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The American Legal Faith: Traditions, Contradictions and Possibilities

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ARTICLES

*R. Bruce Townsend Professorship Inaugural Lecture**

THE AMERICAN LEGAL FAITH: TRADITIONS, CONTRADICTIONS AND POSSIBILITIES

DAVID RAY PAPKE**

One might assume that my consideration of law's role in American culture began while I was either a law student or a graduate student in American Studies. If not then, my work must have begun when I became a university professor teaching in both a law school and a school of liberal arts. In fact, I was much slower to take up the subject, and it was only in 1986-87, during a Fulbright year at Tamkang University in Taiwan, that I started in a sustained way to scrutinize law's role in American culture.

Time and again, my Taiwanese students called on me to reflect critically on my assumptions about law. Surely, they said, I did not really think a U.S. Supreme Court decision could really alleviate racial stress and inequality.[1] Race relations are much deeper than anything law could touch. Certainly, they added, I could not think a proposed equal rights amendment would lead to significant change for American women.[2] Gender is so much more fundamental than any words in the U.S. Constitution. I was naive, my students insisted, in thinking law was all that important. Like many Americans before me, I was manifesting what

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* The R. Bruce Townsend Professorship was established at the Indiana University School of Law—Indianapolis in the fall of 1996. The Professorship is named for R. Bruce Townsend, renowned legal scholar and beloved teacher at the School from 1946 to 1982. The inaugural lecture was delivered on November 20, 1996.

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1. The reaction was provoked, of course, by *Brown v. Board of Education*, 347 U.S. 483 (1954).

2. Phyllis Schafly's contention in opposition to the amendment struck a chord with my Taiwanese students. To wit: "Reasonable people do want differences of treatment between men and women based on the obvious factual differences, namely, that women have babies (and men do not) and that women do not have the same physical strength as men." CONG. DIG., June-July 1977, at 191.

one scholar has called an "uncanny American reverence for law."[3] From the Taiwanese perspective, this seemed silly.

But was it? To be sure, Americans are not particularly law-abiding or even especially knowledgeable about the niceties of the law. American crime rates are high. We lead the world in the percentage of the population formally incarcerated, and studies have confirmed a striking American ignorance of what the law actually says.[4] Yet despite this, Americans, at least traditionally, have had a legal faith. We have historically placed law on a pedestal, have valorized it and elevated it. A belief in law has been central to our ideology, in our sense of ourselves as a people, in our culture as a whole. As I studied law's role in American culture, I concluded that attaching importance to a Supreme Court opinion or constitutional amendment was not naive. Opinions and amendments—laws generally—*are* significant in the context of the world's most legalistic culture.

After a few words of definition, I hope in the comments that follow to trace the development of the American legal faith. I will address both the nineteenth century and the twentieth century, focusing on what I take to be three crucial components of the legal faith: the Constitution, the courtroom trial and, most ambitiously, the rule of law itself. The Constitution, I will argue, is an icon of the legal faith, the trial is a ritual, and a belief in the rule of law is the faith's first and most important teaching. Does the faith continue to compel and direct us in the present? Is the faith likely to play as large as role in the American future as it has in the American past?

I. INTRODUCTORY DEFINITIONS

Given the audacity of discussing a subject as large as law's role in American culture in one lecture, I had best set out my terms carefully—if only for defensive reasons. How do I define "culture"? What do I mean by "law"? In what sense could law be the basis of a "faith" in American culture?

"Culture" is one of the most interesting and complicated terms in the English language, and sometimes debates about culture boil down to conflicting definitions of the term itself. "Culture" is a term that has come to be used for key concepts in several intellectual disciplines and in several distinct and incompatible systems of thought. The oldest meaning perhaps involves notions of tending and cultivating, with subsidiary meanings of honor and worship. We find this meaning embedded in such modern terms as "horticulture" or "agriculture." But beyond husbandry, the term from at least the sixteenth century onward also referred to the development of human learning and conduct. Hence, "culture" came to denote the pattern of human knowledge and behavior that groups of humans transmitted from

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3. Daniel J. Boorstin, *Editor's Preface* to ROBERT G. MCCLOSKEY, THE AMERICAN SUPREME COURT at vi-vii (1960).

