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A Theory of Adjudication: Law as Magic

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ABSTRACT: A Theory of Adjudication: Law as Magic

This article takes a new approach to the problem of legal rationality. In the 1920s and 1930s the Legal Realists criticized judicial decisions as "magic solving words" and "word ritual." Though the Realist critique continues to shape American jurisprudence, the legal magic they observed has never been seriously explored. Here, drawing on anthropological studies of magic and ritual, I reconsider the irrational legal techniques the Realists exposed. My thesis is that the Realists were right that law works like magic, but wrong about how magic works. That is, they were right that adjudication makes use of a particular combination of techniques – enacting performances, heightened formality, transformative analogy, performativity, temporal play – that is also found in ritual magic. But they were wrong that those techniques necessarily preclude rational decisionmaking. Drawing on the insights of field anthropology, I theorize legal magic as an authentic mode of legal practice. After considering the different aspects of legal magic and the Realists' critique, I propose three potential roles for legal magic: as a way to imbue official legal decisions with the affective moral force of lived experience, as an institutional practice that may enhance judicial impartiality, and as a method for symbolically reversing otherwise irreparable injuries. I hope that my reanalysis of legal magic can provide a new perspective on the relationship of law and reason, illuminate undertheorized aspects of law and contribute to a more concrete and nuanced understanding of adjudication's social role.

A Theory of Adjudication: Law as Magic

By Jessie Allen[1]

> Law is a "strange compound which is brewed daily in the caldron of the courts."
>
> – Benjamin Cardozo[2]

At least since the Legal Realists' early twentieth-century critique, we have struggled to understand the relationship between law and reason. Other disciplines can help us with that project. The now longstanding trend toward wealth-maximization analysis is one well-developed approach. Recent scholarship on law and risk looks to both economics and psychology. In this article, I use anthropological theories of ritual and magic to reframe legal practice. That analysis suggests that aspects of law often regarded as frankly irrational may contribute to adjudication's social effects and meaning.

In the nineteen-twenties and thirties, the American Legal Realists expressed their critique of legal rationality by complaining that judges practice "legal magic."[3] According to the Realists, legal outcomes were actually determined by judges' individual preferences and ideology -- and actually should be determined by straightforward empirical and evaluative analysis. Precedential hierarchies, doctrinal formulas, and procedural rules were all a kind of "magic solving words,"[4] "word ritual,"[5] and "legal myth"[6] that obscured the real reasons for court decisions. Although the

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[2] THE NATURE OF THE JUDICIAL PROCESS 10 (19).

[3] Felix Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 821 (1935). Across the Atlantic around the same time the Scandinavian Realists contended that modern legal practice was historically descended from magic rituals. "According to the Roman view, Hagerstrom maintains, 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 Hagerstrom and Vilhelm Lundstedt*, 133, in SCANDINAVIAN STUDIES IN LAW 1959, V. 3. ED. FOLKE SCHMIDT.

[4] Cohen, *supra* note , at 820.

[5] Leon Green, *The Duty Problem in Negligence* 28 COLUM. L. REV. 1014, 1016 (1928).

[6] JEROME FRANK, LAW AND THE MODERN MIND 12 (2D ED. 1931) [1930].

most important Realist writings were produced a long time ago, they exert a powerful continuing influence.[7] Complaints about "talismanic" reasoning and "magic words" continue to crop up.[8] Doubtless most comparisons of law and magic today are purely rhetorical;[9] but during the Realist heyday similarities between legal and magical practices were the object of serious investigation, and recently a few scholars have again begun to consider the connections among law, magic and ritual.[10]

I want to reconsider law's magical aspects. This entails both an extension and a critique of Realism. It accepts the core Realist view (and the view of later critical jurisprudes) that categorical doctrinal reasoning, precedent, and formal procedures do not objectively determine legal decisions.[11] But it rejects the Realist assumption that therefore those features of adjudication must be irrational and false. In my view legal magic may have a fruitful role to play in a legal system we conceive as helping to

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[7] As Joseph Singer puts it, "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*, HANKS ET AL., *supra* , at 506, "Realism is without question the most important and influential movement in American legal thought in the 20th century"; MINDA *supra* at 32, "Most law teachers today regard themselves as legal realists."

[8] A Westlaw search for cases from 1945 to 2005 that used the expressions "magic words" or "talismanic" generated 7,837 hits. *See, e.g*, Willington Fraternal Order of Police Lodge #1 v. Bostrom, 1999 WL 39546 (Del. Ch.) (Jan. 22, 1999) at *4 ("Chancery jurisdiction is not conferred by the incantation of magic words."); State v. Lee, 1999 WL 19295 (Wis. App.) (Jan 20, 1999) (judge need not "follow a script in imposing sentence. A trial court is not required to use "magic words" in effectuating its adjudication."); 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.")

[9] For that matter, occasional scornful comparisons to magic can be found in American caselaw long before the Realists' rigorous critique. See, e.g., Sims Leffe v. Irvine 3 U.S. 425, 454 (1799) ("there is no magic in the description of a patent"); The President, Directors and Company of the Bank of the United States v. Dandridge, 25 U.S. 64 (1827) (Marshall, J., dissenting) (rule that corporate directors can be distinguished from corporation and insulated from liability "becomes a talisman by whose magic powers the whole fabric which law has erected respecting corporations is at once dissolved").

[10] See 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); OSCAR CHASE, LAW CULTURE AND RITUAL (2005), Geoffrey P. Miller, *The Legal Function of Ritual*, 80 CHI-KENT L. REV. 1181 (2005).

[11] The indeterminacy of legal analysis is, of course, a core tenet of critical legal studies. *See, e.g.*, DUNCAN KENNEDY, A CRITIQUE OF ADJUDICATION (FIN DE SIECLE) (1997); Mark Tushnet, *Survey Article: Critical Legal Theory (without Modifiers) in the United States*, 13 J. Pol. Phil. 99 (2005).

create the social world.

My thesis is that the Realists were right that law works like magic, but wrong about how magic works. I will take a fresh look at the Realists' critique of the magical nature of legal doctrines, precedent, and procedural formality, applying two different anthropological paradigms -- first that of the Victorian founders of anthropology and then an approach that draws on several different theories developed by 20th century field anthropologists. As I see it, the Realists' understanding of the legal magic they identified was foreclosed by their basically Victorian definition of magic as a kind of false science. That view was revised, however, by modern field anthropologists who observed that magic and ritual are not necessarily in tension with reason. Reconsidering law as magic from this perspective 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 decisionmaking. Second, it suggests some ways that the techniques the Realists criticized might actually enhance law's legitimacy and effectiveness.

No doubt the Realists, quintessential modernists, would want to disavow any association with Victorian social theory. Nevertheless, I propose that the Realist critique of legal magic is founded on a classic Victorian anthropological opposition of magic and rationality. For the Victorians, rain magic was either fraud or fancy, because without the right meteorological conditions the magic wouldn't work. Likewise, for Realists the obvious presence of other causes of legal decisions – i.e., judges' political preferences – and the fact that those decisions are enforced with government violence, make legal magic empty and false. From this perspective if law's doctrinal, precedential, and formal rituals are magical, rather than objectively determinative, they must either cover up or lead to irrational, false legal results. And if law is enforced with state violence, legal magic must have no meaningful role in law's effect on culture. But others have recognized that magic practitioners do not think magic is working *instead* of the weather but *with* it in some way. 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. From all of these perspectives, magic potentially complements and enhances rational inquiry and intervention.

Drawing on these cultural anthropological theories, I shall argue that legal magic need not substitute for subjective value judgments or the use of state force in order to be real. It may work alongside and intertwined with force and desire to achieve the total social effect of the legal system. The rain that falls after rain magic means something different than the storm that comes up quickly when no one was expecting it.

The "magic" that I mean to reference as my point of anthropological comparison is a broad category. It 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 been variously denominated magic, sorcery and shamanism, but, following the Realists, I shall sweep them all under the heading of "magic."[12] 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, for instance, initiation rites. Not all "ritual" is "magic" certainly, and perhaps not all magic requires ritual, but most of my analysis will focus at the intersection of these two categories. I am looking at 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 that is also found in adjudication. For instance, I will argue that in some specific ways, adjudication resembles the rites conducted by Trobriand magicians to "anchor" the harvested yams in their storehouses and protect

[12] 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.g.*, BRONISLAW MALINOWSKI, ARGONAUTS OF THE WESTERN PACIFIC [hereinafter MALINOWSKI, ARGONAUTS] 72-76 (1961) [1922] (describing differentially sorcerers and witches against the background of general magic among the Trobriand Islanders); E.E. EVANS-PRITCHARD, WITCHCRAFT, ORACLES, AND MAGIC AMONG THE AZANDE [hereinafter EVANS-PRITCHARD, WITCHCRAFT, ORACLES, AND MAGIC] (abridged) 176 (1976) [1937] ("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.") 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." Pocock, Introduction to M. MAUSS & H. HUBERT, OUTLINE OF A GENERAL THEORY OF MAGIC1902-03]. As Bruce Kapferer remarks, terms like "sorcery" and "magic" are laden both with the negative prejudices of the 19th century anthropological discourse in which they were originally defined, and with recent valorizations by post-modern critics, and are further problematic because they group together highly diverse practices. THE FEAST OF THE SORCERER: PRACTICES OF CONSCIOUSNESS AND POWER [hereinafter KAPFERER, FEAST OF THE SORCERER] 8-9 (1997).

the harvest from depletion.[13]

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.[14] By sticking with the magic label 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.

In my reanalysis of legal magic, I aim to suspend judgment about its normative significance. But 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."[15] 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 law's magical features 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

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[13] I do *not* mean to include in my comparative category the sort of entertainments presented on Broadway, in Las Vegas, and 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 indeed be things to be learned from a comparison of legal proceedings and Western stage magic. But in this article I focus on practices that are regarded as effectively restorative or transformative even if they are also understood to rely in part on illusion.

[14] *See* STANLEY JEYARAJA TAMBIAH, MAGIC, SCIENCE, RELIGION, AND THE SCOPE OF RATIONALITY, [hereinafter TAMBIAH, MAGIC, SCIENCE, RELIGION], 1-8 (1990); MARY DOUGLAS, PURITY AND DANGER: AN ANALYSIS OF THE CONCEPTS OF POLLUTION AND TABOO, 13-29 (1966).

[15] Milner S. Ball & James B. White, *A Conversation Between Milner Ball and James Boyd White*, 8 YALE J. L. & HUMAN. 465, 468 (1996), quoted in Paul Schiff Berman, *Telling a Less Suspicious Story: Notes Toward a Non-Skeptical Approach to Legal/Cultural Analysis*, 13 YALE J.L. & HUMAN 95 (2001).

for clues they provide about law's potential as well as law's limits.

The article proceeds in four parts. Part I traces the common techniques of adjudication and ritual magic. 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, saying it *does* make it so.[16] And both law and magic make use of metaphor to accomplish transformations.[17]

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 20th century anthropology. The Victorian scholars who developed the academic discipline of anthropology saw magic as false science.[18] But there are other ways to conceptualize magic. Bronislaw Malinowski, for instance, observed that among the Trobriand Islanders he studied, magic worked alongside technical capacity and accurate observations of the physical world. "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."[19] They were also masterful gardeners. The magic Trobrianders practiced over their canoes and crops, then, was something other than a misguided attempt to interfere with natural processes.[20] For the Trobrianders, magic was "a special department; . . .a specific power, essentially human, autonomous and independent in its action."[21] Malinowski observed that magic had an organizing and regulating effect on activities, like gardening and Kula

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[16] J.L. Austin coined the term "performative" to designate utterances that simply by being spoken accomplis an act of some sort. J.L. AUSTIN, HOW TO DO THINGS WITH WORDS (2D ED. 1975) [1962].

