBU RITUAL (1966) [hereinafter TURNER, FOREST OF SYMBOLS] (outlining theory of ritual practice social significance).

As Turner explained, ritual is something other than an “epiphenomenon—the result of some other more basic social force or institution.”¹⁶⁵ He accorded ritual “ontological” status as a social practice with its own primary meaning.¹⁶⁶ Likewise, Arnold rejected the Realist view that legal ritual was secondary to the social facts that determined individual legal outcomes.¹⁶⁷ He saw that procedural and doctrinal rituals worked in a way parallel to or intertwined with other social structures and ideals to give adjudication its social meaning.

Green, Cohen, and Frank always see legal doctrines and rituals as covering up the “real” legal analysis.¹⁶⁸ While Arnold agreed that legal forms and doctrines have more in common with ritual magic than with science, he rejected the conclusion that legal magic is therefore necessarily a way to avoid real legal practice. “[A]t times we eat and sleep and at other times we engage in parade and ceremony,” he explained, “[but neither activity] is an escape from the other.”¹⁶⁹

Today, when judges and law professors remark on the ceremonial or ritual quality of law, they generally intend the reference to be derogatory. The skeptical work of Green, Cohen, and Frank is associated with discussions of law’s “magic words” and “talismanic” reasoning in case law and the legal academy. But is Arnold’s more nuanced view of the social role of ritual and symbol, which has won the day in the social sciences, that which the three better known Realists avowedly embraced?

III. FROM MAGIC AS FALSE SCIENCE TO MAGIC AS EFFECTIVE SOCIAL PRACTICE

Frazer’s presentation of the magical and religious views of mankind is unsatisfactory; it makes these views appear as errors.

Ludwig Wittgenstein¹⁷⁰

Part of the Realist project was an effort to open up legal questions to the empirical methods of the social sciences developing in the first part of the twentieth century. It is thus especially ironic that around the same time the Realists were rejecting legal magic as false science, the first field

165. VICTOR TURNER, DRAMAS, FIELDS & METAPHORS: SYMBOLIC ACTION IN HUMAN SOCIETY 57 (1974) [hereinafter TURNER, DRAMA].

166. *Id.* at 57.

167. ARNOLD, SYMBOLS, *supra* note 150, at 251.

168. *See, e.g.*, Green, *supra* note 6, at 1021. “The formulas in which judgments have been couched have been highly important factors in men’s dealings,” but these doctrinal formulas are nevertheless merely “terms” judges use “to pronounce the judgment passed. The process has been concluded in some unknown way; the result is merely being vocalized.” *Id.*

169. ARNOLD, SYMBOLS, *supra* note 150, at 251.

170. LUDWIG WITTGENSTEIN, REMARKS ON FRAZER’S GOLDEN BOUGH 10 (1979).

anthropologists—some of whom the Realists cite in their work—were revising the Victorian view of magic as science’s “bastard sister.”¹⁷¹ Studying the practices of the Trobriand Islanders, the great functionalist Bronislaw Malinowski observed that magic is not about direct control of nature. Rather, for practitioners, magic is a “power of man over his own creations, over things once brought forth by man, or over responses of nature to his activities.”¹⁷² Malinowski saw that Trobriand magic apparently coexisted with an accurate technical understanding of the world, or at least with much useful technical know-how. He pointed out, for instance, that the Trobrianders he studied were masterful gardeners with “extensive knowledge of the classes of soil, of the various cultivated plants, of the mutual adaptation of these two factors.”¹⁷³ They were “guided by a clear knowledge of weather and seasons, plants and pests, soil and tubers, and by a conviction that this knowledge is sure and reliable.”¹⁷⁴ Yet, despite this technical proficiency, “mixed with all their activities there is to be found magic, a series of rites performed every year over the gardens in rigorous sequence and order.”¹⁷⁵ What were those rituals for?

Malinowski’s observations sometimes suggest that magic practitioners themselves understand ritual as directed at changing the social worldview of its inhabitants. Thus, magic language may be made up of counterfactual affirmations of conditions “desired but not yet fulfilled,” but its effects need not be achieved through automatic intervention in the physical universe.¹⁷⁶ A garden magician’s spells ostensibly address the soil to be planted, declaring the “belly of the garden rises.”¹⁷⁷ The Trobrianders do not understand these magical affirmations as merely describing an expected future condition. But neither do they view the magician as engaged only in a literal communication with an inanimate plot of ground.¹⁷⁸ That is, they do not believe that his words alone can make the harvest burst forth out of dead earth. Although he never expressly embraces the idea, Malinowski’s observations point to another *modus operandi* for magic: that it affects its human practitioners and observers.¹⁷⁹

171. James Frazer, *Preface* to MALINOWSKI, ARGONAUTS, *supra* note 14, at xiii.

172. MALINOWSKI, ARGONAUTS, *supra* note 14, at 401.

173. MALINOWSKI, ARGONAUTS, *supra* note 14, at 57-58.

174. MALINOWSKI, ARGONAUTS, *supra* note 14, at 58-59.

175. MALINOWSKI, ARGONAUTS, *supra* note 14, at 59.

176. 2 BRONISLAW MALINOWSKI, CORAL GARDENS AND THEIR MAGIC: THE LANGUAGE OF MAGIC AND GARDENING 70 (Indiana Univ. Press 1965) (1935) [hereinafter MALINOWSKI, CORAL GARDENS II].

177. *Id.* at 70.

178. Stanley Tambiah comments, “Malinowski was quite clear in his mind that Trobriand magical ideas should not be confused with ideas of determinism implied in their practical activities.” STANLEY TAMBIAH, CULTURE, THOUGHT AND SOCIAL ACTION: AN ANTHROPOLOGICAL PERSPECTIVE 54 (1985) [hereinafter TAMBIAH, CULTURE].

179. See MALINOWSKI, CORAL GARDENS II, *supra* note 176, at 70. Malinowski’s comparison of the garden magician’s exhortations of fertility to social flattery provides an example:

[I]n the designation of people by titles which are just a little above their rank, in the incorrect and

Stanley Tambiah has pointed out that the yamhouse rites described in Part I of this Article exemplify magic grammatically addressed to an inanimate object but understood by its practitioners to affect the people who hear it.¹⁸⁰ After the yam harvest, the Trobrianders conduct rites to “anchor” the yams in their storehouse. A full storehouse signifies a strong economy. It is better, then, for the gathered yams to rot there than to be taken out and eaten. The magician performs the rites over the storehouse where the spells invoke metaphors of anchoring, make comparisons to bedrock and a coral outcrop, and refer to stability and plenty.¹⁸¹ Malinowski observed, however, that the Trobrianders “have not the slightest doubt that the magic does not act directly on the substance of the food but on the human organism, more specifically on the human belly”¹⁸² If the rite were not performed, a magician explained, “men and women would want to eat all the time, morning, noon and evening. Their bellies would grow big, they would swell—all the time they would want more and more food. I make the magic, the belly is satisfied, it is rounded up.”¹⁸³ At first, this might seem to be just another physical displacement because magic that works directly on stomachs seems to us just as physical as a spell that works on a storehouse. Apparently the Trobrianders, however, view the stomach as the seat of both hunger and memory. So, when they speak of something working on people’s stomachs, it is something like what we mean when we say that something affects our heads—that is, it influences the mind

Rather than directly exhorting the villagers to leave the storehouse alone, the magic rite uses the metaphoric capacity of language to create an image of fullness and stability on which people can focus in order to restrain their appetites.¹⁸⁴ Such poetic indirection is not merely ceremonial but may produce real results. Anyone who has tried to lose weight by dieting will appreciate the value of an alternative approach to a straightforward command to eat less. The storehouse magic uses metaphor to renew and strengthen the villagers’ sense of their capacity to feel full and strong even with empty stomachs and to take their minds off eating.

Although the spell ostensibly addresses the yamhouse, Malinowski’s informants insisted that it worked by influencing their bellies, where their

flattering use of terms of affection or kinship, we have the same principle of verbal magic. The word claims more than actually exists, and thus places upon the person addressed certain obligations, or puts him under some sort of emotional constraint.

Id.

180. TAMBIAH, CULTURE, *supra* note 178, at 51-53. Tambiah extends this notion into a general theory. “It is possible to argue that all ritual, whatever the idiom, is addressed to the human participants and uses a technique which attempts to restructure and integrate the minds and emotions of the actors.” *Id.* at 53.