4. For a discussion of the Hearst Corporation's 1983 study of public knowledge of law, see Stewart Macaulay, *Images of Law in Everyday Life: The Lessons of School, Entertainment, and Spectator Sports*, 21 L. & SOC'Y REV. 185, 186-87 (1987). *See also* Martha Williams & Jay Hall, *Knowledge of Law in Texas: Socioeconomic and Ethnic Differences*, 7 L. & SOC'Y REV. 99 (1972).

one generation to another. "Civilization" is sometimes used as a synonym, but with the use of this synonym, still a third important meaning emerged, namely, the varieties of knowledge and behavior that showed one was truly civilized. Music, literature, painting and theater seemed to some what we meant by "culture." In some nations governments even charged ministries of culture with nurturing these varieties of culture.[5]

The second of the meanings—the one most anthropological in nature—is most crucial in my remarks, but I am mindful of how complicated even that single meaning is when applied the collective knowledge and behavior of the United States. We have never had a national culture comparable to the coherent, integrated culture of a tribal group. In the United States there have always been racial, class, ethnic and regional variations. Hence, I should note that for the purposes at hand I will emphasize not all of American culture but rather the dominant American cultural beliefs and behaviors. These, traditionally, have been most generated by and subscribed to by those on the top of the American pile: white, Anglo-Saxon Protestants with money. As for "law," a second key concept in my remarks, I am not particularly concerned with the precise legal prescriptions and proscriptions. Yes, we have them. Armed with a computer one might even be able to count them all up on federal, state and local levels and then show that on a per capita basis Americans have more laws than any other people. Some have deplored this, speaking of a curious indigenous malady known as "hyperlexis."[6] Former Chief Justice Warren E. Burger seemed imbued with this very quantitativeness when he criticized the American law explosion.[7]

But when I speak of "law," the rules and statutes and ordinances are not what I have in mind. "Law is like an iceberg," Iredell Jenkins has said, "only one-tenth of its substance appears above the surface in the explicit form of documents, institutions, and professions, while the nine-tenths of its substance that supports its visible fragment leads a sub-aquatic existence, living in the habits, attitudes, emotions and aspirations of men."[8] The latter are what intrigue me. What can we say about the dominant culture's "sub-aquatic" understanding of law?

As already suggested, this understanding, in my opinion, has an element of "faith" about it. This term customarily has religious connotations, and what I want to call the "legal faith" is not a religion in the strictest sense. There is no godhead. A formal priesthood and church do not exist. But still, the dominant American culture has tended to approach law with some of the belief, trust, allegiance and fidelity more commonly accorded to conventional religious belief. The "legal faith," for better or worse, is one of the defining characteristics of Americanism. The "faith" merits rediscovery and underscoring even if its viability in the present remains an open question.

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5. For an excellent discussion of the wide range of meanings attached to the term, "culture," see RAYMOND WILLIAMS, KEYWORDS: A VOCABULARY OF CULTURE AND SOCIETY 76-82 (1976).

6. Bayless Manning, *Hyperlexis: Our National Disease*, 71 NW. U. L. REV. 767 (1977).

7. Warren E. Burger, *Isn't There a Better Way?*, 68 A.B.A. J. 274 (1982).

8. IREDELL JENKINS, SOCIAL ORDER AND THE LIMITS OF LAW at xi (1980).

II. LEGAL FAITH IN THE NINETEENTH CENTURY

Although the American legal faith came to flower in the nineteenth century, its seeds of course were planted earlier. Contemplation of the intriguing figures of Thomas Paine and Thomas Jefferson offer some hint of what the American legal faith would become in the nineteenth century.

Paine is a fascinating figure. Few would have predicted on the basis of what had happened to him in England that he would find success and prominence upon arriving in the North American colonies in 1774. His uncirculated vita included a bankruptcy, two unsuccessful marriages and false career starts as a grocer, tobacconist and corset-maker. However, Paine was a sharp political thinker and writer. He had an edge. His publication in 1776 of *Common Sense*, a lengthy pamphlet, met with tremendous approval. It sold over 100,000 copies in just three months, and its call for independence did much to fuel the colonists' revolutionary fire.[9]

Of special interest is a passage in *Common Sense* that attempts to assure colonists that they can go forward without a king. Such a step could make one nervous, Paine admits. We've grown accustomed to having a monarch. But there is an alternative. Americans could solemnly set aside a day to honor their legal charter. More specifically, Paine said, bring forward that charter itself, place it on top of the Bible, and then place a crown on top of it all. The whole world would then know, Paine said, "that in America the law is king."[10]