[17] Compare, for instance, Felix Cohen's criticism of "the vivid fictions and metaphors of traditional jurisprudence," Cohen, *supra* note 6, at 812, with Malinowski's observations of the use of metaphor in the spells employed in Trobriand Magic in MALINOWSKI, ARGONAUTS, *supra* note , at 443-52.

[18] *See* SIR EDWARD BURNETT TYLOR, PRIMITIVE CULTURE, PART I: THE ORIGINS OF CULTURE 112-115 (1958) [1871].

[19] MALINOWSKI, ARGONAUTS at 420.

[20] *Id*. at 427.

[21] *Id.*

voyaging, that were central to the Melanesian economy. Thus he, among other early field anthropologists, opened up the possibility that instead of ineffective science, magic might be an effective social and cultural practice.[22]

From a number of theoretical perspectives, modern and post-modern anthropological studies suggest that rather than taking a false view of the natural world, magic focuses on agents' interactions with that world and with one another. Instead of a faulty mechanical description of nature, magic is primarily concerned with the social regulation and cultural meaning of agents' intervention in fortune and misfortune. And rather than aiming to intervene directly in natural causes, magic focuses on the ways social agents affect the world. The fact that magic draws on nature in its method does not mean that it aims to interpret physical reality as distinct from social meaning. Rather, magic links the physical and social aspects of the world symbolically, often with the aim of reinterpreting past events or reconceiving future possibilities to generate a preferred social outcome.

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 reconceptualize 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.

I hope that my analysis of the ritual-magic mode of adjudication can contribute to a more concrete understanding of law as socially constructive. The Realist ideal of law is instrumental: policy decisions made by intelligent, conscientious individuals who combine clear-eyed empirical assessments with thoughtful value judgments to produce sensible, just social regulation. In that paradigm, any aspects of adjudication that smack of ritual magic appear corrupt and dysfunctional. But the model of socially constitutive law -- shaped in part by the Realists' own criticism of law's persistent failure to consistently dispense social justice -- is of a law that interacts with society in much more pervasive, 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.

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[22] *See* TAMBIAH, MAGIC, SCIENCE, RELIGION, 42-64.

I. 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 yamhouse is anchored; my yamhouse is as the
> immovable rock . . . .
> – Trobriand spell[23]

I want to begin my reanalysis of legal magic by setting forth as clearly as possible 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"[24] – that are also found in magic. But the Realists made no attempt to systematically compare the techniques of law and magic. Nor, for that matter, did the Realists 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: (1) enacting performance, (2) heightened formality, (3) performativity, (4) temporal play, and (5) transformative analogy. Below, I consider the role of each, first in comparing a Supreme Court case to a Trobriand harvest rite, and then individually in greater detail in a variety of adjudicative contexts. There is much more that could be said about any one of these techniques. My goal here is not to exhaustively describe their workings, but just to outline their interaction. Moreover, these categories are not necessarily the best ways to describe the overarching similarities between legal and

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[23] MALINOWSKI, CORAL GARDENS AND THEIR MAGIC, VOL. I., SOIL-TILLING AND AGRICULTURAL RITES IN THE TROBRIAND ISLANDS 221 (1965) [1935].

[24] FRANK, *supra* note , at 85, quoting article on "Magic" in ENCYCLOPEDIA BRITANNICA (11th Ed.) 308.

magical practices. Later in this article, I will take a more holistic approach. But I want to offer this categorical breakdown at the outset to establish that the similarities between law and magic do not dissolve upon closer study, and to begin to identify concrete practices behind the general intuition that there is something magical about adjudication.

All five techniques of legal magic can contribute to an analysis of the similarities between the Trobriand spell quoted at the top of this section, which is used to preserve the village yam harvest, and a Supreme Court decision in *Munn v. Illinois* holding that privately owned granaries are public warehouses subject to state regulation.[25] (1) 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 and perform the spell and the rite's prescribed actions. To transform a Chicago granary into a "public warehouse" whose stores are protected from exorbitant storage fees, we must have a public appearance at which the justices and others perform set gestures and utter prescribed words. (2) These performances are rigidly formalized in ways that sets them apart from ordinary actions and speech. Among other things, they are extraordinarily susceptible to formal limits on time and place. Unless the yamhouse spell is spoken at dawn inside the empty storehouse, the magician's words accomplish no protective effect. If five justices assert that the granary is a public warehouse to their next door neighbors – or even in public – we would all understand that was their opinion, but it would not change the status of the building or the grain inside.

(3) Within the appropriate spatial temporal contexts, however, the magic spell and the judicial opinion partake of an unusually strong "performative" force, so that saying it *does* make it (somewhat counterfactually) so. When the magician has completed his yamhouse rite, the storehouse is secure. The rite itself brings about that security. Like the Trobriand magic to preserve the yam stores, the majority opinion in *Munn* is semantically structured as a description of external reality; but it is a reality that is aimed for, desired, until the words effectuate it. The yamhouse "is as a *binabina* stone"; the grain elevator is "in the very gateway of [public] commerce." The effect is transformative. The adjudicative rite 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"; through association to other publicly regulated enterprises, the grain warehouse becomes "public." Of course

[25] Munn v. Illinois, 94 U.S. 113 (1876) (discussed in text accompanying *infra* notes .)

practical actions follow – villagers fill up the yamhouse and refrain from partaking of its stores and government agents monitor Munn's storage charges and threaten fines if they exceed the regulated maximum. But these actions – and their meaning – can only be triggered by the rite or adjudication – at least to the extent that a culture recognizes the power of magic or the rule of law.

(4) Notice that in effecting their performative outcomes, both the Trobriand magician and the *Munn* Court pair the constricted realtime limits of their performances with a transgressive approach to historical time. The Trobriand spell invokes long dead ancestors.[26] 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. (5) And 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 tough rattan cane, substances 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.'"[27] When the warehouse is metaphorically brought within the judicial ancestor's description of "public" transportation, the transformation is complete. Thus all five techniques of legal magic work together *Munn* to generate the transformative effect of that decision.

Each of these five techniques can also be considered independently in different adjudicative contexts.

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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

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[26] Trobriand garden magic spells are largely attributed to an ancestral hero, Tudava. MALINOWSKI, GARDEN MAGIC VOL. II at 70. "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.

[27] 94 U.S. at 132.

to adjudication.[28] The transformations law accomplishes require it. A person's criminal acts for instance, do not make her a felon, nor would an arrest and full confession. For that we have to have a particular ceremony called a conviction, which can take place only through a live, real-time enactment. The majority of those transformed from citizen to convict now bypass the elaborate, quintessential legal performance of a trial. But conviction by plea requires at least two ceremonies – the allocution and the sentencing -- both of which require the accused, a judge, and at least one lawyer for "the people." And often there are subsequent appellate and post-conviction rituals that involve 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.

When one considers the general absence of live performance these days in other areas in which important social decisions are made, adjudication's reliance on these rites is all the more striking. Most governmental functions today seem to pull toward more abstract, informal, 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. Yet adjudication remains live, real-time, and formal.

There is a sense that this persistent use of real-time performances is not merely a matter of tradition and ceremony but definitive – that without live ritual, there could be no adjudication.[29] Consider that even criminal

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[28] This aspect of law has been generally underexamined and undertheorized in a world of legal scholarship that focuses relentlessly on textual interpretation and abstract principles. Some exceptions include 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. L. Issues 51 (1995), and OSCAR CHASE, LAW, CULTURE AND RITUAL: DISPUTING SYSTEMS IN CROSS-CULTURAL CONTEXT (2005).

[29] The singularity of legal rituals, and the importance of their live action, is further emphasized by the way many courts continue to shrink from virtual representations. Television and even still cameras are still locked out of federal courts across the country that insist on the quaint use of sketch artists. At the United States Supreme Court, visitors are not even permitted to take notes (although one can now hear the audio of arguments). When I tried to get a tape of an argument I made in the Eleventh Circuit I was told by the court clerk that though such a tape existed and the judges could listen to it, no one else could listen to it, including the attorneys whose words were on the tape. Much

defendants who abscond while being tried cannot be convicted without the completion of the trial through the unusual device of a trial in absentia, in which all the other legal actors – lawyers, judge and jury – perform their roles to completion.[30] Likewise, a civil defendant, once he has chosen to go to trial, cannot be held liable or deprived of property unless the ceremony of adjudication is completed with all the necessary actors performing all the essential procedures.[31]

In magic there are no shortcuts. 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 not to have been affected much at all.[32] With the rise in caseloads, trial courts still conduct trials pretty much as they always did. True, some appellate courts now hear

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governmental work is done behind closed doors, where the press and general public are forbidden to watch. But adjudication 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.

[30] Fed. Rule of Crim Procedure 43 provides: "(a) PRESENCE REQUIRED. The defendant shall be present 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 this rule.

"(b) CONTINUED PRESENCE NOT REQUIRED. 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 whenever a defendant, initially present, "(1) is voluntarily absent after the trial has commenced...." 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 (1912). The Court explained that if a defendant voluntarily chose to leave his trial in progress, that 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.* at 457 (emphasis added). More recently, the Court struck down a conviction in absentia as invalid because 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 (1993).

[31] I am reminded of my nephew Reuben, whose grandparents had been part of his first five birthday celebrations, and, who, having moved across the country during his sixth year, 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."

[32] An odd exception is the United States Supreme Court, where over the past couple of decades, the numbers of cases heard have decreased drastically.

argument in only a minority of cases.[33] But given their heavier caseloads, the time these courts sit to hear argument may actually have increased. All in all, it seems remarkable that despite shortened periods of 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."[34] And the particulars of magical and legal forms contain certain points of resemblance, particularly in the way they create language sequences that can be referenced across time and verbal references to complex narrative associations.

Legal and magic rituals are both extraordinarily sensitive 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 government or, for that matter, private decisionmaking, beyond the basic need to get the information to the decisionmakers and the practical need for a decision at some point, it does not much matter whether an idea is expressed in June rather than January, or in a coffee shop rather than an official government building.[35] 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 judge according to the legal rules, they will be utterly ineffective, regardless of the substance of the matters discussed.

C. Performativity

The characteristic power of legal and magical words to do things, as

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

[34] Annette B. Weiner, *From Words to Objects to Magic: "Hard Words" and the Boundaries of Social Interaction*, in BRENNEIS & MYERS (EDS.), DANGEROUS WORDS: LANGUAGE AND POLITICS IN THE PACIFIC 181 (1984).

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

well as express them, is what ordinary language philosophers call "performative"speech.[36] In the paradigmatic case of performative utterances, no physical or technical activity is needed; the words do the work.[37] While performatives are present 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 "It 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.[38]

The performative power of language is extraordinarily sensitive to factors outside the conscious intention of the speaker. So, if a magician mispronounces a word in a magic spell, or forgets to perform a gesture that is part of the associated rite, or says the words at the wrong time or place, the spell is ineffective. Likewise, a magistrate's attempted exercise of his contempt power was found to be invalid because it took place during a hearing in a holding cell that "connotes a *jail* rather than a *court*."[39] 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 is thought to take effect, whether the magician intended to make it operative or not. Magic once activated remains in effect until the proper countermagic is worked, even if the magician has second thoughts. 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.