181. MALINOWSKI, CORAL GARDENS I, *supra* note 28, at 226.

182. MALINOWSKI, CORAL GARDENS I, *supra* note 28, at 226.

183. MALINOWSKI, CORAL GARDENS I, *supra* note 28, at 227.

184. *See* TAMBIAH, CULTURE, *supra* note 178, at 52-53.

minds were thought to be. Semantically, magic emulates direct technical intervention in the natural world—here, for example, by using counterfactual statements that seem directed toward making the yam storehouse physically impregnable. But, at the same time, magic language is “transparently rhetorical and performative (in that it consists of acts to create effects on human actors according to accepted social conventions).”¹⁸⁵

Another great early theorizer of magic, Sir Edward Evans-Pritchard, shared and extended Malinowski’s insight that magic need not conflict with accurate technical know-how. According to Evans-Pritchard, “[w]itchcraft explains why events are harmful to man and not how they happen.”¹⁸⁶ He explained that among the Azande of Central Africa, “[W]itchcraft is the socially relevant cause, since it is the only one which allows intervention and determines social behaviour.”¹⁸⁷ Regarding the Victorians’ belief that magic falsified the natural world, Evans-Pritchard explained, “The error here was in not recognizing that the associations are social and not psychological stereotypes, and that they occur therefore only when evoked in specific ritual situations”¹⁸⁸

The Azande themselves explained witchcraft through a hunting metaphor that captures the idea of magic partnering with rather than opposing natural causes.¹⁸⁹ The Azande apportion the meat from a successful hunt both to the man who first speared the animal and to the man whose spear finished the job, who is known as “the second spear.”¹⁹⁰ Together the two hunters killed their quarry. Likewise, “if a man is killed by an elephant[,] Azande say that the elephant is the first spear and that witchcraft is the second spear and that together they killed the man.”¹⁹¹ Magic is viewed as nature’s partner, and magical intervention is interwoven with natural causes. Thus, explanation of reality in terms of magic is not incompatible with an accurate, rational understanding of the natural world. Instead, magic concerns people’s individual and social relations with reality.

185. TAMBIAH, *MAGIC*, *supra* note 16, at 82. Our conception of magic language and its ambiguous position on the continuum between remote physical action and expressive communication, implicates magic’s relationship with science and religion. Tylor distinguished magic and prayer on precisely this line. Suzanne Last Stone, one of the very few contemporary legal scholars to notice and discuss law’s relationship with magic, adopts this distinction as the definitional difference between adjudication and magic. Stone points to uncertainty as the key: “like magic, law is esoteric and, like magic, it is manipulative, coercive, and for a fee. The crucial difference, as with all aggressive prayer, is the factor of uncertainty. Litigation, like aggressive prayer, is thus an intermediate category between coercion and supplication.” Last Stone, *supra* note 10, at 122.

186. EVANS-PRITCHARD, *WITCHCRAFT*, *supra* note 14, at 24.

187. EVANS-PRITCHARD, *WITCHCRAFT*, *supra* note 14, at 25.

188. E. E. EVANS-PRITCHARD, *THEORIES OF PRIMITIVE RELIGION* 29 (1965). In the 1920s, Evans-Pritchard did field work in Central Africa, and in 1937 published his still classic study *Witchcraft, Oracles, and Magic among the Azande*. The book argues that Zande belief in witchcraft and their practice of divination and magic to identify and combat witches readily coexist with technical knowledge of the natural world.

189. EVANS-PRITCHARD, *WITCHCRAFT*, *supra* note 14, at 25.

190. EVANS-PRITCHARD, *WITCHCRAFT*, *supra* note 14, at 25.

191. EVANS-PRITCHARD, *WITCHCRAFT*, *supra* note 14, at 25-26.

In the mid-twentieth century, focusing on the ways ritual helped shape social reality, Victor Turner and Mary Douglas urged a shift in Western understandings of ritual practices. In their analyses, ritual not only expresses or highlights aspects of experience, but by externalizing experience, actually creates and changes it.¹⁹² The insight that ritual has a non-instrumental, socially constructive role to play is crucial to revising the understanding of ritual and magic in the twentieth century. As Mary Douglas says in her reinterpretation of Lienhardt's observations of Dinka religion, "[R]ituals create and control experience."¹⁹³ Though rituals may fail to affect experiences in a natural-physical sense, they are not necessarily socially ineffective. Here, rituals' performative nature is key. Beyond what Douglas calls their "Aladdin-and-the-lamp face value," rituals have another sort of power:

Of course Dinka hope that their rites will suspend the natural course of events. Of course they hope that rain rituals will cause rain, healing rituals avert death, harvest rituals produce crops. But instrumental efficacy is not the only kind of efficacy to be derived from their symbolic action. The other kind is achieved in the action itself, in the assertions it makes and the experience which bears its imprinting.¹⁹⁴

Victor Turner came to see the conflicting and multivocal aspects of ritual symbols as central to the work they did in creating social meaning. He observed, for instance, that Ndembu rituals ostensibly dedicated to a particular social ideal often enacted conflicts with that norm.¹⁹⁵ In everyday life, Turner explained, Ndembu social norms are sometimes "situationally incompatible, in the sense that they give rise to conflicts of loyalties."¹⁹⁶ For example, a woman's nurturing closeness with her daughter conflicts with her allegiance to the tribal tradition of removing girls from their mother's care when they are initiated as adult members of society. Turner found that initiation rituals, superficially glorifying the girl's achievement of adult status and the solidarity of the tribe, enacted rather than suppressed this maternal conflict. Enacting the mother's loss, the ritual barred the mother from the ring of dancing adult women who surround her daughter, and the mother and daughter exchanged clothes, recalling the Ndembu mourning custom of wearing a dead relative's clothing.¹⁹⁷ In terms of individual experience, the conflict between tribal

192. DOUGLAS, PURITY, *supra* note 16, at 67; TURNER, DRAMA, *supra* note 164, at 56.

193. DOUGLAS, PURITY, *supra* note 16, at 67.

194. DOUGLAS, PURITY, *supra* note 16, at 69.

195. TURNER, FOREST OF SYMBOLS, *supra* note 164, at 4 (discussing Ndembu rules governing residences). For example, "[p]eople who observe one set of norms find that this very observance makes them transgress equally valid rules belonging to another set." *Id.*

196. TURNER, FOREST OF SYMBOLS, *supra* note 164, at 4.

197. TURNER, FOREST OF SYMBOLS, *supra* note 164, at 24.

solidarity and mother love may be unresolvable. In Turner's view, however, the ritual enacted a social reconciliation of that conflict.¹⁹⁸ Arnold would say that the symbolic reconciliation allowed the conflicts between tribal solidarity and mother love and between filial attachment and the assumption of adult status to flourish side-by-side.¹⁹⁹

Turner theorized that ritual symbols work by juxtaposing two different modes of experience—sensory and normative.²⁰⁰ He found that important ritual symbols refer on the one hand to physiological, natural, or sensory experience and on the other to normative or ideological meanings.²⁰¹ For instance, the Ndembu girls' puberty ritual is conducted at the foot of a tree that exudes a milky white latex when its bark is scratched.²⁰² Turner's Ndembu informants told him that this "milk tree," as he calls it, stood for human breast milk and the breasts that supply the milk.²⁰³ Not surprisingly, the ritual is conducted at the time that a girl's breasts mature, and its main theme is the tie of nurturing between mother and child.²⁰⁴ The Ndembu also said that "[t]he milk tree is the place of all mothers of the lineage . . . [and] is where our ancestress slept when she was initiated."²⁰⁵ Finally, they explained that in their matrilineal society, the milk tree "is the place of our tribal custom . . . , where we began, even men just the same . . ."²⁰⁶ Thus, the tree symbolized the solidarity and development of Ndembu society along with the girl's individual development toward motherhood.²⁰⁷ According to Turner, this disparity of reference is typical of symbols that are the focal points of important rituals.²⁰⁸

Turner's analysis then tracks Arnold's description of legal ritual. Rather than treating the ambiguity of symbolic meaning as a logical weakness, he presents it as a social strength. Because of their sensory referents, symbols like the milk tree evoke meanings that "arouse desires and feelings," while their ideological meanings suggest values that ground and control individual experience.²⁰⁹ Ultimately, the symbols tend to unite their physiological and moral frames of reference.