This image would have caused no shortage of consternation for most of the Europeans who began settling in North America 150 years earlier, but by the late eighteenth century law and legal institutions had taken on increased importance in colonial society. Against the backdrop of modernization, a reliance on rational/legal systems of authority came gradually to replace an older reliance on status and rank. The changes did not occur overnight. They were not complete and all-conclusive. But by the end of eighteenth century many Americans had come to see legal rights and duties as the keys to relationships, legal institutions as devices to avoid chaos and preserve liberty, and law-abiding conduct as something highly ethical.[11]

Paine captured this sentiment, and the sentiment itself inspired the drafters of the Declaration of Independence, the most important of whom is Thomas Jefferson. Jefferson was very much a lawyer, having studied law at the College of William and Mary and in an apprenticeship. He even at one point taught

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9. Useful biographies of Paine include: ALFRED OWEN ALDRIDGE, MAN OF REASON: THE LIFE OF THOMAS PAINE (1959); NOEL BERTRAM GERSON, REBEL! A BIOGRAPHY OF TOM PAINE (1974); ERIC FONER, TOM PAINE AND REVOLUTIONARY AMERICA (1976).

10. THOMAS PAINE, COMMON SENSE, *in* THE COMPLETE WRITINGS OF THOMAS PAINE 29 (Philip S. Foner ed., 1969).

11. *See* PETER CHARLES HOFFER, LAW AND PEOPLE IN COLONIAL AMERICA 62-63, 96-121 (1992); CHRISTOPHER L. TOMLINS, LAW, LABOR, AND IDEOLOGY IN THE EARLY AMERICAN REPUBLIC 19-34 (1993).

himself Anglo-Saxon in hopes of better understanding the origins and nuances of the common law.[12] The preamble of the Declaration includes the stirring invocation of natural rights that school children to this day memorize, but unbeknownst to many of those school children, the Declaration hardly ends with the preamble. It continues, scholars have noted, much as would have a bill in equity of Jefferson's era, complete with an attempt to establish jurisdiction, identification of the parties, a list of wrongs, a request for remedy and even a concluding oath. Jefferson could have used the same form to ask a Virginia court sitting in equity to enjoin a farmer from marching his cows over a neighbor's garden.[13]

Even more importantly, the Declaration's content was highly legalistic. The King, it seems, has refused to assent to desirable laws, forbidden his governors to pass laws, and abolished valuable colonial laws and charters. The King has also assembled legislatures at unusual times, unduly dissolved these bodies, refused to establish courts, used salary and tenure to manipulate judges, and generally harmed the most crucial of legal institutions. The King, really, was the one who had been disrespectful of law and in a profound sense "illegal." In ways that no doubt appealed to Thomas Paine, the Declaration of Independence launched one of the most curious of revolutions: one that purported to be law-abiding and law-respecting!

After the Revolutionary War and in the early nineteenth century, confidence in law and legal institutions became an even larger part of American ideology. The Constitution became an icon through which one could worship in the legal faith. The courtroom trial, as observed in person and as evoked in newspapers and fiction, served as an important secular ritual. Most importantly, a belief in the rule of law became the central doctrinal commitment of the legal faith. During the first half of the nineteenth century individual Americans and the nation as a whole turned frequently to this faith for self-definition and meaning.

A. The United States Constitution as Icon

To think of the Constitution as an icon might seem strange. Our textual charter perhaps. Our fundamental law. But an icon? My argument is that believers in any faith need something concrete through which they can worship. An icon can provoke devotion, reinforce belief. It is a door, if you will, that opens onto the faith. Walk through it, and one might explore all that the faith entails. The Constitution, I suggest, became this type of entry for the American legal faith.

The Constitution's iconic character was evident as early as the ratification process. Even though the Constitution was heartily debated, there were rallies and parades whenever a state ratified it. The parade in Philadelphia deserves an award for excessiveness. It included city officials, clergy of every denomination, units of light infantry and cavalry, each trade dressed in distinctive working clothes and

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12. *See* ROBERT A. FERGUSON, LAW AND LETTERS IN AMERICAN CULTURE 53 (1984).