If the conditions are properly set, judicial words take effect whether or not the judge who uttered them meant them to do so. This 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

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[36] See. AUSTIN, HOW TO DO THINGS WITH WORDS, *supra* note 18.

[37] *Id.* at 6-7.

[38] 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, e.g., "I charm thy inside of canoe." MALINOWSKI, ARGONAUTS, *supra* note , at 440.

[39] Thompson v. Stahl, 346 F. Supp. 401, 404 (W.D. N. C. 1972).

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, this judge meant that 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. Now, after court had adjourned for the day, the court reporter came up to the judge and asked him if had held the lawyer in contempt. The judge replied that he had not, and thought no more about it.

It was a long trial and it 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 wasn't 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.[40] 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 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, and in so doing 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

[40] AUSTIN, *supra* note , at 3.

court reporter had apparently sensed an ambiguity. Being unsure whether the judge had meant to cause the transformation his words had apparently evoked, he had inquired, and upon finding that the judge had not, had taken it upon himself to remove the effective words from the official 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 wasn't 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 though the judge had originally meant to hold the lawyer in contempt at the time he made his declaration, but had apparently rethought the matter, so there was no point in leaving the original utterance in the record, since 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 in to 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 can't 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 was thus 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 wrongheadedly, to make the record conform to what the judge had meant to say and do, and didn't 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 location. Shamans converse with ancestors in their ritual search for cures, and judges seek advice from men who sat on their court a hundred or more years ago, options that are generally unavailable to ordinary people making decisions.[41] 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, that mirror the idiosyncratic adjudicative practice of authorizing legal decisions

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[41] Moreover , the magician's forbears 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 at 182.

by citing binding precedent.[42] 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."[43] 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 who is 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 (or viewed as a largely indeterminate factor), but by analogy to magical practices we can see that the ritual invocation of precedent as a symbol and source of power. Though judicial precedents change and develop over time, judges are privileged to reach back in time to appropriate the authority of their predecessors for the current version of doctrine. Likewise, "each spell shows unmistakable signs of being a collection of linguistic additions from different epochs. There is in every one of them a good deal of archaic material . . . . So that it may be said that 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 are regarded as timeless and authorized by the ancestors who originated them.[44]

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 distinct 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

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[42] 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 VA. L. REV. 555 (2005).

[43] MALINOWSKI, ARGONAUTS, *supra* note , at 400.

[44] MALINOWSKI, ARGONAUTS, *supra* note , at 428-29.

cells."[45] The hyper-materialized space and sharp temporal limits on the one hand and the sense of escape from ordinary space-time on the other emphasizes the separation of the ritual from ordinary life.

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, the effectiveness of magic spells depends on their ability to mobilize images from diverse areas of experience and regroup them in terms of a small chosen set of desirable themes."[46] 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 objects assimilated, the more force their connection generates – as though their relationship is strengthened by having overcome the gap between them.[47] And the very diversity of the objects and situations drawn together by the legal rule or magic rite serves to emphasize its organizing power.

And metaphor is used to connect ideals and norms with concrete experience in both law and magic.[48] Magic assimilates the spatial characteristic of being long and narrow, for instance, with longevity, so that a length of twine or the line in your palm may indicate whether you will be

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[45] PATRICIA EWICK & SUSAN S. SILBEY, THE COMMON PLACE OF LAW 95 (1998).

[46] Michelle Z. Rosaldo, *It's All Uphill: The Creative Metaphors of Llongot Magical Spells*, IN M. SANCHES & D. BLOUNT (EDS.), SOCIOCULTURAL DIMENSIONS OF LANGUAGE USE 178 (1975).

[47] 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." 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." Quoted in Weiner, *supra* note , at 175.

[48] "[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 & HUBERT, *supra* note , at 77.

long lived. But an indentation in a person's skin and a ball of string are not obviously similar. Their association relies on an organizing principle that was preselected and relates to a central human concern. The problem of lifespan relates the hand and twine: These are both in some sense long things, and thus may be related to the hoped for long life, but the related objects are different in more ways than they are the same.

In both magic and caselaw the goal is to enhance certain aspects of one thing by associations with others. So, for instance, Ilongot hunters ritually exhort their dogs to "be like" a variety of real and abstract objects: a harpoon arrow, the screeching or a hornbill bird, a man meeting an enemy.[49] Each individual reference suggest a different characteristic the hunter seeks – e.g., swiftness and accuracy (the arrow) or implacability (the man confronting an adversary). But according to Rosaldo, the diverse source objects are united by their common association with some kind of violence, and thus the associations together build up an additional overall reference to aggressive behavior, that may make the objects collectively effective as magical source materials and is presumably desirable during the hunt.[50]

Moreover, when objects are linked in either magical or legal associations, only the qualities the magician or judge seeks to invoke are activated. Otherwise, the world would present a vast, chaotic network of infinite correspondences and disconnects. So 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, or its weight, or color, depending on the effect he seeks to create or amplify.[51] 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.[52] Obviously, lightness is a characteristic sought after in a canoe, and it is one of the characteristics of the herbs and leaves used to impart that quality. But the plants have other qualities as well, including some that would probably not be 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

[49] Rosaldo, *supra* note , at 189.
[50] *Id*.
[51] MAUSS & HUBERT, *supra* note , at 69.
[52] MALINOWSKI, ARGONAUTS, *supra* note at 130.

building rite to lighten the canoe and the traditional symbolic association of the herbs and leaves with lightness.

Source materials are undetermined, but generally not limitless. And the use of novel reference points lacks the conventional power of the objects that are already recognizably 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 the real life situations referenced there. Malinowski comments that in Trobriand magic spells sometimes words are used that stand for narratives or pieces of narratives. The opening of a spell, he says, consists of "pithy expressions," each of which stands "for its own cycle of ideas, for a sentence or even a whole story."[53] He reports that the word "papapa," or "flutter," used in context means to the initiate "let the canoe speed so that the pandanus leaves flutter."[54] Malinowski remarks that beyond even this expanded meaning, 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.[55] Compare, for example, the complicated meaning and history that arises for lawyers and judges from the use of legal terms of art like "privity" or "equal protection." Like the magical terms Malinowski explores, these words evoke for practitioners not only abstract concepts of rights and duties but 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.

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."[56] 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 norm or quality that is then being expanded to incorporate the target object. The coffee urn and faulty scaffold are joined in the famous legal decision that turned a Buick into a thing of danger, in a process that mirrors suggestively the way the harpoon arrow and hornbill bird are united in the spell that renders Llongot hunting dogs aggressive.

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[53] *Id.* at 434.
[54] *Id*.
[55] *Id.* at 435.
[56] Macpherson v. Buick Motor Co., 111 N.E. 1050 (N.Y. 1916).

II. 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. Frazer[57]

> [M]agic words and incantations are as fatal to our science as they are to any other.
>
> Hon. Benjamin N. Cardozo[58]

I have said that the foregoing description of adjudication's affinities with magic owes much to the Realists. And it is certainly the case that in some of the best known Realist writings, law is repeatedly likened to magic and ritual.[59] But subsequent analyses of the Realist critique 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 never seem to stop 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 in other cultures. In order 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 in itself proof that law's claim to scientific reasoning was false, because magic was definitionally defective science.[60] Though the Realists rejected the equation

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[57] THE GOLDEN BOUGH 13 (Abridged Ed. 1979) [1911].

[58] THE GROWTH OF THE LAW 66 (1924).

[59] 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 [check this], 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 Edmund Burke v. Southern Pacific Railroad Co.*, 234 U.S. 669, 704 (1914). Earlier references exist as well. *See, e.g.*, Sims Leffe v. Irvine 3 U.S. 425, 454 (1799) ("there is no magic in the description of a patent"); The President, Directors and Company of the Bank of the United States v. Dandridge, 25 U.S. 64 (1827) (Marshall, J., dissenting) (rule that corporate directors can be distinguished from corporation and insulated from liability "becomes a talisman by whose magic powers the whole fabric which law has erected respecting corporations is at once dissolved").

[60] *See, e.g.*, *Green*, *supra* note , criticizing "the part which sacred words, taboo words, magic words, continue to play in our law," *id*. at 1016, and suggesting that a judge who focuses on language, as opposed to policy and justice concerns, "can only do his science

of law and deductive science and analytic reasoning, they assumed that legal decisionmaking 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 Frazer[61]

Victorian anthropologists theorized magic as a primitive evolutionary phase, both logically and chronologically prior to scientific reasoning.[62] 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 no longer be magic but science."[63] 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 "ideal connexions for real connexions."[64] Tylor's ideas, elaborated and popularized by Frazer in his still classic *Golden Bough*, formed the framework in which magic was viewed by many social scientists at the beginning of the twentieth century. Though the equation of magic and "pseudo-science" has been resoundingly rejected by virtually every field anthropologist who subsequently made a first-hand study of

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ill," *id*. at 1019.

[61] GOLDEN BOUGH, *supra* note , at 57.

[62] *See* SIR EDWARD BURNETT TYLOR, PRIMITIVE CULTURE, PART I: THE ORIGINS OF CULTURE, [hereinafter TYLOR, PRIMITIVE CULTURE] ch. IV at 112-115 (1958) [1871].

[63] THE GOLDEN BOUGH, ABRIDGED ONE-VOLUME EDITION 63 (1979).

[64] TYLOR, PRIMITIVE CULTURE, *supra* note , at 116.

magical practices, it was a dominant intellectual concept of magic when the Realists were writing, at least among English and American scholars, and outside anthropological circles remains influential to this day.[65]

The heart of the Victorian definition of magic as an evolutionary precursor to science is 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 science; underlying the whole system is a faith, implicit but real and firm, in the order and uniformity of nature."[66] But what separates magic from science is magic's modus operandi. Where science uses empirical observation and technical intervention to understand and affect the world, 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."[67]

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."[68] 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."[69] Magic was based on a primitive (or childish) assumption that the chain of mental associations from reality to imagination runs in both directions. "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, "and to conclude that association in thought must involve similar

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[65] There was of course 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 20th century theories of magic that I discuss in the Section III. His influence can really not be overstated. Another important source is Marcel Mauss, whose work on magic was also original and influential. For reasons of space and focus, and because the Realists appear to have focused on Anglo-American sources in their discussion of magic, I have chosen to omit Mauss and Durkheim's seminal work and deal with social and cultural theories of magic in the later work of Malinowski, Evans Pritchard, Turner and Douglas.

[66] FRAZER, GOLDEN BOUGH, *supra* note , at 220.

[67] *Id.* at 25.

[68] TYLOR, PRIMITIVE CULTURE, *supra* note , at 116

[69] *Id*.

connexion in reality."[70] So, according to Tylor, the primitive who notices similarities in form or quality that link various objects in his mind assumes that manipulating of one of these similar objects will cause a real world effect on another. 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.[71]

In the Victorian scheme, then, magic is definitively insubstantial and false. Yet Victorian anthropologists were ambivalent about what that essential falsehood entails. Is it mostly willful deception or naive delusion? Frazer explained that magicians "perceive how easy it is to dupe their weaker brother and play on his superstition for their own advantage."[72] But, at the same time, 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."[73] In fact, the puzzle over the credulity and/or duplicity of "savage" magic practitioners is one of the focal points of Victorian anthropology. What is not ambiguous, in the Victorian view, is the utter falsity of magic. 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 with what is really happening.