Turner theorized that the symbolic "union[] of 'high' and 'low'" was associated with ritual's social function.²¹⁰ The idea is that the condensation in

198. TURNER, FOREST OF SYMBOLS, *supra* note 164, at 40-41.

199. See ARNOLD, SYMBOLS, *supra* note 150, at 17.

200. TURNER, FOREST OF SYMBOLS, *supra* note 164, at 28.

201. TURNER, FOREST OF SYMBOLS, *supra* note 164, at 28.

202. TURNER, FOREST OF SYMBOLS, *supra* note 164, at 20.

203. TURNER, FOREST OF SYMBOLS, *supra* note 164, at 20.

204. TURNER, FOREST OF SYMBOLS, *supra* note 164, at 20-21.

205. TURNER, FOREST OF SYMBOLS, *supra* note 164, at 21.

206. TURNER, FOREST OF SYMBOLS, *supra* note 164, at 21.

207. TURNER, FOREST OF SYMBOLS, *supra* note 164, at 20-22.

208. TURNER, FOREST OF SYMBOLS, *supra* note 164, at 28-29.

209. TURNER, FOREST OF SYMBOLS, *supra* note 164, at 28-29.

210. TURNER, FOREST OF SYMBOLS, *supra* note 164, at 30.

ritual symbols of sensory affective content with social ideals tends to combine the two in the minds of ritual participants. “Norms and values, on the one hand, become saturated with emotion, while the gross and basic emotions become ennobled through contact with social values.”²¹¹ Ritual achieves its status as a primary social experience in part through this dynamic tension. In the dramatic conflict between norms and the combination of norms and affect, ritual can create, as well as express, social roles, attitudes, and relationships. For Turner, ritual is “a mechanism that periodically converts the obligatory into the desirable.”²¹² As he explained it, “[R]itual symbols are not merely signs representing known things; they are felt to possess ritual efficacy, to be charged with power from unknown sources,” and thus, to be able to change those who come into contact with them in ritual contexts.²¹³

Like Arnold, Turner appreciated that transformative ritual did not merely express static social categories and norms; it constructed those norms and conflicts among them. Thus, ritual was not necessarily a tool for representing and reifying a monolithic version of reality and morality.²¹⁴ Indeed, ritual may not be a tool at all. Instead of thinking of ritual instrumentally, as a mechanism for social expression and social control, we can think of it as a kind of, or aspect of, experience that generates and expresses social reality. Ritual may sometimes enforce dominant social categories. But in Turner’s and Arnold’s conception, it is theoretically capable of creating and maintaining conflicting social norms through symbolic recreations and reconciliations of conflicts.²¹⁵

The different perspectives of Malinowski, Evans-Pritchard, Douglas, and Turner—and, in the legal context, Arnold—share the view that magic and ritual can coexist with rational understanding. In fact, they suggest that, in some contexts, magic may enhance the effectiveness of rational techniques that transform social and, ultimately, physical situations. Magic produces real social effects. Such effective magic might produce beneficial or harmful (legitimate or illegitimate) results, depending on the practitioner’s goals and skills, the particular situation, the sociocultural setting, and, of course, the point of view of the person evaluating those results.

211. TURNER, *FOREST OF SYMBOLS*, *supra* note 164, at 30.

212. TURNER, *FOREST OF SYMBOLS*, *supra* note 164, at 30.

213. TURNER, *FOREST OF SYMBOLS*, *supra* note 164, at 54.

214. Compare the treatment of narrative in law. As others have noted, narratives may be hegemonic as well as subversive. See generally Patricia Ewick & Susan S. Silbey, *Subversive Stories & Hegemonic Tales: Toward a Sociology of Narrative*, 29 *LAW & SOC’Y REV.* 197 (1995).

215. As I have already pointed out, Arnold’s analysis of legal rituals sometimes comes remarkably close to Turner’s later anthropological theory of ritual drama and its role in regulating conflicts among social values. Compare, for instance, Arnold’s view that a criminal trial ostensibly dedicated to truth-finding actually dramatizes the conflict between the social ideals of “the dignity of the State as an enforcer of law” and “the dignity of the individual when he is an avowed opponent of the State” See ARNOLD, *SYMBOLS*, *supra* note 150, at 130.

IV. A REANALYSIS OF LEGAL MAGIC

It is the essence of magic that, by the affirmation of a condition which is desired but not yet fulfilled, this condition is brought about.

Bronislaw Malinowski²¹⁶

[T]o understand that law is socially grounded is to enable us to harness the transformative power of law as a means of social construction.

Steven L. Winter²¹⁷

In this section, I will develop two main results from the anthropological reanalysis of legal magic. First, I will theorize a ritual-magic mode of adjudication that is not necessarily contrary to legal reason. Then, I will discuss three potential roles for this ritual-magic mode of legal practice: as a way to imbue official articulations of legal norms and decisions with the affective moral force of lived experience, as an institutional practice that may enhance judicial and jury impartiality, and as a ritual-symbolic method for enacting a kind of social triumph over morbidity and death.

A. The Centrality and Authenticity of Legal Magic as a Mode of Legal Practice

To this day, much of the debate about the value of precedential practices, procedural formality, and doctrinal reasoning remains wedded to the either-or understanding of the Victorians and Realists. In this view, rules and doctrines either help determine an objectively correct (and thus predictable) outcome, or they are meaningless trappings of a false ceremony that obscure the subjective individual interpretive process that actually produces legal results. Legal decisions are either the product of autonomous authors' subjective judgments or they are determined objectively by doctrine and precedent. Legal compliance is either coerced or freely chosen.

Contrary to the Victorian/Realist view, the work I discussed in the last section rejects this either-or, P-or-not-P, vision. Instead, the metaphoric language of ritual magic is conceived as a social practice that not only expresses thoughts and experiences, accurately or inaccurately, but alters or attempts to alter experience. "Although ritual conveys information about the most basic conceptual categories and ordering systems of the social group, it is used primarily to transform one category into another while maintaining the integrity of the categories and the system as a whole."²¹⁸ As Mary Douglas has

216. MALINOWSKI, CORAL GARDENS I, *supra* note 28, at 70.

217. Winter, *supra* note 27, at 1197.

218. CATHERINE BELL, RITUAL: PERSPECTIVES AND DIMENSIONS 44 (1997).

explained, ritual is not like a map or illustration, a model or guide for an experience we would otherwise have in some other way.²¹⁹ Through its unique social practice, ritual changes experience. Likewise, adjudication's primary social role is not explanation. Rather, court proceedings are intended to intervene in the social world in transformative ways.

The Realists' antiformalist point is that legal language cannot really work automatic changes in society anymore than a stage magician can really make a rabbit materialize out of an empty hat. But this critique presumes a classically Victorian view of magic. Ritual magic need not aim for this kind of false automatic effect. To the extent that ritual is instead understood as a mode of accomplishing social transformation through its effects on group participants, adjudication's ritual magic techniques appear well adapted to accomplishing social change.

The work of Bronislaw Malinowski, Sir Edward Evans-Pritchard, and especially Victor Turner and Mary Douglas helps us appreciate that the Realists' skepticism about legal magic was tied to their instrumental view of law and the assumption that human thought processes are and should be autonomous and impenetrable. In contrast, the notion of a performative effect and the transformative impact of magic depends on a heightened susceptibility to others' language. For instance, in both Malinowski's observations of the yamhouse magic and Turner's theories of the way ritual symbols operate, what is being described is not the sort of vulnerability to automatic magic that the Victorians theorized. But neither is it communication entirely mediated by the conscious reasoning of an autonomous subject. Here, ritual is conceived as a special combination of gestures, language, and circumstances that together create a kind of hyperpersuasive communication experienced by participants as reconstituting their experience of the world.

In contrast, the Realists cannot conceive of an authentic ritual legal technique that shapes adjudicative decisions. From their perspective, every judge "must employ the processes of intelligent men generally," and grapple with a problem's values and facts just like everyone else.²²⁰ Of course, this observation is unassailable in one sense. Whatever practice—ritual or otherwise—a judge employs in making her decision, she will contribute, and be limited by, her own insight and experience. Modern anthropology of magic, however, challenges the Realists' insistence that the individual mind is the sole determinant of legal judgment and thus that the techniques of legal magic are empty. In these theories, magic need not pose a choice between real automatic effects (here, the logical determination of an objectively preferable legal result) and no magical effects. The Trobriand Islanders conduct the yamhouse rites in language ostensibly aimed at the buildings themselves. But Trobriand

219. See DOUGLAS, PURITY, *supra* note 16, at 65.

220. Green, *supra* note 6, at 1020.

practitioners understand the rites as aimed at and affecting their own appetites.

Similarly, the legal determination that a warehouse is “public” will ultimately be enforceable by state-sanctioned violence; but that does not render the metaphorical and performative language used by the judges who make that decision necessarily ineffective or empty. From the Victorian/Realist point of view, practitioners of magic, legal or otherwise, are the victims or perpetrators of a trick that confuses the limits of subjective and objective categories. But once we consider that the objects of magical and legal transformation are, as Malinowski and Evans-Pritchard stressed, social rather than physical facts, we might see this method as authentically transformative.