13. *See* PETER CHARLES HOFFER, THE LAW'S CONSCIENCE: EQUITABLE CONSTITUTIONALISM IN AMERICA 71-79 (1990).

carrying a display related to the trade. In addition there was a literal ship of state, named *The Union*, and another float shaped like an eagle, drawn by majestic steeds and featuring a giant representation of the Constitution. Although this float might have been expected to steal the show, the much discussed "New Roof" was even more symbolically striking. The float presented the Constitution as a roof-like structure supported by thirteen pillars and presumably sheltering the Republic. It was drawn by ten white horses, ornamented with bright stars, and crowned at the very top with the figure of Plenty and her sprawling cornucopia.[14]

Between 1800 and 1850 schoolbooks routinely spoke of the Constitution as divinely inspired and glorious. The Washington Benevolent Society, other civic organizations, and profit-seeking entrepreneurs produced countless facsimiles and elegant reproductions as well as banners, wall hangings and even handkerchiefs with all or part of the document.[15] Americans could and did carry the Constitution with them. Presidents and plenty of other politicians praised and invoked the Constitution, and a man such as Daniel Webster attempted to build a whole career on the veneration of the Constitution. "I believe that no human working on such a subject, no human ability exerted for such an end, has ever produced so much happiness as the Constitution of the United States," Webster said.[16] The Constitution, he was sure, was "complete and perfect, and any change could only result in marring the harmony of its separate parts."[17] The Constitution was "the basis of our identity, the cement of our Union, and the source of our national prosperity and renown."[18]

Webster was even involved in what was the most bizarre example of Constitution worship from the first half of the nineteenth century. It involved President William Henry Harrison. He is not a President about whom Americans know much, and there is a good reason for that. After standing out in the rain greeting well-wishers after his 1841 inauguration, Harrison caught a severe cold, retired to his death bed, and passed away after only one month in office. Perhaps it was his just desert for earlier in life sneaking up on and slaughtering an Indian village in the so-called "Battle of Tippecanoe." Webster, in any case, was present at Harrison's death and along with four others prepared Harrison's death notice. The notice reported that the last utterance from Harrison's lips was a fervent invocation of the Constitution.[19] Even when invoked by someone in the cold

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14. *See* E.L. DOCTOROW, *A Citizen Reads the Constitution*, THE NATION, Feb. 21, 1987, at 211, 211.

15. A fine collection of facsimiles and reproductions is housed at the New York Public Library.

16. Brooks D. Simpson, *Daniel Webster and the Cult of the Constitution*, 15 J. AM. CULTURE 15, 15-16 (1992).

17. *Id.* at 17.

18. *Id.* at 16.

19. 4 JAMES D. RICHARDSON, MESSAGES AND PAPERS OF THE PRESIDENTS, 1789-1897, at 22 (Washington, Government Printing Office 1897). For quotations from various early-nineteenth-century Presidents regarding the Constitution, see MICHAEL G. KAMMEN, A MACHINE THAT WOULD GO OF ITSELF: THE CONSTITUTION IN AMERICAN CULTURE 15-16, 61-62, 70-71 (1986).

ground, the Constitution could objectify mythic tales of the legal faith, unlock attitudes and assumptions, promise order, and invite patriotism.

B. The Courtroom Trial as Ritual

If the Constitution as an icon allowed contemplation of the mysteries and meanings of the legal faith, the trial became the most important ritual of the faith. Each new trial not only reached a verdict in the case at hand but also reinforced the faith. Like rituals in a conventional faith, the trial provided reassurance that there was a community of believers.

This, too, might seem a strange perception, but recall that in the nineteenth century courtroom trials had a different social standing than they do today. In rural areas the judge and lawyers often rode circuit, and their arrival at the county seat was much heralded. Not only the participants but also the simply nosy descended on the courthouse to watch, argue, and sometimes picnic on the lawn. Trials were probably *the* most dramatic manifestation of government in rural America.[20] In the cities, government did not rely as much on courts to establish its identity as it did in the country, but courtroom trials were nevertheless followed carefully. They were significant civic "events," and the leading trial lawyers were some of the most prominent people in the land. According to the era's lawyer and treatise writer St. George Tucker, "The cabinet maker is known in his town; a good physician for 100 miles; a lawyer throughout America."[21]

And indeed, one did not have to attend a trial to follow it. Periodicals of the period covered courtroom trials extensively and also published separate trial reports.[22] The daily penny press emerged in the 1830s and 1840s, and it counted trial reporting as one of its staples. The penny dailies were chock-full of trial reporting, and it is asserted that James Gordon Bennett's *Herald*, a New York City daily, tripled its circulation in 1836 by giving two months of front-page coverage to the trial of a man alleged to have killed a prostitute with a hatchet.[23] Readers, many of whom were first-generation literate, could find in the trial reports a forum for denouement, a locus for resolution of social problems, and an expression of community norms.