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 central Realist attack on legal formalism as irrational is anticipated in the Victorian definition of the "pseudo-science" of magic as a practice that manipulates verbal formulas instead of investigating and intervening in empirical reality. The Victorian understanding of magic is also suggestive of a particular kind of mistake or trick the Realists attributed to doctrinal legal analysis. It was a distortion of analogical reasoning that mistook "an ideal for a real connexion."[74] The Victorian idea that belief in magic was based on a projection of the associations of ideas onto concrete objects[75] is very close to the Realist complaint that judges substitute fictional legal concepts for relevant social

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[70] *Id*.
[71] MALINOWSKI, ARGONAUTS, *supra* note , at .
[72] FRAZER, GOLDEN BOUGH, *supra* note , at 215.
[73] *Id*.
[74] TYLOR, PRIMITIVE CULTURE, *supra* note , at 116.
[75] Sir James Frazer, The Golden Bough, Part I: The Magic Art 53 (1980) [1913].

facts, manipulate those concepts into patterns and then mistake (or cynically switch) the patterns for reality.[76]

My point is not that the Realists' critique of law was causally influenced by Victorian anthropology, though it may have been. There are references to Frazer in Jerome Frank's work.[77] But so are there references to later field anthropologists, including some of the structural-functionalists whose revision of the Victorian view I will discuss in Section III. Felix Cohen cites Bronislaw Malinowski's "functional" approach to social science as a model for a rational jurisprudence.[78] My point is rather that – for whatever reason -- in some interesting ways the Realists' critique of law mirrors the Victorian view of magic as formalistic pseudo-science. That similarity suggests both why the Realists were disposed to see adjudication as magical in the first place, and why, once they began to discover in how many practical ways adjudication resembled ritual magic they were not disposed to consider the possibility that those similarities might represent authentic, potentially useful aspects of legal practice. Classic adjudicative practice – with 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 so 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.
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> – Leon Green[79]

The charge of formalism is the core Realist criticism of legal process. As Felix Cohen explained, judges used verbal formulas – "the magic 'solving words' of traditional jurisprudence" – to answer "legal

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[76] *See* Cohen, *supra* note , at 809-20.

[77] *See, e.g.*, LAW AND THE MODERN MIND, *supra* note , citing "the writings of Frazer" for the proposition that "the belief in . . . a disciplined universe is consistently acted upon only by primitive men, children, and the insane" 158-59 n. 5.

[78] Cohen, *supra* note , at 831 and notes 63-65. One work that seems to have been influential for the Realists' views of magic language was Ogden and Richards' *Meaning of Meaning.* Frank quotes from it at length and Green also cites it for the idea that "primitive man has a deeply rooted belief that 'a word has some power over a thing'"– that is for the kind of automatic effect of magic words the Victorians attributed to "primitive" magic. Frank at 84-86; Green at 1016 note 11.

[79] Green, *supra* note 9, at 1018.

problems" rather than asking relevant empirical and ethical questions.[80] The Realists viewed doctrinal concepts like "fair value" "due process" and "proximate cause," as illusory verbal symbols mobilized in judicial opinions to mask judges' real reasoning process.[81] "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.[82] Doctrinal reasoning relied on what Green called a "language technic" rather than a straightforward "judging technic" that would acknowledge that it was men, not words, that decided cases. This atavistic focus on verbal formulas mistakes the "machinery by which the power of thought is handled" for the power itself.[83] It is a doomed effort at transcending the necessarily imperfect and ultimately uncontrollable individual "exercise of that power we hand over to judges."[84]

At the heart of the Realist critique 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 – treating words as though they have transformative power. "A word is used by the savages when it can produce an action and not to describe one, still less to translate thoughts. The word therefore has a power of its own, it is a means of bringing things about, it is a handle to acts and objects and not a definition of them."[85] For the Realists, the use of magic language entailed a naive belief in intrinsic, automatic verbal effects, "a conviction that words have power over things, a theory of an inherent connection between symbols and things to which the symbols refer."[86] Jerome 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. In Frank's 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.

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 express thoughts and value judgements and describe situations in the

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[80] Cohen, *supra* note , at 820.
[81] Green, *supra* note , at 1016.
[82] *Id*. at 1016.
[83] *Id*. at 1018.
[84] *Id*. at 1020.
[85] FRANK, *supra* note , at 85.
[86] *Id*.

world; they do not change them. Resonant words like "duty" or "right," Green says, are not the real determinants of legal outcomes. 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."[87] Likewise, for everyone else, the judges' words are effective precisely because armed agents of the state stand ready to enforce them. The power of judicial language inheres not in the words themselves, but in the fact that judges have been authorized to decide who will be subjected to the force of the state.

For Realists, language is enabling, not generative: "Words are the machines by which the power of thought is handled," Green declares.[88] But even that literally instrumental image may ascribe too much positive value to legal language. Later in the same article Green muses, "an 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."[89] 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 the observation that ritual use of language is a key technique of adjudication. "Word ritual under one guise or another has always been one of the primary modes of law administration," Green contends.[90] But the instrumentalist view that legal language is purely a means of communicating decisions backed by force and not a factor shaping legal meaning, 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. For instance, the "so-called 'cautionary instructions' to the jury -- are they

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[87] Green, *supra* note , at 1021.
[88] *Id*. at 1018.
[89] *Id*. at 1022.
[90] *Id.* at 1016.

not, too, like debased magic spells or cabalistic formulas"?[91] Everyone knows, says Frank, that judges' instructions to jurors not to be affected by emotion and to stick to the evidence don't really 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"?[92] 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."[93] 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.[94] But power to do what? For Frank, any belief that the formal charge could improve the jury's decisionmaking process "smacks of child magic," that "hopefully employs formulas and key-words to conquer the environment without substantial effort."[95] 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*.[96] That article 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.[97] Then these magical objects are elaborated into a complicated metaphysical narrative that substitutes for policy analysis and hard ethical choices. Criticizing judges' use of "magic solving words," like "fair value" "corporation" or "proximate cause," to justify their rulings, Cohen likens 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. Jerome Frank

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[91] FRANK, *supra* note , at 182.
[92] *Id*. at 183.
[93] *Id*. at 184.
[94] *Id*.
[95] *Id*.
[96] 35 COLUM. L. REV. 809.
[97] *Id*. at 811.

likewise criticized doctrinal "Word Magic" as "a trick resulting from 'a confusion of the subjective and objective in the conception of things."[98]

As an example of 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.[99]

In Cohen's view, this sort of "supernatural approach," whether mistakenly, or deliberately, treats a fictional legal concept -- a corporation -- like a real entity -- a person, that "travels about from State to State as mortal men travel."[100] Cohen finds it absurd that the question of jurisdiction should be decided (or defended) by imagining that the fictional corporate being had acted in any sense autonomously. He wants an investigation of modern 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 New York.[101] And for legal scholars the goal should be to "substitute a realistic, rational, scientific account of legal happenings" for what he calls the "theological jurisprudence of concepts" with its "legal magic and word-jugglery."[102]

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,"[103] looks very much like Frazer's explanation of "sympathetic magic," based on the principle of similarity. Cohen complains that to determine personal jurisdiction over corporations, judges play out the metaphoric identifications between corporate structures and individual persons instead of inquiring empirically into real-life relationships among corporations, the

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[98] Frank, *supra* note , at 64.

[99] Cohen, *supra* note , at 811, *citing* Tauza v. Susquehanna Coal Co., 220 N.Y. 259, 268 (1917).

[100] *Id.*

[101] *Id.*, at 810.

[102] *Id*. at 821.

[103] *Id.* at 810.

jurisdictions where they are located and the people suing them. Thus, says Cohen, the court espoused a "traditional supernatural approach to practical legal problems"[104] and ignored or covered up the real "social forces" that actually shaped the decision, instead grounding it in "vivid fictions and metaphors."[105] Again it goes back to a non-instrumental, non-denotative use of words – and the Realists' belief that such magical language use can only obstruct reasoning, never enhance it. As Green put it, "The 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."[106] For the Realists, symbolic doctrinal phrases always replace or hamper principled decisionmaking, they never facilitate it. For Cohen, determining "where" a corporation is by analogizing it to a human being absurdly reified the metaphoric corporate "body." Like Tylor's savage practitioners of magic, Cardozo mistook "an ideal for a real connexion."[107] As Jerome Frank explained in remarkably Tylorish terms, law's doctrinal word magic is "a trick resulting from 'a confusion of subjective and objective in the conception of things."[108]

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 Lerner[109]

Like the Victorians, the Realists are quite certain that magic is essentially false, but 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."[110] The problem is that legal magic

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[104] *Id*. at 813.

[105] *Id.* 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, e.g.,* Wood v. Lucy, Lady Duff-Gordon, 222 NY 214, 91 (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 not. 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.

[106] Green, *supra* note , at 1030.

[107] TYLOR, PRIMITIVE CULTURE, *supra* note , at 116.

[108] FRANK, *supra* note , at 64.

[109] *The Shadow World of Thurman Arnold,* 47 Yale L. J. 687, 695 (1938).

[110] Cohen, *supra* note , at 821.

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 to 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."[111] 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.[112] 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 laws and the social ideals by which the law is to be judged."[113]

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. Consider the practice of precedent. Given the volume of existing case law, Frank points out, "a court can usually find earlier decision which can be made to appear to justify almost any conclusion."[114] Existing precedent, therefore, cannot be the cause of a yea or nay legal outcome. In the Realist/Victorian fraud/truth dichotomy, that means precedential magic simply doesn't work. The fact that precedents are not logically determinative of subsequent cases renders them meaningless. Far from defining judicial art, the judicial practice of precedent can only obfuscate and detract from the true judicial practice. "The concealment has merely made the labor of the judges less effective."[115] 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.[116] Frank makes no

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[111] *Id*. at 841-42.

[112] *Id*.

[113] *Id*., at 812.

[114] FRANK, *supra* note , at 152.

[115] *Id.* at 157.

[116] In contrast, Holmes, perhaps the least magical of all jurists, embraced the notion that individual case results shaped general priciples 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." Codes and the Arrangement of the Law (1870), in THE COLLECTED WORKS OF JUSTICE HOLMES: COMPLETE PUBLIC WRITINGS AND SELECTED JUDICIAL OPINIONS OF OLIVER WENDELL HOLMES, VOL. I, 212 (1995), *quoted in* LOUIS MENAND, THE METAPHYSICAL CLUB: A STORY OF IDEAS IN AMERICA (1st Paper Ed. 2002) at 217.

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 does raise the question why magic practitioners (here, lawyers) who observe that the system they adhere to 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 of being adjudicated.[117] Mirroring the Victorian view, Frank concludes that practitioners of legal magic are driven by a childish fear of "chance and change"[118] and a yearning for the certainty that he regards as the "basic myth" legal magic serves.[119]

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.[120] Legal magic's status as fraud or fancy might be 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.

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[117] Explicating his theory, Frank draws on the developmental theory of psychologist Jean Piaget, who described individual mental maturation as a process of moving from "magical thinking" to reason. Frank also cites a number of anthropologists' work on "primitive" magic, among them Malinowski and Frazer. Cohen and Green likewise cite to anthropological studies, though not necessarily work on magic *See e.g.*, *Transcendental Nonsense*, citing Malinowski and Boaz.

[118] FRANK, *supra* note , at 18.

[119] *Id*. at 3.

[120] *Id.* at 159.

– Thurmond Arnold[121]

One contemporary of Green, Cohen, and Frank took a different view of the formal and doctrinal aspects of adjudication the Realists called legal magic. Thurman Arnold is often counted a Realist.[122] 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. Their function is rather to keep an ideal alive."[123] But Arnold critiqued the Realists' view that doctrine and formal procedure were therefore either worthless or positively harmful. His investigations of legal ritual incorporate, and sometimes prefigure, the functional structural and symbolic theories that were soon to revise the Victorian views of magic and ritual.