The two different anthropological views of magic can also shed light on a current issue regarding courts’ precedential practices. In many states, no-citation rules bar discussion of recent state appellate court decisions, which are labeled “nonprecedential.” Until recently, four of the busiest federal courts—the Second, Seventh, Ninth, and Federal Circuit Courts of Appeal—likewise forbade lawyers and lower court judges from citing their courts’ summary “nonprecedential” decisions.²²¹

The leading federal case defending the constitutionality of no-citation rules and nonprecedential opinions is a Ninth Circuit decision, *Hart v. Massanari*.²²² *Hart’s* formalistic model of the binding power of precedent recalls the belief in automatic magic that the Victorians ascribed to practitioners of primitive magic. “If a court must decide an issue governed by a prior opinion that constitutes binding authority, the later court is bound to reach the same result”²²³ It is as if once a judge recognizes that a relevant precedential case exists, the old ruling decides the new case for her. “[B]inding authority is very powerful medicine,” intones *Hart*.²²⁴ The metaphor of a drug, which acts

221. This is not a matter of excluding a few marginal decisions. Under these rules, in 2003, the Ninth Circuit forbade citation to 84% of its decisions. In the Second Circuit, 75% of cases were unavailable as precedent, as were 57% of Seventh Circuit decisions. STATISTICS DIV., ADMIN. OFFICE OF THE U.S. COURTS, 2003 ANNUAL REPORT OF THE DIRECTOR: JUDICIAL BUSINESS OF THE U.S. COURTS, 36 tbl.S-3 (2003). The jurisdictions whose intermediate appellate courts forbid citation of some (usually most) decisions are Alabama, Arizona, Arkansas, California, Colorado, District of Columbia, Florida, Hawaii, Idaho, Illinois, Indiana, Kentucky, Louisiana, Maryland, Massachusetts, Missouri, Montana, Nebraska, Nevada, New Hampshire, Pennsylvania, Rhode Island, South Carolina, South Dakota, Washington, and Wisconsin. See JESSIE ALLEN, THE RIGHT TO CITE: WHY FAIR AND ACCOUNTABLE COURTS SHOULD ABANDON NO-CITATION RULES 3 (Brennan Center 2005) [hereinafter ALLEN, RIGHT TO CITE], available at <http://www.nonpublication.com/allen.pdf>.

222. 266 F.3d 1155 (9th Cir. 2001). The case arose when a California lawyer cited a “nonprecedential” summary disposition of the Ninth Circuit in violation of that court’s rules and was ordered to show cause why he should not be sanctioned. *Id.* at 1159. The lawyer responded by citing an Eighth Circuit opinion (since vacated as moot on other grounds) striking down that court’s rule allowing nonprecedential cases as a violation of Article III of the U.S. Constitution. *Id.* In *Hart*, the Ninth Circuit rejected the constitutional challenge and upheld both the nonprecedential treatment and the citation ban, though the court did not impose sanctions on the attorney. *Id.* at 1180.

223. *Id.* at 1170.

224. *Id.* at 1171.

without regard for the will or desire of the person who swallows it, is telling. In *Hart's* world, the judge takes her precedential medicine, and the medicine decides the case.

It is not surprising that in such a world judges would want a powerful antidote to control unforeseen side effects of their precedential "medicine." In *Hart's* view, when judges speak or write officially, their words acquire an automatic effect, regardless of the context. The opinion thus adopts the black and white approach ascribed to magic practitioners by Victorians and Realists. From this perspective, the only way to control the power of legal words is to suppress them. Indeed, the ritual-magic explanation for the no-citation rules makes a good deal more sense than many commonly offered explanations. Complaints that with open citation, judges will have to defend departures from prior rulings and spend more time ensuring the accuracy of their summary decisions are indefensible from the point of view of judicial accountability.²²⁵ Claims that summary opinions have no informational value are simply incorrect.²²⁶ But, if judges understand their own legal magic as either automatically transformative or utterly illusory, then we can understand why they fear future repetition of hastily written summary opinions.

Like the court reporter described in Part I who erased the trial judge's words about contempt, courts use no-citation rules to suppress judicial language that might otherwise trigger unintended legal effects. Just as the Victorians' view of magic explains *Hart's* formalist jurisprudence, the later work of Malinowski, Evans-Pritchard, and Turner suggests an alternative approach to the unruly power of judicial language. Precedent can be conceived as evolving continuously through each new application. Indeed, this is the traditional common-law approach.²²⁷ According to Malinowski, the Trobriand Islanders applied a similar approach to their magic spells.²²⁸ Although Trobrianders perceive magic as timeless, "a magical formula is in reality constantly being shaped as it passes from one generation to another, and even within the mind of the same man."²²⁹ For instance, the Trobrianders reworked traditional fishing magic to accommodate a new practice of diving for pearls.²³⁰ In the either-or Victorian view of magic words, however, precedential "medicine" is either automatically binding or unreal. Judges (and others) proceeding from this view understandably fear that treating precedent as subject to reinterpretation will rob judicial words of power.

No-citation rules are a solution that allows courts to maintain a black-and-white view of judicial decisions. They ascribe a naïve, automatic power to

225. See ALLEN, RIGHT TO CITE, *supra* note 220, at 7-8; Allen, *Just Words*, *supra* note 49, at 572-73.

226. See ALLEN, RIGHT TO CITE, *supra* note 220, at 10-14; Allen, *Just Words*, *supra* note 49, at 579-82.

227. Allen, *Just Words*, *supra* note 49, at 600-01.

228. MALINOWSKI, ARGONAUTS, *supra* note 14, at 402.

229. MALINOWSKI, ARGONAUTS, *supra* note 14, at 402.

230. MALINOWSKI, ARGONAUTS, *supra* note 14, at 402.

designated precedents and no power at all to opinions labeled “nonprecedential.” In this light, no-citation rules appear primarily as a defense of precedential authority. Words that must be suppressed to prevent their otherwise unmanageable effect are powerful indeed. Though *Hart*’s main focus is ostensibly on the legitimacy of nonprecedential, uncitable summary decisions, subsequent opinions have often cited *Hart* for its avowal of the “binding” power of designated precedent.²³¹

If we look at precedential magic in light of the symbolic theories I described in the previous section, no-citation rules may weaken rather than strengthen the power of the remaining citable precedents. In the works of Turner and Douglas, ritual techniques emerge as having real power to bring about social effects through their symbolic enactments.²³² From this perspective, precedent appears as a symbolic technique through which judges’ words acquire enhanced power that may be undermined by no-citation rules. In a precedential system, it is understood by all the participants that when judges speak or write, they commit themselves to unforeseeable and uncontrollable legal effects. In this way, within the ritual of adjudication, judges assume for their words the kind of risk we all face daily in our physical actions, as we stumble forward through our embodied lives. Acceptance of this ongoing risk may be part of what entitles judicial words to transform ordinary people’s lives.

Importantly, this magical symbolic connection between precedent and bodily action can accommodate a more flexible view of precedent. Although our physical actions are irrevocable and we cannot foresee all their subsequent effects, we can make adjustments to respond to those effects. When we find that by shoring up a wall in one place we have inadvertently weakened it somewhere else, we can fix the new weak spot, or perhaps decide to reinforce the whole structure in a different way and occasionally recognize that we have to tear the whole thing down and start again. What we cannot do without consequence is ignore the effects of our initial hammering and proceed as though the weakening never happened.

If precedent sets judicial words apart, making them at once less like ordinary words and more like ordinary actions, then no-citation rules undermine that symbolic shift. Allowing judges to pick and choose which words carry potential unintended consequences makes all their words seem less like chancy physical action. We surely do not have the power to select in advance which of our physical acts will have lasting impact. The symbolic identification of

231. See *Doyle v. Warden*, 447 F. Supp. 2d 1123, 1129 (C.D. Cal. 2006) (“[A] district judge may not ‘disagree with his learned colleagues on his own court of appeals who have ruled on a controlling legal issue.’” (quoting *Hart v. Massanari*, 266 F.3d 1155, 1170 (9th Cir. 2001))); *In Re Purchasepro.com, Inc.*, 332 B.R. 417, 422 (Bankr. D. Nev. 2005) (“Binding authority must be followed unless and until overruled by a body competent to do so”).

232. See generally TURNER, DRAMA, *supra* note 165 (examining power of ritual techniques); DOUGLAS, PURITY, *supra* note 16 (observing change through rituals’ symbolic enactments).

precedential language with action and the ritual impact of precedential rulings are weakened in a no-citation regime. In this way, no-citation courts undermine a technique that symbolically charges judges' words with a power to affect reality that we otherwise associate with physical intervention.²³³

With some help from anthropology, we can see legal magic as an authentic mode of legal practice, rather than as a corruption or obfuscation of legal interpretation and legal enforcement. Legal magic has "ontologic" status, in Turner's parlance, in between or alongside the better-recognized modes of interpretation and enforcement.²³⁴ Like interpretation and enforcement, legal magic can be done well or poorly, with or without authority we would recognize as legitimate, and have socially beneficial or detrimental results. There is nothing marginal about law's ritual-magic mode. To the contrary, assuming it would be possible to jettison all ritual-magic aspects of today's legal process, the resulting institution would be profoundly different than what we now call adjudication; indeed, it might not be adjudication at all.