Furthermore, readers did not even have to rely on the factual. Cheap fiction also began rolling off the presses in this era, and story-papers and nickle novels were full of trial accounts.[24] The legal historian Maxwell Bloomfield has located a largely forgotten body of popular nineteenth-century novels concerning heroic

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20. *See* FERGUSON, *supra* note 12, at 23, 69-70.

21. JACKSON TURNER MAIN, THE SOCIAL STRUCTURE OF REVOLUTIONARY AMERICA 200 (1965).

22. *See* DANIEL A. COHEN, PILLARS OF SALT, MONUMENTS OF GRACE: NEW ENGLAND CRIME LITERATURE AND THE ORIGINS OF AMERICAN POPULAR CULTURE, 1676-1860, at 26-31 (1993).

23. *See* FRANK LUTHER MOTT, AMERICAN JOURNALISM: A HISTORY, 1690-1960, at 233 (3d ed. 1962).

24. *See* DAVID RAY PAPKE, FRAMING THE CRIMINAL: CRIME, CULTURAL WORK AND THE LOSS OF CRITICAL PERSPECTIVE, 1830-1900, at 78-80, 100-01 (1987).

lawyers and often culminating in stirring trial scenes. The lawyers customarily are hard-working Protestants who move to the American city from the country. These young men study the law, learn to ride the bouncy currents of modernization, and represent the poor but deserving against the greedy and their shyster attorneys. In the concluding trial scene, prefiguring Perry Mason, justice triumphs.[25]

Through trips to the courthouse, by reading the newspapers and popular fiction, and via simple conversations with fellow citizens, Americans could and did contemplate countless trials. The courtroom trial, like the rituals of traditional religions, was inherently dramatic, and Americans could come to and spring from the cultural image of the trial time and again. For the average American, the ritualized, dramatic courtroom trial did more than establish the guilt and innocence of the defendant. What was right, and what was wrong? Did the laws and legal institutions respect the society's norms and aspirations? What are our individual and collective identities under the rule of law? "In almost every trial," the scholar Carl Smith has written, "there is a second drama going on in addition to the case at hand: the ceremonial enactment of the law itself and the affirmation of the principles, good or bad, by which society is ordered."[26]

C. The Rule of Law as the Central Teaching

If the Constitution was a sturdy icon for the nineteenth-century legal faith, that was not enough. If the popular culture offered countless renderings of the courtroom trial, still more was required. The American legal faith, like all faiths, needed its premises, its doctrines, its system of beliefs. These came in the form of what some have called "legalism," a multifaceted belief in the usefulness, fairness and legitimacy of laws and legal institutions.[27] And this, too, became a part of the dominant American ideology in the nineteenth century, as Americans experienced rapid social change and sought ways to calm their anxiety, as elites shifted and attempted to maintain their dominance. At the center of American legalism and crucial to the legal faith was a commitment to the rule of law.

The belief in the rule of law is somewhat more complicated than one might think. It is not just a belief in rules. It is not simply law-abiding conduct. As part of their legal faith Americans believed that laws were to be made in public, without bias for particular individuals or classes, and with rationality and honest commitment to the public good. Lawmakers were then to expressly promulgate the laws in clear, general, non-retroactive and non-contradictory form. The laws were to be feasible and predictable, and the people were, for the most part, to

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25. *See* Maxwell Bloomfield, *Law and Lawyers in American Popular Culture*, *in* LAW AND AMERICAN LITERATURE: A COLLECTION OF ESSAYS 1, 11-16, 22 (A.B.A. Comm'n on Undergraduate Educ. in Law and the Humanities ed., 1980).

26. Carl Smith, *American Law and the Literary Mind*, *in* LAW AND AMERICAN LITERATURE: A COLLECTION OF ESSAYS 1, 12 (A.B.A. Comm'n on Undergraduate Educ. in Law and the Humanities ed., 1980).

27. An early and influential discussion of legalism is JUDITH N. SHKLAR, LEGALISM: LAW, MORALS AND POLITICAL TRIALS (1986).

know them or at least be able to find them out. Officials applying the law, especially judges, were to be fair and impartial, and the application process was to treat similar cases in similar ways, extending due process, free from public pressure, to one and all. When I say the American legal faith of the nineteenth century included at its core a belief in the rule of law, I refer to all of this. Stated more succinctly, Americans believed law should rule men rather than vice-versa.