Arnold's central insight was that just because the symbolic and ritual aspect of legal practice were not grounded in empirical fact or overt value judgments, they were not necessarily false and corrupting. Though he sometimes pokes fun at law's reliance on "folklore" and "spiritualism" Arnold suggests that these aspects of legal practice might have a useful, even a definitive, function.[124] In any case, for Arnold, ritual and spiritual qualities are inextricable from legal process. Whether useful or deleterious, they could not be expunged from a legal system without fundamentally altering its character.

In Arnold's view, what he called legal "ritual," while not necessarily benevolent, is authentically part of legal practice. He argues that legal ceremonies, especially trials, work to symbolically reconcile conflicting social ideals. For Arnold, it is precisely the symbolic, ritual ceremonial nature of adjudication that makes possible a kind of ideological reconciliation that is beyond the reach of other forms of political discourse. The enacted ceremonies of legal process provide "a way of talking about all

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[121] THE SYMBOLS OF GOVERNMENT 6 (1935).

[122] Jerome Frank lists Arnold in a subgroup of Realists he calls "fact skeptics," along with Leon Green and others. JEROME FRANK, COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE 74 (1949). Arnold's biography spans all three Realist vocations of scholar, practitioner and judge. He was an antitrust lawyer in the Justice Department, a Yale law professor, and, briefly, a U.S. Circuit Judge.

[123] ARNOLD, SYMBOLS OF GOVERNMENT at 45.

[124] In two books he published in the 1930s, *The Symbols of Government* and *The Folklore of Capitalism*, Arnold explored the "symbolic" "ritual" "ceremonial" and "ideal" character of legal theory and practice.

the unsolved and unsolvable problems of society" allowing us to "talk in different ways about the same problems without appearing to contradict ourselves."[125] In this way legal ritual provides a chance for coherence without sacrificing the multiplicity of social perspectives. "It is child's play for the realist to show that law is not what it pretends to be," says Arnold, "that it constantly seeks escape from reality through alternate reliance on ceremony and verbal confusion."[126]

But he concludes that law's unrealistic reliance on ceremony and ritual is "not its weakness but its greatest strength."[127] It is through this ritual symbolic action that legal institutions can "constantly reconcile ideological conflicts."[128]

Probably Cohen and Frank would agree that legal magic "preserves the appearance of unity while tolerating and enforcing ideals which run in all sorts of opposing directions."[129] But like the Victorians, they see that "appearance" as illusory and false. Where Cohen finds only shady sleight of hand and Frank a childish dependence on wishful thinking, Arnold sees something potentially valuable that does not necessarily conflict with rationality. He contends that legal ritual's ability to symbolically reconcile conflicting ideas creates an institutional mechanism that may strengthen society's capacity to tolerate ideological conflict. Thus, for Arnold, the ritual nature of the legal process makes possible the kind of ideological conflict that should be present in a liberal society that resists any totalizing social philosophy. "The judicial system loses in prestige and influence wherever great, popular, and single-minded ideals sweep a people off its feet," Arnold contends.[130] "It rises in power and prestige when society again becomes able to tolerate contradictory ideals."[131]

Arnold is not claiming that legal ritual's capacity to harmonize

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[125] ARNOLD, SYMBOLS at 247-48.

[126] *Id*. at 44.

[127] *Id.*

[128] *Id.*

[129] *Id.* at 247. Arnold's descriptions of their confidence-building role sometimes have an uncomfortably undemocratic aspect. He blithely explains, at one point, that the omission of a ceremonial, mystical, or "ideal" element from law would lead to "a spiritually unstable institution, backed by the harsh exercise of power, lacking that permanence and strength which come from unquestioning public acceptance." *Id.* at 71. You can almost hear Jerome Frank shouting, "I rest my case." No doubt Frank would say that in a democracy a legal system has no business cultivating "unquestioning public acceptance" through ritual or any other means.

[130] *Id.* at 247.

[131] *Id.*

inconsistent values necessarily has benign results. He distinguishes the benefits of legal ritual from the justice of any particular legal outcome. Ritual norms are not determinative of substantive individual results. Arnold suggests, for instance, that criminal procedure is followed especially scrupulously in cases involving defendants who are obviously guilty and sure to be convicted. "Courts may more willingly give the accused the advantage of every protection because of the fact that these protections can do him no good."[132] Focusing on the impact of criminal trials on the public at large, however, Arnold sees the positive side of legal symbolism in action. Conflicts between two sets of competing ideals are played out: fairness versus law enforcement[133] and "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."[134] Unfolding in a ritual drama, trials "permit the public to argue and discuss all the various contradictory attitudes about crime and criminals" and so provide "a great stabilizing agency."[135]

Students of anthropology will recognize that Arnold's idea that trials ritually reconcile conflicting social ideals foreshadows a theory of ritual practice developed by the anthropologist Victor Turner in the 1950s and 1960s.[136] Turner's ideas were avant garde when they were first published and continue to be viewed as a major theoretical development in twentieth-century anthropology. Remarkably, Arnold, a lawyer, made a parallel conceptual leap some thirty years earlier. Even more striking than Turner and Arnold's substantive agreement about ritual's ability to resolve social conflict is the shift both make to accord ritual primary status as a cultural phenomenon. Rather than viewing ritual as a projection of existing social organization, both Turner and Arnold see social organization as a secondary result of ritual. As Turner put it, ritual is something other than an "epiphenomenon -- the result of some other more basic social force or institution."[137] He was determined to accord ritual "ontological" status as a social practice with its own primary meaning.[138] Arnold's writing on legal ritual makes a parallel shift in outlook from the prevailing Realist view of legal magic as a delusion or disguise that obscures the "real" psychological and social forces driving instrumental legal decisions. Whereas the (other)

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[132] *Id.* at 139.

[133] *Id.* at 149.

[134] *Id.* at 130.

[135] *Id.* at 147.

[136] *See* VICTOR TURNER, THE FOREST OF SYMBOLS: ASPECTS OF NDEMBU RITUAL (1966).

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

[138] *Id.*

Realists viewed legal magic as a way to rationalize conclusions that were really determined by other, economic, social, and political values and pressures, Arnold saw that procedural and doctrinal rituals worked in a way parallel to, or intertwined with other social structures and ideals.

Even when Green, Cohen and Frank see something in legal magic beyond sheer illusionist trickery, they still view it as somehow secondary -- a mutation or avoidance of a more "realistic" legal analysis. Like them, Arnold recognized that legal forms and doctrines had more in common with ritual magic than with science. But he rejected their conclusion that legal magic is a necessarily inferior, inauthentic form of legal practice. For Arnold, legal rituals and formulas do not dance attendance on – or evade – some other more basic, truer authentically "legal" practice or reasoning. "It is true that at times we eat and sleep and at other times we engage in parade and ceremony," Arnold says, "yet neither type of conduct is an escape from the other."[139]

Today, Arnold's theories remain relatively obscure. When a judge or law professor remarks on the magic or ritual quality of some aspect of law, the reference generally is meant to be self-obviously derogatory. If judicial references to "magic words" and "talismanic" reasoning are associated with any serious jurisprudential critique, it is the skeptical work of Green, Cohen and Frank. But here the analyses of the three better known Realists have parted company with the social science they avowedly embrace.

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 Wittgenstein[140]

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 anthropologists – some of whom the Realists cite in their articles – were

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[139] ARNOLD, SYMBOLS , *supra* note , at 251.

[140] REMARKS ON FRAZER'S PHILOSOPHICAL ANTHROPOLOGY (19), quoted in TAMBIAH, MAGIC, SCIENCE, RELIGION at 57.

revising the Victorian view of magic as science's "bastard sister."[141] Studying the practices of the Trobriand Islanders, the great functionalist Bronislaw Malinowski observed that magic "is not directed so much to nature as to man's relation to nature and to the human activities which affect it."[142] Malinowski saw that Trobriand magic apparently coexisted with an accurate technical understanding of the world, or at least with much useful technical knowhow. 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."[143] 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."[144] 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."[145] What were those rituals for?

Malinowski's observations sometimes suggest that magic practitioners themselves understand ritual as directed at changing the social world view of its inhabitants. Thus, magic language may be made up of counterfactual affirmations of conditions "desired but not yet fulfilled,"[146] but its effects need not be achieved through automatic intervention in the physical universe. A garden magician's spells ostensibly address the soil to be planted, declaring, the "belly of the garden rises."[147] 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. That is, they do not believe that his words alone can make the harvest burst forth out of dead earth. Though he never expressly embraces the idea, Malinowski's observations point to another modus operandi for magic – that it affects its human practitioners and observers.[148]

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[141] SIR JAMES FRAZER, PREFACE TO MALINOWSKI, ARGONAUTS, *supra* note (1922).

[142] MALINOWSKI, ARGONAUTS, *supra* note , at .

[143] *Id*. at 27.

[144] *Id.* at 28.

[145] *Id.*

[146] MALINOWSKI, CORAL GARDENS AND THEIR MAGIC, VOL. II, THE LANGUAGE OF MAGIC AND GARDENING 70 (1965) [1935].

[147] *Id*.

[148] *See*, *e.g.*, Malinowski's comparison of the garden magician's exhortations of fertility to social flattery. "[I]n the designation of people by titles which are just a little above their rank, in the incorrect and 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.* at 70.

Stanley Tambiah has pointed out in Malinowski's account of Trobriand garden magic an example of magic grammatically addressed to an inanimate object but understood by its practitioners to affect the people who hear it.[149] After the yam harvest, the Trobrianders conduct rites to "anchor" the yams in their storehouse. A full storehouse is the sign of a strong economy. It is considered better for the gathered yams to rot there than to be taken out and eaten. The rites are performed over the storehouse, and the spells invoke metaphors of anchoring, making comparisons to bedrock and to a coral outcrop and referring to stability and to plenty.[150] "Every detail of the storehouse is enumerated, the whole village, which means really all the food stored in the village, is made immovable and unshrinkable by verbal imprecation."[151] 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."[152] 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."[153] At first, this might seem to be just another physical displacement, since magic that works directly on stomachs seems to us just as physical as a spell that works on a storehouse. But apparently the Trobrianders view the stomach as the seat both of 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, i.e., that it influences the mind, or aspects of it.

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. 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

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[149] STANLEY J. TAMBIAH, CULTURE, THOUGHT AND SOCIAL ACTION: AN ANTHROPOLOGICAL PERSPECTIVE 51-53 (1985). Tambiah extends this notion into a general theory: "Thus, 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.

[150] MALINOWSKI, CORAL GARDENS AND THEIR MAGIC, VOL. I., *supra* note , at 226.

[151] *Id.*

[152] *Id.*

[153] *Id.* at 227.

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.