B. The Potential Roles of Legal Magic

1. Legal Magic May Enhance the Power of Official Legal Outcomes Through Its Enacted Conflict

Sorcery is above all directed to the contradictions, discordancies, and incompatibilities of life worlds as these are brought together in the immediacy of personal experience. In other words, sorcery is a form whose apparently irrational structure manifests the irrationalities and absurdities of the world

Bruce Kapferer²³⁵

Analyses of the social constitutive aspect of law tend to focus on nonofficial ways in which law interacts with cultural norms. Robert Cover's early influential work emphasizes religious, personal, and often resistant sources of legal meaning.²³⁶ For Cover, similar to judicial precedents, the abolition movement or the Jehovah's witnesses, for example, are sources of constitutional law. He points out that the strength of legal interpretation generated by these sources depends on individual and group commitments to

233. See, Allen, *Just Words*, *supra* note 49, at 608-10.

234. TURNER, *DRAMA*, *supra* note 165, at 57.

235. KAPFERER, *FEAST OF THE SORCERER*, *supra* note 14, at 15.

236. Robert Cover, *The Bonds of Constitutional Interpretation: Of the Word, the Deed and the Role*, 20 GA. L. REV. 815 (1986); Robert Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1628-29 (1986) [hereinafter Cover, *Violence*]; Cover, *Nomos*, *supra* note 24, at 7-8.

live and interpret their lives according to the principles those interpretations embody.²³⁷ Thus, a community's lived commitment can often make nonjudicial legal meanings more vital than the official ones, which lack the moral and affective force such committed experience provides and depend on violent enforcement for their priority.

The reanalysis of the Realists' legal magic suggests that the ritual symbolic aspects of adjudication may substitute for the lived commitment that animates nonjudicial interpretations of legal norms. Perhaps the development of adjudicated law through ritual action imbues official legal interpretations with some of the affective and moral force generated by the kind of lived commitment Cover associates with religious and communal norms. For instance, the link between precedential language and physical action may impart to judges' words a ritual version of the lived commitment to constitutional interpretation Cover found among civil rights activists and religious resisters.²³⁸ The metaphorical connections in legal doctrine that the Realists criticized as illusory and incoherent may foster public identification with official legal determinations. Explicating Turner's theory of symbolic communication in Ndembu rituals of transformation, Catherine Bell explains, "The mobilization of such symbols in ritual involves a dynamic exchange between their two poles: the orchestration of the sensory experiences associated with such symbols can effectively embed their allied ideological values into people's consciousness, endowing the ideological with sensory power and the sensory with moral power."²³⁹ Thus, "the ritual provides tangible and compelling personal experiences of the rightness and naturalness of the group's moral values. It makes the values the stuff of one's own experience of the world."²⁴⁰

In Turner's theories, ritual symbolism serves to embody intangible and previously unknown qualities. Turner notes that the Ndembu term for a ritual symbol means literally "to blaze a trail" by marking trees "to serve as guides back from the unknown bush to known paths."²⁴¹ A symbol, he concludes, "is a blaze or a landmark, something that connects the unknown with the known."²⁴² By superimposing conversations about what Arnold called society's insoluble problems onto the ritual conflict between litigants, adjudication may "make visible" legal norms that "cannot directly be perceived" and activate the official applications of those norms with the energy

237. Cover, *Nomos*, *supra* note 24, at 44-45.

238. Cover, *Nomos*, *supra* note 24, at 26-40 (analyzing jurisgenerative process of religious groups in modifying constitutional interpretations).

239. BELL, *supra* note 218, at 41.

240. BELL, *supra* note 218, at 41.

241. TURNER, FOREST OF SYMBOLS, *supra* note 164, at 48.

242. TURNER, FOREST OF SYMBOLS, *supra* note 164, at 48.

of the particular, personal real-world conflict at stake.²⁴³

Adjudication has long been seen as a socially preferable substitute for the violent personal and group conflicts that are presumed to be the alternative if court process were not available to resolve disputes.²⁴⁴ But rather than simply providing an outlet for personal disputes, adjudication may also use these conflicts to energize official legal interpretation. Turner's analyses suggest that the ritual conflict of adjudication may allow legal proceedings to produce legal norms and determination, whose meaning reverberates with some of the same moral affective power Cover observed coming from communities' living out their normative commitments.²⁴⁵

Although we often think of lawsuits as primarily aimed at controlling individual conflict and imposing doctrinal order on the chaos of everyday life, the ritual-symbolic view of adjudication reveals how litigation carries the energetic conflict of everyday life into legal structures. In the process, legal structures may be energized and transformed. As Mary Douglas comments, "[r]itual recognizes the potency of disorder."²⁴⁶ Chaos is overcome by channeling chaotic energy into chaos-limiting principles. The process is one of constant exchange, involving a continuous reordering and reshaping of these principles.

Adjudication could not continue to exist without disorder. "Betwixt and between" the assertion of legal rights and duties at the beginning of the lawsuit and the legal structure affirmed at the end, a transformative sequence of events unfolds.²⁴⁷ In that liminal phase—the time in between the filing of the complaint and the court's decision—the real life discord generating the lawsuit begets a doctrinal argument that throws into conflict and questions previously settled legal norms and principles. Lawyers depend on disorder for their livelihood, trafficking in everything that undermines social order and making institutions insecure as they advocate for their clients.

The formal categories of doctrinal thought are employed in the ritual of adjudication not only to affirm existing legal structures but also to disrupt them. Jeremy Waldron points out that a litigator's arguments make "institutions

243. TURNER, FOREST OF SYMBOLS, *supra* note 164, at 49-50. "One aspect of the process of ritual symbolization among the Ndembu is, therefore, to make visible, audible, and tangible beliefs, ideas, values, sentiments, and psychological dispositions that cannot directly be perceived." *Id.*

244. See Laurence H. Tribe, *Trial by Mathematics: Precision and Ritual in the Legal Process*, 84 HARV. L. REV. 1329, 1376 (1971).

245. See Cover, *Nomos*, *supra* note 24, at 30. "There is a powerful, almost physical image at work in the conception to which Amish and Mennonites implicitly appeal in their constitutional confession." *Id.*

246. DOUGLAS, PURITY, *supra* note 16, at 95.

247. See TURNER, FOREST OF SYMBOLS, *supra* note 164, at 93-94. Turner used this phrase to describe the central, liminal part in the three-phase ritual structure theorized originally by Arnold Van Gennep. *Id.* at 93. This is the period in a transformational rite of passage, during which the participants leave behind their previous social identities before assuming their transformed roles. *Id.* at 94. In this phase, "the state of the ritual subject . . . is ambiguous; he passes through a realm that has few or none of the attributes of the past or coming state . . ." *Id.* at 94.

'questionable, ambiguous and insecure' as the lawyer struggles to find an opportunity or an exception in the rules and the formalities for the ambitions or predicament of his client."²⁴⁸ Opposing counsel may manipulate doctrinal concepts to present conflicting and disparate views of the dispute at hand. Consequently, litigation, when practiced by skilled advocates, leads to a period of ambiguity during which *both* the parties' fortunes and the doctrines invoked to determine them are up for grabs. During the liminal phase of adjudication, the formal conventions of legal doctrine carry the disruption of the particular parties' lives deeper and wider into society's political, economic, and social structures by symbolically articulating the particular dispute as a categorical conflict related to past, present, and future conflicts.

In the process of adjudication, then, real life danger and chaos are not so much rejected, as Frank complained, as symbolically reenacted and reorganized in ways that inform legal meanings. The energy to reanimate or disintegrate familiar social values, embodied in the legal norms employed in adjudication derives from the social conflicts enacted in the adjudicative ritual. From a functionalist perspective, "[t]he raw energies of conflict are domesticated into the service of social order."²⁴⁹ Or, from a poststructuralist view, adjudication's ritual mode is a "strategic practice[]" for transgressing and reshuffling cultural categories in order to meet the need of real situations."²⁵⁰ Both possibilities are there. The key point is that the ability of law's ritual-magic mode to channel conflict may be a resource for generating and enlivening legal meaning.