There are hundreds, indeed thousands of examples of citizens, lawyers, political figures, and even novelists subscribing to this belief, but perhaps one especially striking example will suffice. In 1838 Abraham Lincoln, at that point in time a twenty-nine-year-old lawyer, rose to address the Young Men's Lyceum in Springfield, Illinois. He proposed to those assembled that Americans swear an oath to revere the law:

> Let reverence for the laws be breathed by every American mother to the lisping babe that prattles on her lap; let it be taught in schools, in seminaries, and in colleges; let it be written in primers, spelling-books, and in almanacs; let it be preached from the pulpit, proclaimed in legislative halls, and enforced in courts of justice. And, in short, let it become the political religion of the nation . . . .[28]

To a perhaps surprising extent this actually happened, and foreign visitors who traveled in the United States in the nineteenth century perceived it. Well heeled and curious, these visitors wanted to observe how a country might function without an aristocracy, without castes, and without an official church. No Disney World for them, the visitors of a century and a half ago wanted to know how the United States worked as a nation. The minor French nobleman and public servant Alexis de Tocqueville has emerged as the most famous of these visitors, not so much because of his fame at the time but rather because of the volumes he later wrote about what he had observed. Lawyers, de Tocqueville said, were the highest political class, the equivalent of an aristocracy.[29] The people respected judges, completed their civic educations by serving on juries, and accepted courtroom decisions.[30] What's more, de Tocqueville said, Americans respected law itself, a phenomenon he contrasted with the European masses' suspicions regarding law.[31] The language of the law becomes, he said, "a vulgar tongue; the spirit of the law, which is produced in the schools and courts of justice, gradually penetrates beyond their walls into the bosom of society, where it descends to the lowest classes, so

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28. Abraham Lincoln, *Address Before the Young Men's Lyceum of Springfield, Illinois, in* 1 COMPLETE WORKS OF ABRAHAM LINCOLN 35, 43 (John G. Nicolay & John Hay eds., Cumberland Gap, Lincoln Mem'l Univ. 1894).

29. ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 205 (Henry Reeve trans., Oxford Univ. Press 1946) (1835). For an interesting suggestion that Daniel Webster was the type of American lawyer that de Tocqueville admired, see R. Kent Newmyer, *Daniel Webster as Tocqueville's Lawyer*, 11 AM. J. LEGAL HIST. 127 (1967).

30. *See* DE TOCQUEVILLE, *supra* note 29, at 206.

31. *Id.* at 175.

that the whole people contracts the habits and tastes of the magistrate."[32] More so than even Thomas Paine had imagined, the law had become King in nineteenth-century America. More so than Thomas Jefferson had imagined as he drafted the Declaration of Independence, the nation had come to understand and define itself with reference to law.

III. LEGAL FAITH IN THE TWENTIETH CENTURY

American attitudes regarding the law, like American attitudes in general, grew more complicated and contradictory in the twentieth century. On the one hand, there are indications that a legal faith continued to inspire and direct the citizenry. On the other hand, the faith began to wear, weaken and wither. The complexities and contradictions might indicate that the legal faith will eventually lose its central position in American ideology.

With regard to the Constitution, which I have cast as the most important icon of the legal faith, there are some indications that the Constitution maintained its iconic character in the twentieth century. At the time of the bicentennial of the Constitution in 1987, there was one of those iconic avalanches that had also occurred at the time of the centennial in 1887 and at the time of the sesquicentennial in 1937. There were countless facsimiles and reproductions; there were pamphlets and books praising the Constitution as the "soul," "citadel," or "sentinel" of the nation. All of these could be thought of as comparable to the carvings and paintings of the saints in early Christianity, as icons of the faith, albeit the legal one.

Then, too, there is the interesting reaction to Charles A. Beard's, *An Economic Interpretation of the Constitution.*[33] The book was at the time of its writing and is still today arguably the most controversial work of American history ever written. Why? In the book Beard suggested that commercial and property interests had directed the drafting and ratifying of the Constitution. No matter how measured Beard's tone or convincing his argument, his interpretation hardly sat well with Constitution worshipers. President Taft denounced the book as unseemly muckraking besmirching the reputations of the Founders, and Warren Harding attacked Beard's "filthy and rotten perversions" in an article entitled "Scavengers, Hyena-Like, Desecrate the Graves of the Dead Patriots We Revere."[34] Clearly, Beard had ruffled feathers. Beard was literally an "iconoclast," and this sat badly with those anxious to worship through the Constitution in the glories of the legal faith.[35]

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32. *Id.* at 207-08.