Though the spell is ostensibly addressed to the physical structure of the yamhouse, Malinowski's informants insisted that it worked by influencing their bellies (where their minds were thought to be). Semantically, magic emulates direct technical intervention in the natural world (here by using counterfactual statements that seem directed toward making the yam storehouse 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)."[154]

Another great early theorizer of magic, E. Evans-Pritchard, explained, "Witchcraft explains *why* events are harmful to man and not *how* they happen."[155] Among the Azande of Central Africa, who have a highly developed practice of divination for witches, Evans Pritchard explained, "witchcraft is the socially relevant cause, since it is the only one which allows intervention and determines social behavior."[156] Thus Evans-Pritchard shared, and extended, Malinowski's insight that there was no necessary contradiction between rational, technical approaches to the world and the practice of magic. Regarding the Victorians' failure to explain why "primitives" confused ideal and real associations in magic but not in their technical practices, 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."[157]

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[154] TAMBIAH, MAGIC, SCIENCE, RELIGION, *supra* note 22, at 82. As the title of Tambiah's work suggests, our conception of the role of language in magic, its ambiguous position on the continuum between remote physical action and expressive communication – implicates the relationship of magic 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, pointing 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." 17 Yale J. L. Human. at 122.

[155] EVANS-PRITCHARD, WITCHCRAFT, ORACLES & MAGIC, *supra* note , at 24.

[156] *Id*. at 25.

[157] 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

The Azande themselves explained the operation of witchcraft with a hunting metaphor that captures the idea of magic working in partnership, rather than opposition, with natural causes. The Azande apportion the meat from a successful hunt both to the man who first speared the animal and then to the man whose spear finished the job, who is known as "the second spear."[158] Together the two hunters killed their quarry. Likewise, Evans-Pritchard's informant explained, "if a man is killed by an elephant Azande say that the elephant is the first spear and witchcraft is the second spear and that together they killed the man."[159] Magic is viewed as the partner of nature, and magical intervention is interwoven with natural causes. Thus an investigation and explanation of reality in terms of magic is not incommensurate with an accurate rational understanding of the natural world. Instead, magic concerns people's individual and social relations with reality.

In the mid-twentieth century, focusing on the ways ritual helped to shape social reality, Victor Turner and Mary Douglas urged an important shift in Western understandings of ritual practices. In their analyses, ritual not only expresses or highlights some aspects of experience, but by externalizing experience, actually creates and changes it.[160] The insight that ritual has a noninstrumental socially constructive role to play is key 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, "rituals create and control experience."[161] That they may fail to do so in a natural-physical sense does not mean that they are socially ineffective. Their performative nature is key here. For beyond what Douglas calls ritual's "Alladin-and-the-lamp face value," they 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

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combat witches, readily coexist with technical knowledge of the natural world.

[158] EVANS PRITCHARD, WITCHCRAFT, ORACLES & MAGIC, *supra* note , at 25.

[159] *Id*. at 25-26.

[160] *See*, TURNER, DRAMAS, FIELDS & METAPHORS, *supra* note , at 56; DOUGLAS, *supra* note , at 67.

[161] MARY DOUGLAS, *supra* note , at 67.

and the experience which bears its imprinting.[162]

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. In everyday life, Turner explained, Ndembu social norms are sometimes "situationally incompatible, in the sense that they give rise to conflicts of loyalties."[163] For instance, a woman's nurturing closeness with her daughter conflicts with her allegiance to the tribal tradition of removing the girl from her mother's care when she is initiated into her role as an adult member of society. Turner found that initiation rituals ostensibly glorifying the girl's achievement of adult status and the solidarity of the tribe, enacted rather than suppressed this maternal conflict. The novice's mother was barred 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.[164] In terms of individual experience, the conflict between tribal solidarity and mother love may be unresolvable. In Turner's view, the ritual enacted social reconciliation of that conflict.[165] Arnold would say that symbolic reconciliation allowed the conflicting tribal solidarity and mother love, filial attachment and the assumption of adult status, to flourish side by side.

Turner theorized that ritual symbols work by juxtaposing two different modes of experience – sensory and normative.[166] 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. 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. Turner's Ndembu informants told him that this "milk tree," as he calls it, stood for human breast milk and the breasts that supply it.[167] 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. The Ndembu also said that the milk tree "is the place of all mothers of the lineage" and "is where our ancestress slept when she was initiated."[168] Finally, they

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[162] *Id*. at 69.
[163] TURNER, FOREST OF SYMBOLS, *supra* note , at 4.
[164] *Id*. at 24.
[165] *Id*. at 40-41.
[166] *Id*. at 28.
[167] *Id*. at 20.
[168] *Id*. at 21.

explained that in their matrilineal society, the milk tree "is the place of our tribal custom, where we began, even men just the same."[169] Thus it symbolized the solidarity and development of Ndembu society along with the girl's individual development toward motherhood. According to Turner, this disparity of reference is typical of symbols that are the focal points of important rituals.[170]

Turner's analysis then makes a move that tracks Arnold's description of legal ritual. Rather than treating the ambiguity of symbolic meaning as a logical weakness, he theorized 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.[171] Ultimately, the symbols tend to unite their physiological and moral frames of reference.

Turner theorized that the symbolic "union of 'high' and 'low'," was connected with ritual's social function.[172] The idea is that the condensation in 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."[173] It is in part through this dynamic tension that ritual achieves its status as a primary social experience, capable of changing, and creating as well as expressing, social roles, attitudes, and relationships. For Turner, ritual is "a mechanism that periodically converts the obligatory into the desirable."[174] As he explained it, "ritual 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.[175]

Like Thurman Arnold, then, Turner saw that transformative ritual did not just express static social categories and norms, it constructed those norms and conflicts among them. So ritual was not necessarily a tool for representing and reifying a monolithic version of reality and morality.[176]

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[169] *Id.*

[170] *Id.* at 27-30.

[171] *Id.*

[172] TURNER, THE FOREST OF SYMBOLS, *supra* note , at 30.

[173] *Id.*

[174] *Id.* at 30.

[175] *Id.* at 54.

[176] Compare the treatment of narrative in law. For some reason, legal scholars have tended to emphasize stories' ability to destabilize the existing social order. But, as others

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 as well as expresses and affects social reality. Ritual may sometimes enforce ruling social categories. But in this conception, it is at least theoretically capable of generating, illuminating and maintaining conflicting social norms through symbolic recreations and reconciliations of conflicts.[177]

The different perspectives of Malinowski, Evans-Pritchard, Douglas and Turner – and, in the legal context, Thurmond Arnold – have in common the view that magic and ritual can coexist with rational understanding. They suggest, in fact, 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 practitioners' goals and skills, the particular situation, the sociocultural setting, and, of course, on the point of view of the person evaluating those results.

IV. A REANALYSIS OF LEGAL MAGIC

> It is the essence of magic that, by affirmation of a condition which is desired but not yet fulfilled, this condition is brought about.
>
> – Bronislaw Malinowski[178]

> [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. Winter[179]

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have noted, narratives may be hegemonic as well as subversive. Patricia Ewick & Susan S. Silbey, *Subversive Stories & Hegemonic Tales: Toward a Sociology of Narrative*, 29 LAW & SOC'Y REV. 197 (1995).

[177] As I have already pointed out, Thurmond 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 truthfinding) 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." ARNOLD, SYMBOLS, *supra* note , at 130.

[178] MALINOWSKI, CORAL GARDENS II, *supra* note , at 70.

[179] Winter, *Transcendental Nonsense, supra* note , at 1197.

Legal magic, seen through a modern anthropological lens, 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 generate and transform it. As Robert Cover expressed it, law and culture together constantly create and recreate "nomos," a normative universe of legal meaning, beyond state-enforced legal power.[180] 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 analyses law's absorption of social norms and production of social meaning through the narrative structure of caselaw.[181] But outside of narrative theory, consideration of law as a socially constituting force mostly takes place at a high level of abstraction.[182] In this conceptual vagueness law's constitutive functions pale beside the interpretive and enforcing modes that are explored in precise terms from a variety of theoretical perspectives.[183] Using the anthropological theories of magic discussed in the last section, I want to consider how legal magic may help shape social reality in ways that are neither wholly discursive nor wholly coercive.

In this section, then, I will develop two main results of the anthropological reanalysis of legal magic. 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

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

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

[182] *See* Annelise Riles, *Representing In-Between: Law, Anthropology, and the Rhetoric of Interdisciplinarity*, 1994 U. Ill. L. REV. 597, 600 (1994), contending that 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 (1989), arguing that anthropologists tend to treat formal legal proceedings as *sui generis*, and thus uninteresting or opaque in terms of the law/culture boundary, and that legal scholars 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.

[183] There are exceptions that provide excellent concrete analysis of law's constructive techniques. *See, e.g.*, Ewick & Silbey, *supra* note ; Donald P. Korobkin, *Bankruptcy, Law, Ritual & Performance*, 103 COL L. REV. 2124 (2003); Steven L. Winter, *Transcental Nonsense and the Stakes* , 137 U. PA. L. REV. 1105 (1989).

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. Either rules and doctrines help determine an objectively correct (and thus predictable) outcome, or they are meaningless trappings of a false ceremony that obscures the subjective individual interpretive process that actually produces legal results. Either legal decisions are the product of autonomous authors' subjective judgments or they are determined by doctrine and precedent. Either legal compliance is coerced or it is 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 experience, or at least is aimed at such alteration. "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."[184] As Mary Douglas has explained, ritual is not like a map or illustration, a model or guide for an experience we would otherwise have in some other way.[185] Through its unique social practice, ritual changes experience. Likewise, adjudication's primary social role is not explanation. Court proceedings are intended to intervene in the social world in ways that are sometimes transformative.

The Realists' antiformalist point is that legal language cannot really work automatic changes in reality anymore than a stage magician can really make the rabbit materialize out of an empty hat. But that presumes a classically Victorian view of magic. Ritual magic need not aim for this kind of false automatic effect. "We shall not understand Zande magic, and the differences between ritual behaviour and empirical behaviour in the lives of Azande," commented Evans-Pritchard, "unless we realize that its main purpose is to combat other mystical powers rather than to produce

[184] BELL, RITUAL, *supra* note , at 44.
[185] DOUGLAS, PURITY & DANGER, *supra* note , at 65.

changes favourable to man in the objective world."[186] To the extent ritual is understood as a mode of accomplishing social transformation through its effects on group participants, adjudication's ritual magic techniques appear well adapted to its purpose.

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

In contrast, in the Realist view, there is and can be no authentic ritual legal technique that shapes adjudicative decisions. In the end, every judge "must employ the processes of intelligent men generally,"[187] must just stumble along like anyone grappling with a problem involving values and facts. Of course this observation is unassailable in one sense. Whatever practice, ritual or otherwise, a judge employs in making her decision, she will bring to that practice the benefits and limitations of her own insight and experience. But modern anthropology of magic 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 practitioners understood the rites as aimed at, and effective upon, their own appetites.

Similarly, that the legal determination of a warehouse as "public" will be enforceable ultimately by state-sanctioned violence does not render

[186] EVANS-PRITCHARD, WITCHCRAFT, ORACLES, & MAGIC, *supra* note , at 199.
[187] Green, *supra* note , at 1020.

the metaphorical/performative language used by the majority necessarily ineffective or empty. (Anymore than the absence of technical power makes the Trobriand spell ineffective.) Both may affect compliance and the meaning of compliance with the norms they embody. From the Victorian/Realist point of view it seems that 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 I have been discussing can also shed light, I think, on a current issue regarding courts' precedential practices. In many states, no-citation rules bar discussion of most recent state appellate court decisions, which are labeled "non precedential." Until recently four of the busiest federal courts – the Second, Seventh, Ninth and Federal Circuits – likewise forbade lawyers and lower court judges from citing the courts' summary decisions, which are usually labeled "nonprecedential."[188]

The leading federal case defending the constitutionality of no-citation rules and nonprecedential opinions is a Ninth Circuit decision, *Hart v. Massanari*, authored by Judge Kozinski.[189] *Hart*'s formalistic model of the binding power of precedent recalls the belief in automatic magic the Victorians ascribed to practitioner of primitive magic. "If a court must decide an issue governed by a prior opinion that constitutes binding

[188] This is not a matter of 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 off limits, 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 states 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.