I want to emphasize that I am articulating a role of legal conflict and its affective component differently from the usual analysis of court process as a substitute for individual violence or an opportunity for a cathartic release of built-up social tensions. In my view, the ritual structure feeds rather than subdues emotional responses. The aspect of Turner's theory that I am focusing on here is the sense in which "ritual does not really resolve social conflicts and result in social equilibrium; instead, the ritual dramatizes the tensions in a context in which the simultaneous expression of overarching social bonds and symbols of unity facilitates the ongoing dynamics that make up the processes of real social life."²⁵¹ Likewise, Arnold suggested that genuine conflicts between social norms are not resolved through trial dramas. Instead, his notion was that trials provided an opportunity to discuss the "unsolvable problems" of society in a coherent way.

In adjudication, social issues at stake are not discussed and debated in a discursive analytical way, or woven into a story told from beginning to end, but

248. See Jeremy Waldron, *Dirty Little Secret*, 98 COLUM. L. REV. 510, 526 (1998) (quoting EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE 43 (L. G. Mitchell ed., Oxford Press 1993) (1790)) (considering whether litigious nature of attorneys fosters revolutionary consequences).

249. TURNER, FOREST OF SYMBOLS, *supra* note 164, at 39.

250. BELL, *supra* note 218, at 78 (describing Pierre Bourdieu's practice theory).

251. BELL, *supra* note 218, at 55.

are rather enacted in rituals whose mind-numbingly boring repeated routines are punctuated unpredictably with heated emotional disorder. In fact, in adjudication, social norms and conflicts never appear in a straightforward, representational, and linear fashion that would speak directly as a coherent narrative or argument about the social reasons for the obligations that will be imposed at the end of the hearing. Instead, those issues emerge only indirectly in ritual enactments that will change the relationships, status, and lives of some of the participants. Official legal norms are not just discussed, narrated, or imposed through threat of force; they are also embodied in a ritual conflict that engages participants in emotionally intense, morally committed action. Considered in this light, official interpretations of law begin to look more like the unofficial legal meanings that Cover argued developed through committed moral action in individuals' lives.

But can law legitimately partake of such affective power? In illuminating the role of violent enforcement in law, and the way the mobilization of such violence sets judicial interpretations apart from other sources of legal meaning, Cover acknowledged that law's violence is a necessary attribute in a society governed by the rule of law:

As long as death and pain are part of our political world, it is essential that they be at the center of law. The alternative is truly unacceptable—that they be within our polity but outside the discipline of the *collective* decision rules and the individual efforts to achieve outcomes through those rules.²⁵²

The role of legal magic may be justified in a similar way. Unless there are ways to imbue official legal interpretations with the kind of lived, affective moral commitment Cover finds in unofficial legal meanings, adjudication's power to alter social reality and reshape everyday experience will only be experienced as a violent suppression of moral commitments and cultural meanings. I propose that the ritual-magic mode of adjudication may provide a mechanism for imbuing official interpretations and applications of legal norms with the affective force of moral commitments that develop through lived experience.

2. *The Magic of Impartiality*

Magic affects its practitioners. Even if doctrines, precedents, and formalities do not cause judges' decisions, as the Realists asserted, they may shape their decision-making process. The Realists assumed without argument that any such effect was detrimental. Here, I want to consider how legal magic might contribute to judicial impartiality without substantively directing legal

252. Cover, *Violence*, *supra* note 235, at 1628.

outcomes.

Recent research attempting to quantify the effects of judges' personal political perspectives on their rulings has yielded some intriguing results.²⁵³ The studies confirm that among federal appellate judges, the party affiliation of the president who appointed a judge is a fairly strong predictor of how the judge will rule in some types of cases whose outcomes are ideologically polarized. In other words, appellate judges appointed by Republican presidents tend to rule in ways generally perceived as consistent with conservative ideology, and judges appointed by Democrats more often make rulings consistent with liberal positions. For example, Cass Sunstein and his colleagues found that on appellate panels composed of three Democratic appointees, judges voted in favor of sex discrimination plaintiffs 75% of the time.²⁵⁴ In contrast, panels made up of all Republican appointees judges were far less sympathetic to plaintiffs in such cases, ruling for them only 31% of the time.²⁵⁵ Similar trends were found for cases involving affirmative action, sexual harassment, disability, corporate liability, campaign finance, and environmental regulation.²⁵⁶ In some other politically controversial areas, however, no such partisan trends appeared. Decisions in criminal appeals, takings cases, and federalism cases showed no significant ideological bias.²⁵⁷

Such studies confirm a political bias among appellate judges that hardly seems to need confirmation. Every person has her own perspective on the world, shaped in part by politics. Moreover, federal judges often have expressed strong support for, or even worked to promote, one or another party's policy agenda prior to their appointment. It would be quite surprising to find that judges' political principles vaporized upon their taking up positions on the bench. The question is whether the practices of appellate judging in any way neutralize those biases.

The study by Sunstein and his colleagues produced two findings that suggest adjudication does shift judges' ordinary subjective viewpoint. First, the study found an interesting effect on case outcomes when appellate panels are politically mixed—that is, when two Democratic appointees sit with one Republican or vice versa. In such situations, the ideological effect of the

253. Cass Sunstein, David Schkade & Lisa Michelle Ellman, *Ideological Voting on Federal Courts of Appeals: A Preliminary Investigation*, 90 VA. L. REV. 301, 320 (2004) [hereinafter Sunstein].

254. *Id.* at 320.

255. *Id.* Another study of the D.C. Circuit showed that panels composed of all Democratic appointees or all Republican appointees deferred to agency decisions in only 33% of cases where the panel's politics apparently diverged from the agency's decision, but deferred in 71% of the cases where the agency decision under review appeared consistent with the panel's politics. Frank B. Cross & Emerson H. Tiller, *Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Courts of Appeals*, 107 YALE L. J. 2155, 2172 (1988).

256. Sunstein, *supra* note 254, at 320-23.

257. Sunstein, *supra* note 254, at 325-27.

majority's political affiliation is significantly weakened.²⁵⁸ In the sex discrimination cases, for instance, although three-Democrat panels ruled for plaintiffs 75% of the time, panels composed of two Democrats and one Republican ruled for plaintiffs in only 49% of cases.²⁵⁹ Recall that a two-judge majority has every bit as much legal power as a unanimous panel to decide the outcome of a case, yet the presence of a single Republican judge greatly reduced the chances that a two-Democrat majority would exercise that power. Similar effects have been found in other case areas and with panels composed of two Republicans and one Democrat. Second, as already noted, the study showed that no partisan effects were found in several areas generally considered politically controversial. Moreover, as the authors point out, the study shows that "even when party effects are significant, they are not overwhelmingly large."²⁶⁰ Both Democratic and Republican appointees voted against stereotypical partisan interest in more than one-third of the cases studied.²⁶¹

The authors suggest possible explanations for these results that reflect their own jurisprudential perspective, which might be characterized as liberal legal-process doctrinalism modified with a dose of Realism. In the case of panel effects that seem to neutralize politics, they suggest that a possible explanation is that the judge in the political minority is able "to call the panel's attention to the tension between its inclination and the decided cases."²⁶² Assume that the existing precedent is "not entirely clear," they say, "but that fairly applied," it dictates one outcome.²⁶³ In such a situation, "fallible human beings might well be inclined to understand the law in a way that fits with their own predilections."²⁶⁴ But, they hypothesize, a judge with a different ideological perspective can point out to the others how they are being swayed by ideology and help them to recognize that the existing legal precedents actually call for a different result.²⁶⁵ Where no political effects materialized, the authors propose that the observed effects are the result of either ideological unanimity across party affiliation or the existence of "binding precedent" under prevailing legal doctrines and case law.²⁶⁶

From the perspective of legal magic, however, we can imagine a third possible explanation worth studying as a possible cause of the apparent mitigation of judges' personal political ideologies in their legal determinations. It would be very interesting to see whether in cases where judges voted across

258. Sunstein, *supra* note 254, at 315, 329.

259. Sunstein, *supra* note 254, at 314 tbl. 1.

260. Sunstein, *supra* note 254, at 336.

261. Sunstein, *supra* note 254, at 336.

262. Sunstein, *supra* note 254, at 344.

263. Sunstein, *supra* note 254, at 344.

264. Sunstein, *supra* note 254, at 344.

265. Sunstein, *supra* note 254, at 344.

266. Sunstein, *supra* note 254, at 334-35.

type, there was a strong emphasis on—or notable absence of—doctrine, precedent, and formality in their opinions. Likewise, we might study the use of the five techniques of legal magic—enactment, heightened formality, performativity, temporal play, and analogic connection—in conjunction with the degree of partisanship evidenced in different judicial contexts. In other words, one could look to see whether the incidence of voting contrary to expected partisan interest correlated with, for instance, the presence or absence of metaphorical doctrinal reasoning and citation to precedent in the relevant case law, or high or low levels of procedural formality in a particular jurisdiction.²⁶⁷ One could, for instance, look to procedural forms in different courts and different case law areas. The use of oral argument would be an interesting variable. There is a wide variation among appellate courts today in the use of argument. Some federal appellate courts, for instance, still provide for oral argument in every case, while others decide most of their cases on the briefs. Does a court's use of this form of enactment heighten, dampen, or not affect the partisan tendencies of its judges?