33. (1913).

34. Bertell Ollman takes special delight in skewering Taft and Harding for their reactions to Beard's work. Bertell Ollman, *Introduction* to THE UNITED STATES CONSTITUTION: 200 YEARS OF ANTI-FEDERALIST, ABOLITIONIST, MUCKRAKING, AND ESPECIALLY SOCIALIST CRITICISM 4 (Bertell Ollman and Jonathan Birnbaum eds., 1991).

35. When Constitution worship seemed an impediment to addressing the Great Depression, Max Lerner, Editor of *The Nation*, warned that such blindness could contribute to the emergence

There is, then, some indication that the Constitution has remained iconic in the twentieth century, but there are also indicators that this is ending. At the time of the bicentennial, for example, many flinched at the messy dialogue between former Chief Justice and director of the bicentennial celebration Warren Burger on the one side and Justice Thurgood Marshall on the other. Burger was the traditionalist and gushed about the glories of the Constitution in a way that would have done Daniel Webster proud, but Marshall was of a less traditional mind. How glorious is a Constitution, he asked, that was around for 100 years before it recognized African-Americans as full human beings and citizens? How glorious was a Constitution that took another fifty years to give women the vote?[36] Given these comments from a sitting member of the Supreme Court, as well as recent confirmation fights over Robert Bork and Clarence Thomas, one wonders about the Constitution's ongoing iconic viability. Would Charles Beard's *An Economic Interpretation of the Constitution* cause any kind of stir if it were published today?

As for the trial, which I have cast as the most important ritual of the legal faith, the signs are also mixed. Trials are portrayed everywhere in our popular culture. Most Americans have never participated in or even witnessed an actual trial, but portrayals of the trial are standard on our front pages, in our movies, our prime-time television programming, our plays, and our novels. These images and motifs are so common in American culture that Americans "naturalize" them; they take them for granted. These scenes are a way we routinely find meaning in our culture, meaning not only concerning the guilt or innocence of individual parties, real and fictional, but also meaning regarding the larger values and norms of our society. Rarely do Americans reflect on the courtroom scene as a convention consciously employed by writers and filmmakers.[37]

However, how inspirational is the courtroom trial ritual in the final decade of the twentieth century? We have had a whole spate of nationally prominent celebrity trials: Lorena Bobbit, Mike Tyson, William Kennedy Smith, the Menendez brothers, and, of course, the one and only O.J. Simpson. These trials are televised. The country stood still when the Simpson jury returned to the courtroom with its verdict. Through each trial the thoughtful observer can garner insights about American life. But, overall, these trials seem to me more entertainment than faith-confirming ritual. How, after all, does one use the Lorena Bobbit farce to worship in the legal faith? In addition, our novels, movies and television shows featuring courtroom trials seem increasingly to challenge the notion that trials are able to deliver truth and justice.[38]

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of American fascism. Max Lerner, *Constitution and Court as Symbols*, 46 YALE L.J. 1290, 1303-05, 1316 (1937).

36. *See* Stuart Taylor, Jr., *Marshall Sounds Critical Note on Bicentennial*, N.Y. TIMES, May 7, 1987, at A1.

37. *See* David Ray Papke, *The Courtroom Trial as American Cultural Convention*, *in* THE LAWYER AND POPULAR CULTURE 103-10 (David L. Gunn ed., 1993).

38. *See* David Ray Papke, *The Advocate's Malaise: Contemporary American Lawyer Novels*, 38 J. LEGAL EDUC. 413 (1988) (book review); A.B.A. DIV. FOR PUB. EDUC. & MUSEUM OF BROAD. COMMUNICATIONS, JUST IMAGES II, LAWYERS AND THE COURTROOM ON PRIMETIME

And what about the rule of law, the notion that this is a country of laws not men, the sense that we can believe in law's ability to guide and direct us? There are several indicators that this fundamental belief is eroding, and one of these indicators is what happens inside the contemporary American law school. The law school traditionally could have been seen as a seminary for the legal faith, as the place where our secular priesthood is trained. But I have been struck for years by what happens to many of the students at this school and by comparable trends reported to me by friends at other schools. Students, it seems, often enter as natural lawyers, that is, as believers in some synchronization between fundamental morality and law. They then convert to legal positivists somewhere in the course of their first or second year, that is, they become adept at spotting rules and applying them. Indeed, they have to be good at this, or they fall by the wayside. Then in the third or fourth year another conversion takes place, at least for many. They move from being legal positivists to being legal cynics. Law is what those with power and money want it to be.