[189] 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. 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. In *Hart* the Ninth Circuit rejected the constitutional challenge and upheld both the nonprecedential treatment and the citation ban.

authority, the later court is bound to reach the same result . . . ."[190] It is as though once a judge recognizes that a prior precedent exists, the old ruling decides the new case for her. "[B]inding authority is very powerful medicine," intones *Hart*.[191] The metaphor of a drug, which acts without regard for the will or desire of the person who imbibes it, is telling. In *Hart's* world, the judge takes her precedential medicine and the medicine decides the next 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 the context. From the Victorian/Realist perspective, the only way to control the unruly power of legal words is to suppress them. Indeed, the ritual-magic explanation for the no-citation rule makes a good deal more sense than many of the commonly proffered explanations. These claims, such as, that with open citation judges will have to defend departures from prior rulings and spend more time making sure their summary decisions are correct, or that summary opinions have no useful information value, seem either flatly indefensible or incorrect. But if judges understand their own legal magic as either automatically transformative or utterly illusory, we can understand why they would fear the repetition of their hastily written summary opinions.

Like the court reporter I described in Section I, who decided to erase the trial judge's words about contempt, courts use no-citation rules to suppress judicial language that might otherwise trigger legal effects the judges don't intend. The other way to deal with the unruly power of judicial language is to take a more complex view of precedent. If precedent is not conceived as automatically binding in the first place, then judges can work with existing opinions, reshaping them to suit new applications. This was the approach of the Trobriand Islanders to their magic spells, according to Malinowski. Though magic is conceived by Trobrianders as timeless, "a spell is constantly being remoulded as it passes through the chain of magicians."[192] Malinowski describes, for instance, how traditional fishing magic was reworked to accommodate a new practice of diving for pearls. But in the either/or Victorian view of magic words, precedential "medicine" is either automatically binding or unreal. So judges (and others) proceeding from this view understandably fear that treating precedent as subject to reinterpretation in subsequent contexts will rob judicial words of power.

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[190] *Hart*, 266 F.3d at 1170.

[191] *Id.* at 1171.

[192] MALINOWSKI, ARGONAUTS, *supra* note , at .

No-citation rules are thus a solution that allows courts to maintain a black and white view of judicial decisions – ascribing a naive, automatic power to designated precedents and no power at all to opinions labeled "nonprecedential" whose citation is banned. Indeed, 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 the legitimacy of nonprecedential, uncitable summary decisions, the opinion has been cited often by subsequent courts for its avowal of the "binding" power of designated precedent.[193]

But if we look at precedential magic in light of the symbolic theories I described in the last section, no-citation rules may weaken rather than increase the power of the remaining citable precedents. In the work of Victor Turner and Mary Douglas, ritual techniques emerge as having real power to bring about social effects through their symbolic enactments. From this perspective, precedent appears as a symbolic technique by which judges' words acquire enhanced power and which may be undermined by no-citation rules. In a precedential system, it is understood by all the participants that whenever judges speak or write in the context of adjudication, they commit themselves to lasting legal effects they cannot foresee or control. 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 that sort of active 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. For though our physical actions are irrevocable, and though we cannot foresee all their subsequent effects, we can adjust 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

[193] *See, e.g.*, In Re Purchaspro.com, Inc., 332 B.R. 417, 422 (Bkrptcy. D. Nev. 2005) "Binding authority must be followed unless and until overruled by a body competent to do so"; Doyle v. Warden, 447 F. Supp. 2d 1123, 1129 (C.D. Cal. 2006) "district judge may not 'disagree with his learned colleagues on his own court of appeals who have ruled on a controlling legal issue.'"

hammering and proceed as though it never happened.

If precedent sets judicial words apart, making them at once less like ordinary words an more like ordinary actions, 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 don't have the power to select in advance which of our physical acts will have lasting impact. So in a no-citation regime the symbolic identification of precedential language with action is weakened and with it the ritual impact of precedential rulings. 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.[194]

With some help from anthropology, then, 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.[195] And like interpretation and enforcement it 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 were possible to jettison all the ritual-magic aspects of today's legal process, the result would be profoundly different than the institution we now call adjudication. Indeed, it might not be adjudication at all.

B. The Potential Roles of Legal Magic

In law as in other sorts of ritual magic, transforming the meaning of a set of social circumstances can happen in a way *through* these techniques of performance, counterfactual utterances, formality, metaphor, and time play, that otherwise look like they are only distractions or ways to disguise what is really going on. While the techniques of legal magic are not themselves substantively determinative of rational decisions, they are not necessarily in tension with rational decisionmaking. Some functions of law in our society may in fact depend, in part, on just 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

[194] For more on this issue, see Allen, *supra* note .

[195] TURNER, DRAMAS, FIELDS & METAPHORS, *supra* note , at 57.

the affective power of lived experience and thus generate the kinds of personal and collective commitment that leads to social transformation. Particularly in this time when the social influence of extra-legal religious and community norms is more and 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.[196]

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 Kapferer[197]

Much analysis of the social constitutive aspect of law focuses on non-official ways law interacts with cultural norms and is shaped by political, social and personal views. Robert Cover's early influential work emphasized nonofficial, religious, personal – and often resistant – sources of legal meaning.[198] Cover pointed out that the strength of the legal interpretations generated by these sources depends on individual and group commitments to live and interpret their lives according to these principles.[199] 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 are thus wholly dependent on violent enforcement for their priority.

The reanalysis of the Realists' legal magic suggests that the ritual symbolic aspects of official adjudication may substitute for the lived

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[196] In another time of historic conflict between social beliefs and constitutional legal order, the legal historian Calvin Woodard was similarly led to ponder the social effects of what he called the "secularization"of law through our broad adoption of the Realists' critique more generally. Calvin Woodard, *The Limits of Legal Realism: An Historical Perspective*, 54 VA. L. REV. 689 (1968).

[197] KAPFERER, *supra* note , at 15.

[198] Cover, *Nomos & Narrative*, *supra* note ; Robert Cover, *Violence and the Word*, 95 YALE L. J.1601, 1628 (1986); Robert Cover, *The Bonds of Constitutional Interpretation: of the word, the deed and the role*, 20 GA. L. REV. 815 (1986).

[199] Cover, *Nomos & Narrative*, *supra* note , at 44-45.

commitment that animates other nonjudicial interpretations of legal norms. It may be that the ritual action through which official law develops brings those official legal interpretations to life in a way that imbues them with some of the affective and moral force generated by the kind of lived commitment Cover associated with religious and communal norms. I am struck, for instance, by the way the link between precedential language and physical action that I have discussed may impart to judges' words a ritual version of the lived commitment to law that Cover found among civil rights activists and communities of religious resisters.[200] The metaphorical connections that the Realists criticized as illusory and incoherent in legal doctrine 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.[201]

So "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."[202]

In Turner's theories, ritual symbolism serves to embody intangible and previously unknown qualities. Turner notes that the vernacular 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."[203] A symbol, he concludes, "is a blaze or a landmark, something that connects the unknown to the known."[204] 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 of the particular, personal real-world conflict at stake.

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[200] *Id.* At 26-40.
[201] BELL, RITUAL, *supra* note , at 41.
[202] *Id*.
[203] TURNER, FOREST OF SYMBOLS, *supra* note , at 48.
[204] *Id*.

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.[205] But rather than simply providing an outlet for personal disputes, adjudication may 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.[206]

Though we often think of lawsuits as primarily aimed at gaining control over individual conflict and imposing doctrinal order on the chaos of everyday life, the ritual-symbolic view of adjudication allows us to see 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, "ritual recognizes the potency of disorder."[207] Chaotic energy overcome is energy pressed into the service of the principles used for overcoming – but not without reshaping and reordering those principles to some extent. The process is one of constant exchange.

Adjudication could not continue to exist without disorder. In the liminal phase "betwixt and between"[208] the assertion of legal rights and duties at the beginning of the lawsuit and the legal structure affirmed at the end, the real life discord that generated the suit is enacted as a doctrinal argument that throws into conflict and question legal norms and principles that were previously understood to be settled. Lawyers depend on disorder for their livelihood, trafficking in everything that undermines social order and making institutions insecure through their search for an exception to the rules for their clients.

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[205] See, e.g., Laurence H. Tribe, *Trial by Mathematics*, 84 HARV. L. REV.1329, 1376 (1971).

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

[207] DOUGLAS, *supra* note , at 95.

[208] Turner used this phrase to describe the central, liminal part in the three-phase ritual structure theorized originally by Arnold Van Gennep. TURNER, FOREST OF SYMBOLS, *supra* note , at 93. This is the period in a transformational rite, prototypically rites of passage, during which the participants have left behind their previous social identities but not yet assumed their transformed roles. 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.

In fact, the formal categories of doctrinal thought are employed in the ritual of adjudication not only – perhaps not even primarily – to affirm existing legal structures but also to disrupt them. Jeremy Waldron points out that a litigator's arguments, make "institutions 'questionable, ambiguous and insecure' as they struggle to find an opportunity or an exception in the rules and the formalities for the ambitions or predicament of his client."[209] Opposing counsel manipulate doctrinal concepts to present conflicting and disparate views of the dispute at hand. 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 – in between the filing of the complaint and the court's decision – 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 other conflicts, past, present and future.

In the process of adjudication, then, real life danger and chaos are not so much rejected, as Frank complained, but reenacted symbolically and reorganized in ways that inform legal meanings. The energy to reanimate or to disintegrate familiar social values embodied in legal norms is borrowed from the social conflicts enacted in the ritual of adjudication. From a functionalist perspective, the "raw energies of conflict are domesticated into the service of social order."[210] Or, from a post-structuralist view, we could see adjudication's ritual mode as a "strategic practice[] for transgressing and reshuffling cultural categories in order to meet the need of real situations."[211] Both possibilities are there. The key point is that law's ritual-magic mode may be a resource for generating and enlivening legal meaning, through the ability of ritual to enact and channel conflict.

I want to emphasize that I am articulating here a role of legal conflict and its affective component that is different from the usual discussion of court process as a substitute for individual violence or an opportunity for a kind of cathartic release of built up social tensions. In my

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[209] Jeremy Waldron, *Dirty Little Secret*, 98 COLUM. L. REV. 510, 526 (1998) (reviewing ROBERTO MANGABEIRA UNGER, WHAT SHOULD LEGAL ANALYSIS BECOME? (1996)), quoting EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE 43 (L.G. Mitchell ed., Oxford Press 1993) (1790).

[210] TURNER, FOREST OF SYMBOLS, *supra* note , at 39.

[211] BELL, RITUAL, *supra* note , at 78, describing Pierre Bourdieu's practice theory.

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."[212] Likewise, Thurmond 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.[213]

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 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, 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 day. Instead those issues emerge only indirectly in ritual enactments that enactment will change the relationships, status, and lives of some of the participants and, in some cases, palpably change the surrounding world as well. Official legal norms aren't just discussed, narrated, or imposed through threat of force – they are also embodied in a ritual conflict that engages participants in an intense, committed, affective activity. Considered in this light, official interpretations of law begin to look more like the unoffficial 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."[214] The role of legal magic may be justified in a similar way. Unless there are ways to

[212] BELL, RITUAL, *supra* note , at 55.
[213] ARNOLD, SYMBOLS .
[214] Cover, *Violence and the Word*, at 1628.