In my experience, most appellate judges and advocates believe that oral argument rarely influences a case's outcome. They point out that it is generally easier to assess the strength of the parties' arguments and the approach of existing case law by reading the briefs and relevant decisions. Despite the view that appellate argument has little instrumental value, many practitioners and some judges continue to value it highly. At least one judge describes the importance of oral argument in terms that are resonant of the argument I made above about the importance of legal ritual for imbuing legal norms with tangible value: "It is the right to be heard made concrete, or, in biblical language, the 'word made flesh.'"²⁶⁸ Oral argument may well have value as a symbolic "hearing" that contributes to people's satisfaction with judicial outcomes.²⁶⁹ But in this section, I am considering the possibility that the real time performance of the parties' arguments may actually contribute to judicial impartiality.

It is important to see that the magic-ritual effect I am hypothesizing here is nonsubstantive. In other words, it does not depend on the assumption of Sunstein and his colleagues that the shift in legal outcomes for mixed panels reflects an objectively present substantive rule provided by the existing case law that should determine, or at least steer, legal outcomes once partisan bias is suppressed. Rather, an approach to legal magic informed by modern

267. A research project that would address some of these issues is currently in the design phase, overseen by Oscar Chase of New York University.

268. Gilbert S. Merritt, *The Decision Making Process in Federal Courts of Appeals*, 51 OHIO ST. L.J. 1385, 1387 (1990).

269. Studies suggest that claimants' satisfaction is related not only to legal outcome but also to the opportunity to appear and be heard. Tom R. Tyler, *A Psychological Perspective on the Settlement of Mass Tort Claims*, 53 LAW & CONTEMP. PROBS. 199, 204 (1990).

anthropological theories of magic opens the possibility that the symbolic ritual elements in doctrine and the adjudicative process might suppress partisan bias *without* providing direction about substantive results. In this view, the magic-ritual mode of adjudication may facilitate judges' move *away from* their ordinary personal outlook without moving them *toward* any particular decisional outcome. While agreeing with the Realist conclusion that legal magic does not substantively determine legal outcomes, this approach envisions the use of legal magic to achieve results Realists would admire.

3. Restorative Legal Magic

Things come and depart: the soul comes back to the body, fever is driven away. An attempt is made to make sense of an accumulation of images. The bewitched person is ill, lame, imprisoned. Somebody has broken his bones, dried up his marrow, peeled off his skin. The favourite image is of something holding him, and it is tied or untied

Marcel Mauss²⁷⁰

[W]here there is a legal right, there is also a legal remedy

*Marbury v. Madison*²⁷¹

I want to suggest that the ritual-magic mode of modern adjudication may correspond to another feature adjudication shares with magic in other settings: an avowed goal of re-forming the past. At least at the level of ordinary language, adjudication is concerned with remaking the past. We speak in a contracts action of placing the injured party in the position in which she would find herself if the agreement had never been breached. In tort suits, we strive to "make whole" a person injured, often in ways that are irredeemable in a physical or technical sense. Indeed, what Douglas observes of ritual in general is definitively true of the ritual of adjudication: "what has passed is restated so that what ought to have been prevails over what was"²⁷²

This reversibility is, of course, anything but realistic. In this embodied life, we can only go forward. Glance at the clock and discover that the morning set aside for writing has been wasted on household chores and the newspaper; you cannot have those hours back. More dramatically, the moment after your car crashes into the one ahead of you, or you swallow some foreign object inside a soft drink, there is no return to the world just before disaster struck. In an instant, reality is reoriented. Whatever damage is done cannot be undone, or

270. MAUSS, *supra* note 14, at 61.

271. 5 U.S. 137, 163 (1803).

272. DOUGLAS, PURITY, *supra* note 16, at 68.

can it? In life, not usually, but in ritual, certainly, and that includes the ritual mode of adjudication. In life, things break. While sometimes we can repair them, they are never the same again, and many injuries are irreparable. But law is different, for laws are made to be broken.

Above all, legal magic enacts a form of scripted action that stands in for inchoate, chaotic, and uncontrolled experience of real life in order to transform real life. Once again, the crucial thing to recognize—in order to relate adjudication to this kind of magical symbolic undoing of past events—is that magic aims to reorient social reality. Formal ritual symbolism reinterprets physical finality in terms of potential social transformation. All real-time events have a social as well as a physical level. By substituting a symbolic-metaphoric world for technical physical reality, magic reorders the disruptions of illness, accident, and even death. Magic reorders them—that is, in terms of their social meaning and effects.

Victor Turner argued that the Ndembu Milk Tree stood at once for the theoretically timeless tribal social structure and that most deeply time- and body-bound affective relationship between an individual mother and her nursing infant.²⁷³ Likewise, the doctrine of precedent embodies both the ideal reversibility of the (legal) injury and the fundamental irreversibility of our embodied existence. Precedent allows judges to talk to one another through their opinions across history as though no temporal or mortal limits exist. Elizabeth Mertz has pointed out that even when a judicial opinion emphasizes historical disjunctions in social settings and understandings of legal norms—as, for instance, when *Brown v. Board of Education* reinterpreted *Plessy*'s understanding of equal protection—the overarching “narrative convention that permits the two texts to speak to one another across such radically different contexts” emphasizes “the power of legal [language] across these social changes.”²⁷⁴ Just as magic spells and legal doctrines exaggerate the metaphoric capacity of ordinary language to create heightened forms of symbolic association, law's triumph over historic time results from an exaggeration of ordinary notions of history. As Carol Greenhouse notes, common law both “reflects perfectly a logic of linear time, in its reliance on precedent” and “involves larger claims beyond linear time.”²⁷⁵ The doctrine of precedent reifies and takes to extremes the embodied psychophysical reality of irreversible time. In a precedential legal system, as Greenhouse puts it, law “accumulates, but it never passes”²⁷⁶

But the precedents that incorporate this extreme irreversibility are then

273. DOUGLAS, PURITY, *supra* note 16, at 56.

274. Elizabeth Mertz, *Consensus and Dissent in U.S. Legal Opinions: Narrative Structure and Social Voices*, in *DISORDERLY DISCOURSE* 150 (Charles L. Briggs ed., 1996).

275. Carol J. Greenhouse, *Just in Time: Temporality and the Cultural Legitimation of Law*, 98 *YALE L.J.* 1631, 1640 (1989).

276. *Id.*

applied to reverse damage and disorder reconceived as legal transgressions. Thus, precedent approaches transcendence and the achievement of its timeless opposite: reversibility. “Because it is timeless, legality is not only cumulative and expansive but reversible. The past can meet and control the present, but the present can reverse the past as well.”²⁷⁷ This is the magic reversal. That which is ordinarily irreversible—the real life effects of embodied existence—has become amenable to remedy, while the ordinarily intangible, malleable stuff of abstract thought and expression has hardened into irreversibility. Through precedent, the past words of judges meet and control the present, and the energy of the present disorder that is legally reversed is absorbed back into the precedential rule, proving and increasing its potency. The past, in the form of precedential judicial language controls the results of the present adjudication so that the present adjudication can reverse real life. Past events are transformed into legal injury or a “lawbreaking” that the subsequent adjudication either identifies and remedies or determines never occurred in the first place.

But legal magic’s treatment of time is not entirely transcendent. The doctrine of precedent imports to judicial language the irrevocability of physical action. By accepting an irreversibility akin to that of physical acts, judges’ precedential language acquires an unusually active quality that might increase our sense of its power to affect social reality.²⁷⁸ In adjudication, then, the embodied reality of one-directional time and irrevocable physical action is flattened and denied as timeless doctrinal formulas are applied to ritually remake the past. Judges defy mortal limits to converse with one another across centuries. But temporal limits are shifted onto adjudication’s ritual language. It is judges’ *words* that can never be wholly undone, not the real-world situations in which they intervene.

In the everyday physical world, generally speaking, what’s done is done. Not so in adjudication, where the past can be reworked according to legal concepts. But the ordinary, uncancellable contingency of the embodied temporal world comes back through the doctrine of precedent. Judges absorb some of this physical irrevocability into their words. The meaning of those words may be subsequently modified. Indeed, in a common-law system, every subsequent application of a precedent affects the system, just as every daily act affects our bodies. Subsequent cases must take account of previous decisions in the same way each of our acts tomorrow is in part determined by what we do today.