The cynicism that one finds among some, not all, law students is also evident in the population generally and concomitantly antithetical to a belief in the rule of law. Jokes, for example, are often especially revealing in their ability to expose cultural fault lines, and the recent plethora of jokes about law and lawyers is a telling indicator of contemporary cultural attitudes. Americans are not only wisecracking about law and lawyers at the water cooler but also putting together substantial published collections of such jokes.[39] In addition, law and lawyer jokes have acquired a new mean-spiritedness. Law and lawyers are now the source of genuine cultural distrust.

There is also the wide current of contemporary law and order sentiment. Lock up the lawbreakers. Use mandatory sentencing. Be faithful to the letter of the law. But literal legal faithfulness of this sort is not the equivalent of the legal faith I have been discussing. It constitutes in my opinion a legal fetish instead of a legal faith,[40] fetish being understood as an often pathological tendency to invest a material object with magical power and then obsess about it. The belief and trust in law of Thomas Paine and Thomas Jefferson, their allegiance and fidelity, were on a different level.

CONCLUSION

What might the future entail with regard to the legal faith? One could, in concluding this lecture, deliver a vigorous jeremiad. Like the Hebrew prophet Jeremiah, I could now offer a prolonged lament, a tale of woe. I could then call

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TELEVISION (1996).

39. Recent collections of law and lawyer jokes include, but are not limited to, JURIS-JOCULUM: ANTHOLOGY OF MODERN LEGAL HUMOR (Ronald Brown ed., 1989); JOHN B. MCCLAY & WENDY L. MATTHEWS, CORPUS JURIS HUMOROUS (1993); SKID MARKS: COMMON JOKES ABOUT LAWYERS (Michael Rafferty ed., 1988).

40. For a discussion of the tendency toward legal fetishism in western society, see HUGH COLLINS, MARXISM AND LAW 10-14 (1982).

on us to return to the right path, to the true source of our greatness. Such a stance is common in American culture. From Anne Hutchinson to Ralph Waldo Emerson to Eugene Debs to Alan Ginsburg in his poem "Howl," self-conscious Americans have said that this special nation with its chosen people is going to hell in a handbasket. I could place myself in this noble tradition if I now called on us to return to the legal faith that had inspired our founding fathers.

But alas, there is not much of a reactionary prophet in me. I am no Jeremiah. I want to conclude not with a reassertion of the traditional legal faith but with a suggestion regarding what our attitude regarding law might be in the century ahead. How should my children and your children think about law in the future? What are the possibilities?

I think in this regard that the legal faith served the modernizing United States of the nineteenth century well. It also continued to serve through much of the twentieth century. The Constitution did not answer all questions. Courtroom trials were not always inspiring. The rule of law was as much aspirational as it was actual. But the legal faith was beneficially central to our ideology. It was a crucial part of our mythic fabric, myth being understood not as falsehood but rather as the normative stories we tell about ourselves as a people.

But now I sense the page turning. We are, in the language of cultural studies, changing from a modern to a post-modern nation. Our world is increasingly one of images, of multiple selves and identities, of cultural relativism rather than a sense of scientific or God-given truths. The post-modern society might, by necessity, have to be post-legal, or at least we might have to reconceptualize law, to articulate not the traditional legal faith but rather a more modest law-related faith.

For my own part, as my current students have heard too many times, I have adopted a largely discursive model. Law seems to me valuable as a fluid, contested, sometimes contradicted discourse, as one way in which we can think and talk and argue and perhaps find some partial and tentative meanings in our lives.

At first hearing this might not sound like much. What happened to law's glory, magnitude and special place? What happened to law's permanence, its stability and reliability? Personally, I am not sure it was like that in the first place, but what I would like my children to know and think about law is that it is a discourse and process in which creation and recreation can take place. I want them to approach law not as restriction and control but as one of several realms of human possibility. I want my children—all of us, really—to know through law that we are not only culturally constituted but also, as human beings, culturally constituting. Thought of in this way, law might continue to have an extremely important and empowering role in the American culture of the twenty-first century.