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 moral and affective force of normative meanings that develop through lived experience.

2. The magic of impartiality

Legal magic may have effects on judges. Even if, as the Realists asserted, doctrines, precedents, and formalities do not cause judges' decisions, they may affect their decisionmaking processes. The Realists assumed without argument that any such effect would be detrimental. Here I will take a stab at a theory of how legal magic might contribute to judicial impartiality without substantively guiding legal outcomes.

Recent research attempting to quantify the effects of judges' personal political perspectives on their rulings has turned up some intriguing results. The studies confirm that among federal appellate judges, the party affiliation of the president who appointed a judge is a fairly strong predictive factor in 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. So, for instance, Sunstein et al. found that appellate panels composed of three Democratic appointees ruled in favor of sex discrimination plaintiffs 75% of the time.[215] In contrast, panels made up of all Republican appointees were far less sympathetic to plaintiffs in such cases, ruling for them only 31% of the time.[216] Similar trends were found for cases involving affirmative action, sexual harassment, disability, piercing the corporate veil,

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

[216] *Id.* *See also* 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 (1988). This study of the D.C. Circuit showed that panels of all democrat 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. *Id*. at 2172.

campaign finance, and environmental regulation.[217] In a few other politically controversial areas, however, no such partisan trends appeared. These included criminal appeals, takings and federalism cases.

Such studies confirm a political bias among appellate judges that seems hardly to need confirming. After all, every person has her own perspective on the world, shaped in part by politics, and 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 then is whether the practices of appellate judging in any way neutralize those biases.

The study by Sunstein et al. produced two findings that are suggestive of potential interest in this regard. 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 majority's political affiliation is significantly weakened.[218] In the sexual harassment cases, for instance, though three-Democrat panels ruled for plaintiffs 76% of the time, panels composed of two Democrats and one Republican ruled for plaintiffs in only 50% of cases. 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 in several areas generally considered politically controversial, where researchers expected to find similar partisan effects none were observed. Moreover, as the authors point out, the study shows that "even when party effects are significant, they are not overwhelmingly large."[219] Both Democratic and Republican appointees voted against stereotypic partisan interest in more than one third of the total cases studied.[220]

The authors suggest possible explanations for these results that reflect their own jurisprudential perspective, which might be characterized

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[217] Sunstein et al., *Ideological Voting*, *supra* note at 320-23.
[218] *Id*. at 315, 329.
[219] *Id.* at 336.
[220] *Id*.

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."[221] Assume that the existing precedent is "not entirely clear," they say, but that "fairly applied" it dictates one outcome. In such a situation, "fallible human beings might well be inclined to understand the law in a way that fits with their own predilections."[222] But, they hypothesize, a judge with a different ideological perspective can point out to the others how they are being swayed by ideology and thus free them to recognize that the existing legal precedents actually call for a different result. 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 caselaw.[223]

From the perspective of legal magic, however, we can imagine a third possible explanation that would be worth considering and inquiring into 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 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 caselaw, or high or low levels of procedural formality in a particular jurisdiction.[224] One could, for instance, look to procedural forms in different courts and different caselaw 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. Among federal courts, e.g., a few, like the Second Circuit, still provide for oral argument in every case, while others decide most of their cases on the papers. Does a court's use of this form of enactment heighten or dampen (or not affect) the partisan

[221] *Id.* at 344.

[222] *Id.*

[223] *Id.* at 334-35.

[224] A research project that would address some of these issues is currently in the design phase, overseen by Tom Tyler and Oscar Chase.

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 caselaw by reading the briefs and relevant decisions. Yet 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.'"[225] Thus oral argument may well have value as a symbolic "hearing" that contributes to people's satisfaction with judicial outcomes.[226] 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 here the magic-ritual effect being theorized here is nonsubstantive. In other words, it does not depend on the assumption of Sunstein et al. that the shift in legal outcomes for mixed panels reflects an objectively present substantive rule provided by the existing caselaw, that should determine, or at least steer, legal outcomes, once partisan bias is suppressed. Rather, an approach to legal magic informed by modern 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 ritual-magic mode of adjudication may facilitate judges' move *away from* their ordinary personal outlook without moving them *toward* any decisional outcome. Thus this approach theorizes the use of legal magic potentially to achieve substantive 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,

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[225] Gilbert S. Merritt, *The Decisionmaking Process in Federal Courts of Appeals*, 51 OHIO ST. L. J. 1385, 1387 (1990).

[226] Studies suggest that claimaints' 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).

> lame, imprisoned. Somebody has broken his bones, dried up his marrow, peeled off his skin. The favorite image is of something holding him, and it is tied or untied.
>
> – Marcel Mauss & H. Hubert[227]

> Where there is a right, there is also a legal remedy.
>
> *– Marbury v. Madison*[228]

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-technical sense. Indeed, what Mary Douglas observes of ritual in general is definitively true of the ritual of adjudication, that in it "what has passed is restated so that what ought to have been prevails over what was."[229]

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 hidden in a soft drink, there is no return to the world just before disaster struck. In an instant, reality is reoriented. Whatever damage done cannot be undone. Or can it? In life, not usually, but in ritual, certainly. And that includes the ritual mode of adjudication. In life, things break. While sometimes they can be repaired, 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. And a key task of formal ritual symbolism is to reinterpret physical finality in terms of potential social

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[227] MAUSS & HUBERT, *supra* note , at 61.
[228] 5 U.S. 137, 163 (1803).
[229] DOUGLAS, *supra* note , at 68.

transformation. Real-time events all have a social as well as a physical level. By substituting a symbolic-metaphoric world for the technical physical world, magic is able to reorder the disruptions of illness, accident, even death, reorder them, that is, in terms of their social meaning and effects.

Victor Turner theorized that the Ndembu Milk Tree at once stood for the theoretically timeless tribal social structure and that most deeply time- and body-bound affective relationship of an individual mother and her nursing infant.[230] 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 Ed.* 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."[231] 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."[232] 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."[233]

But the precedents that incorporate this extreme irreversibility are then 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

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[230] *Id*. at 56.

[231] Elizabeth Mertz, *Consensus and Dissent in U.S. Legal Opinions: Narrative Structure and Social Voices*, in DISORDERLY DISCOURSE, Briggs, C. (ed.) 150 (1996).

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

[233] *Id*.

well."[234] 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 a sense of 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.[235] 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's *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 in through the doctrine of precedent. Judges absorb some of this physical irrevocability into their words. These may be subsequently modified. Indeed, in a common law system, every subsequent use of a precedent affects it, just as our bodies are affected by every daily act. Every subsequent case must take account somehow of the judges' previous decisions, just as in life each of our acts tomorrow are in part determined by what we do today.

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[234] EWICK & SILBEY, COMMON PLACE OF LAW, *supra* note , at 95.

[235] 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. TAMBIAH, MAGIC, SCIENCE, RELIGION, *supra* note , at 81-83.

So, 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 actionlike 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 naive or fraudulent attempts to automatically reverse irreversible physical processes and deny reality. But subsequent observers of magic recognized that "instrumental efficiency is not the only kind of efficacy to be derived from symbolic action."[236] As Evans-Pritchard reminds us, "even death is not only a natural fact but also a social fact."[237] 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."[238] 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 and processes are themselves disordered, at least temporarily, and sometimes reordered. In any case the structures of law are energized and strengthened in their original or new configuration by the power of the real life destruction and damage they are called upon to realign, and paradoxically by being broken themselves. Generally speaking, in the physical world when things get broken they become less themselves, at least temporarily, sometimes losing their identify altogether. With laws it is just the reverse. A law that is never broken ceases to exist.[239]

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

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[236] DOUGLAS, *supra* note , at 69.

[237] EVANS-PRITCHARD, WITCHCRAFT, ORACLES & MAGIC, *supra* note , at 25.

[238] DOUGLAS, *supra* note , at 69.

[239] This is most obvious with common law, where no written statutes exist in books ahead of time to draw a line between legal and illegal, 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, though, lose authority when no one breaks them. For laws that go unbroken go unenforced and unnoticed and eventually fall into obsolescence. At the very least they will only be revived as significant in anyone's mind at the point that someone breaks one.

embody a childish mistaken view about the nature of the physical universe.[240] In life, when things break it is often unexpected and generally problematic. Then they either stay broken or they are repaired in a way that does not restore them to their former unbroken condition. But laws, like 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 stuff made for babies and young toddlers the hallmark of which is its capacity for being taken apart and put back together again. My personal favorite was a set of "slicing vegetables," tomatoes, eggplants, peppers – each cunningly molded into two pieces held together with velcro into a single vegetable shape. So 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 put back together, but largely defined by that capacity. Like the velcroed 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.[241]

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 lack a concept of the difference between the sorts of damage that is fixable and the sort that is not. As a toddler my daughter did not understand her powers of repair to be limited to toy plastic vegetables. She would gleefully rip flowers out of the ground, tear off their petals and then try to stick them back together and replant them. In contrast, lawyers (and according to field anthropologists,

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[240] Small children in general are fascinated with the damage they can cause. Developmentally, our first sense of our own ability to affect the world comes through the capacity to break stuff. Long before children can make much of a mark creatively, they are capable of spectacular destruction. But 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).

[241] In fact, I think law might be the premiere example of a general category of things that can be broken and thoroughly restored. Or maybe I should say law appears to self-consciously aim at the symbolic effect of all such objects: affirming our power to consciously intervene in and reshape the effects of our actions. Jerome Frank would no doubt say they are a wish fulfillment. And in some undeniable sense these objects do fulfill the magical wish to be able to go back and undo something you've just done, to perfectly reverse an action, so that no one could ever tell 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.

practitioners of ritual magic) distinguish between categories of social and physical facts and causes, and, thus, between injuries that are amenable to legal restoration and injuries that are not. I am suggesting that 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 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 first transforms the injuries and violation of, say, a car wreck, into a doctrinal conflict about proximate cause, which, when resolved, 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 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 misfortunes is reversed to confer unusual healing power on the formerly afflicted individual and reconfirms the traditional social structure by demonstrating its power to overcome and transform misfortune.[242] Likewise adjudication first transforms individual conflict, pain and violence into lawbreaking – a kind of damage that is by definition reversible, and then by remedying it legally, reaffirms our society's ability to overcome social chaos, to reverse time and reorder social reality.

CONCLUSION

As provocative as it may sound, law as magic is no farther out than, say, law as nothing but the prediction of what judges and other government officials will do, or law as literature. H.L.A. Hart calls these kinds of jurisprudential redefinitions "great exaggerations" that are at once "illuminating and puzzling."[243] Like these other theories, my analysis of adjudication as ritual magic is meant to highlight neglected truths about our legal system, and in the process I ignore or downplay other better recognized features. The aim is to bring to light a dimension of law that is

[242] TURNER, FOREST OF SYMBOLS, *supra* note , at 9-15. As one of Turner's Ndembu collaborators expressed it, "What hurts you, when discovered and propitiated, helps you." *Id.* at 133.

[243] THE CONCEPT OF LAW 2 (1961).

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 but more recently interpreted as reasonably effective in their own social contexts.

In the spirit of Realism, I think it is worth reanalyzing the magical aspects of adjudication the Realists observed in light of anthropological insights that redefine magic. From this perspective, we may glimpse ways in which the magical techniques of adjudication can coexist with rational decisionmaking, without resorting to the claim that such techniques substantively determine legal decisions. We might even discover that legal magic can sometimes work with rational decisionmaking to make judicial results both more impartial and more socially effective.