277. EWICK & SILBEY, *COMMON PLACE*, *supra* note 27, at 95.

278. It is also interesting to consider how this duality might be related to the one that Tambiah pointed out through which magic language grammatically addresses the inanimate world (like a physical intervention) but apparently takes effect through its persuasion of people. See TAMBIAH, *MAGIC*, *supra* note 16, at 81-83.

Thus, in adjudication, we act as if the real-world events at the center of the case—the crime, accident, or breach of promise—are reversible. But judges' precedential language acquires the action-like quality of irrevocability that normally attends real physical life. Through the ritual-magic technique of precedent, a potential for order and control is symbolically imposed on the real-life situation at hand. Meanwhile, the symbolic structure itself (i.e., the practice of precedent) seems to have absorbed some of the uncontrollable chanciness of ordinary embodied existence.

The Victorians, and the Realists, saw magic rituals as naïve or fraudulent attempts to automatically reverse irreversible physical processes and deny reality. But modern field anthropologists recognized that “instrumental efficacy is not the only kind of efficacy to be derived from . . . symbolic action.”²⁷⁹ As Evans-Pritchard reminds us, even “death is not only a natural fact but also a social fact.”²⁸⁰ Magic practitioners may or may not hope that a ritual or sacrifice can reverse the natural fact of death, but at its primary level, the symbolic ritual reversal enacts “a social triumph over death.”²⁸¹ Likewise, law substitutes a symbolic-metaphoric world of doctrine for real-life conflict and damage, and with the resolution of the doctrinal conflict, enacts a social triumph over disorder and injury. But in the process, legal principles are themselves temporarily disordered and sometimes reorganized. The structures of law are energized and strengthened in their original or new configuration not only by the power of the real-life destruction and damage they are called upon to realign, but also paradoxically, by being broken themselves. In the physical world, when things get broken, they usually become less themselves, at least temporarily, and sometimes lose their identity altogether. With laws it is just the reverse: a law that is never broken ceases to exist.²⁸²

Once again, then, from a Realist perspective, the magic-ritual mode of law looks like the Victorian evolutionist concept of magic as it appears to embody a childish and mistaken view about the nature of the physical universe. In life, when things break it is often unexpected and usually problematic. They either stay broken, or they are repaired in a way that does not restore them to their former unbroken condition. But laws, like many children's toys, are made to be broken and put back together over and over in a seemingly endless series of enactments of perfect reversibility. In fact, there is a whole genre of baby and toddler merchandise the hallmark of which is its capacity for being taken apart

279. DOUGLAS, PURITY, *supra* note 16, at 69.

280. EVANS-PRITCHARD, WITCHCRAFT, *supra* note 14, at 25.

281. DOUGLAS, PURITY, *supra* note 16, at 69.

282. This is most obvious with common law, where no written statutes exist in books ahead of time to draw a line between legalality and illegality, where the determination of the law is in some sense always retrospective, arising out of someone's claim that breakage has occurred. Even legal codes, however, lose authority when no one breaks them; for laws that go unbroken go unenforced and unnoticed and eventually fall into obsolescence. Those dead or dormant laws will only be revived as significant in anyone's mind at the point that someone breaks one.

and put back together again.²⁸³ My personal favorite was a set of “slicing vegetables”—tomatoes, eggplants, peppers—each cunningly molded into two pieces held together with Velcro to form a single vegetable shape. Each could be endlessly sliced with a plastic knife and then rejoined into a whole. Law is that sort of object: not merely capable of being broken and repaired, but largely defined by that capacity. Like the Velcro tomato, it exists to be broken and reshaped again and again and again. The reversible vegetables provide tangible proof to young children of their effect on the world. Likewise, law’s endless capacity to be broken and restored constantly demonstrates and reaffirms a society’s capacity to transform and restore reality.²⁸⁴

Here again, the insights of anthropology can shed new light on this apparently primitive outlook. For in the law’s ritual reversibility of injuries, ontogeny does not mirror phylogeny. Young children cannot distinguish between repairable and irreparable damage. As a toddler, my daughter did not understand that her powers of repair were limited to toys. She would gleefully rip flowers out of the ground, tear off their petals, and then try to replant them. In contrast, practitioners of ritual magic distinguish between categories of social and physical facts and causes, and thus, between those injuries that are amenable to legal restoration and injuries that are not. The reversibility of legal magic may play a hitherto unstated role in our legal system’s ability to “grant relief,” i.e., to generate remedies for legal injuries that are both psychologically satisfying on an individual level and socially restorative. Trobriand magic first transforms individual villagers’ hunger pains into a potential weakness in the yamhouse structure, which, when remedied, generates a sense of increased plenty and stability in the village. In a parallel way, a lawsuit transforms the physical and emotional injuries and violation of, say, a car wreck into a doctrinal conflict about proximate cause, the resolution of which reinforces the notion that our global village can come to terms with the mortal speed and risks of a motorized world.

It is as though dysfunction—pain, want, misfortune, conflict—carries a kind of energy that both magic and legal systems recognize and aim to transform

283. Small children are fascinated with the damage they can cause. Developmentally, children’s first sense of their own ability to affect the world comes through the capacity to break stuff. Long before they can establish themselves creatively, children are capable of spectacular destruction. Destruction as a mode of identity development is not confined to toddlers. Elaine Scarry points to the repeated instances of divine wounding and destroying as the way in which the God of the Old Testament achieves tangible reality. ELAINE SCARRY, *THE BODY IN PAIN* 198-205 (1985).

284. In fact, law may be the premiere example of a general category of things that can be broken and then thoroughly restored. Or perhaps we should say that law aims at the symbolic effect of all such objects: affirming our power to deliberately intervene in and reshape the effects of our actions. Jerome Frank would undoubtedly characterize this view of law as wish fulfillment. In some undeniable sense, both toys and law fulfill the magical wish to go back and undo something you have just done, to perfectly reverse an action so that no one could ever know that the original action had even taken place at all, so that no one would ever feel any of its consequences. But at the same time, they are recognizably not real; they fulfill that wish *symbolically*.

into positive personal or social power. The Ndembu translate misfortune in hunting as a violation of ancestral duties. When that violation is recompensed in what Turner called the “rituals of affliction,” the disruptive energy of the hunting misfortune reverses to confer unusual healing power on the formerly afflicted individual. In the process, the ritual reconfirms the traditional social structure by demonstrating its power to overcome and transform misfortune.²⁸⁵ Likewise adjudication first transforms individual conflict, pain, and violence into lawbreaking, a kind of damage that is by definition reversible, and then by legally remedying it, reaffirms our society’s ability to overcome social chaos, to reverse time and reorder social reality.

V. CONCLUSION

As provocative as it may sound, law as magic is no more outlandish than law as literature or law as nothing but the prediction of what judges and other government officials will do. H.L.A. Hart calls these kinds of jurisprudential redefinitions “great exaggerations” that are at once “illuminating and puzzling.”²⁸⁶ Like these other theories, my analysis of adjudication as ritual magic is meant to highlight neglected truths about our legal system. In the process, I ignore or downplay other better recognized features. The aim is to bring to light a dimension of law that is at once taken for granted and largely invisible. Moreover, it strikes me as worthy of further investigation that a social institution avowedly devoted to truth and reason, but perennially criticized as false and irrational, looks so much like a set of social practices traditionally viewed as false and irrational, though more recently interpreted as reasonably effective in their own social contexts.

In my reanalysis of legal magic, I aim to suspend judgment about its normative significance. Still, I recognize that the tone of my discussion is optimistic, even idealistic. That optimism is in part driven by a personal desire, perhaps a personal need, to believe that the practice of law has real potential for enriching and transforming our society. As James Boyd White remarked, if “we can imagine law as an activity that in its ideal form, at least on occasions, has true intellectual, imaginative, ethical and political worth[,]” then we will find “both something to aim for and a more workable and trustworthy ground for the criticism of what we see around us.”²⁸⁷ Nevertheless, I do not mean to suggest that a more idealistic view of the ritual-magic techniques of adjudication should *replace* the Realists’ critique. The Realists catalogued and demystified legal magic and exposed the ways in which law’s magical features

285. TURNER, *FOREST OF SYMBOLS*, *supra* note 164, at 9-15. As one of Turner’s Ndembu collaborators expressed it, “What hurts you, when discovered and propitiated, helps you.” *Id.* at 133.

286. H.L.A. HART, *THE CONCEPT OF LAW* 2 (1961).

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

2008]

A THEORY OF ADJUDICATION: LAW AS MAGIC

831

can masquerade as objective truth and costume politics as nature. They showed convincingly that legal magic, like other forms of magic, can be used to screen ulterior motives and to carry out projects of social dominance. But unless we read these critiques as ultimately counseling that we dismantle our legal system, we must look for clues they provide about law's potential as well as law's limits.