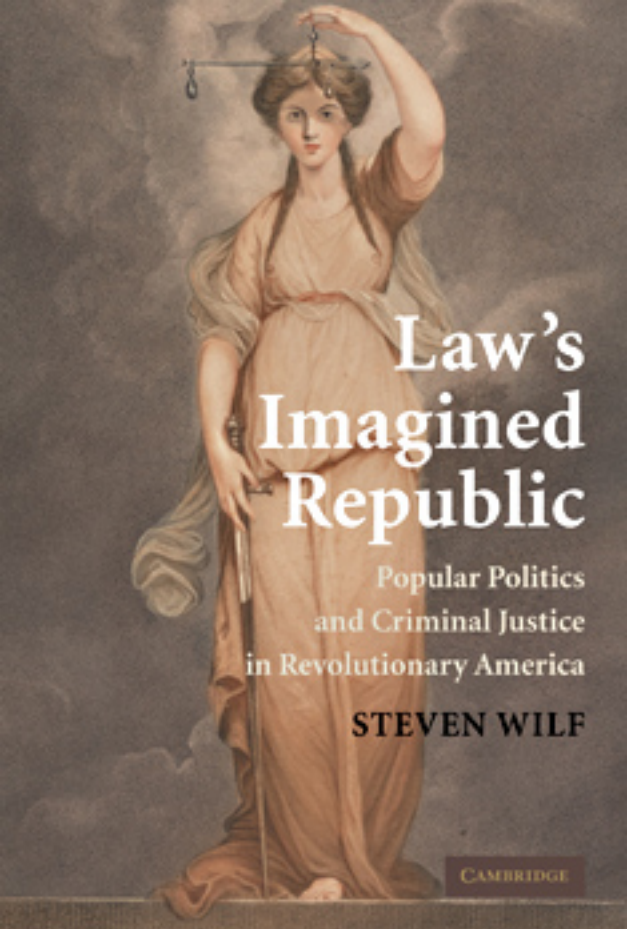

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Law's Imagined Republic

Law's Imagined Republic shows how the American Revolution was marked by the rapid proliferation of law talk across the colonies. This legal language was both elite and popular, spanned different forms of expression from words to rituals, and included simultaneously real and imagined law. Because it was employed to mobilize resistance against England, the proliferation of revolutionary legal language became intimately intertwined with politics. Drawing on a wealth of material from criminal cases, Steven Wilf reconstructs the intertextual ways Americans from the 1760s through the 1790s read law: reading one case against another and often self-consciously comparing transatlantic legal systems as they thought about how they might construct their own legal system in a new republic. What transformed extraordinary tales of crime into a political forum? How did different ways of reading or speaking about law shape our legal origins? And, ultimately, how might excavating innovative approaches to law in this formative period, which were forged in the street as well as in the courtroom, alter our usual understanding of contemporary American legal institutions? *Law's Imagined Republic* tells the story of the untidy beginnings of American law.

Steven Wilf is Joel Barlow Professor of Law at the University of Connecticut. He is the author of *The Law Before the Law* (2008), which examines how legal systems address the problem of existing law prior to a law-giving moment, and numerous articles in law and history. Professor Wilf's research focuses on intellectual property law, historical jurisprudence, and legal history.

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Law's Imagined Republic

Popular Politics and Criminal Justice in Revolutionary America

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For Guita

After the leaves have fallen, we return
To a plain sense of things.
It is as if
We had come to an end of imagination,
Inanimate in an inert savoir.

Wallace Stevens
"The Plain Sense of Things"

Contents

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Law's Imagined Republic

Introduction

How did Americans imagine law as they sought to establish their own independent sovereignty? This book is about the forging of new conceptions of legalism between the beginning of the Seven Years' War in 1756 and the period of the French Revolution in the 1790s. To tell this story properly means focusing on the intersection of criminal law, politics, and language. Criminal law – not the abstraction of constitutional principles – was often the locus of debates about justice. Its captivating tales from the underworld, its setting into stark relief fundamental issues of proper conduct, and its reliance upon the violence of punishment made it the most talked-about legalism in late-eighteenth-century America's coffee houses and cobblestone streets. Politics was intertwined with law in Revolutionary America. Legal arguments and narratives provided a cultural network for galvanizing a population stretched out along the Atlantic seaboard and westward. The rituals of punishment, such as hanging in effigy, became the rituals of rebellion.

Popular law talk was at the heart of revolutionary law-making and at the heart of the American Revolution itself. It assumed many guises and served many purposes, including the legitimation of resistance against the British, establishing a link between street ritual and print culture, acting as an instrument of political mobilization, and mere entertainment. Historians have uncovered a burgeoning public sphere for political discourse in the end of the eighteenth century across the Atlantic world. This arena is often associated with meeting places such as taverns or new forms of conviviality. But law – an abstraction made tangible through mock executions or contestation over actual cases – was itself a public sphere.

Although the explosion of law talk in Revolutionary America had its origins in the folk rituals of rough justice from early modern England, the particular circumstances of its spread were grounded in the social milieu of a politicized America searching for a common language that would bridge differences in social status and geography. As we shall see, the centrality of legalism in American culture did not begin with the settled jurisprudence of courts. Ironically, however, law's prominent cultural role led to the common designation by the early nineteenth century of America as a country dedicated to the rule of law – what John Adams famously called "a government of laws, not of men." This predisposition is even more surprising when one remembers that this was a people located at the edge of an empire, facing a frontier filled with new immigrants raised in disparate traditions, and that just emerged from a revolution against lawful authority. In every sense of the word, the United States in the end of the eighteenth century was a new democracy. Nevertheless, Revolutionary America had chosen to replace the personal governance of monarchy with an ordered republic of legal norms. Tom Paine summed up this change with a pithy phrase: "In America the law is king."[1]

Most stories of how America became subject to the rule of law focus on framers and justices, on the serious-minded founders of a new nation. The received traditional narrative is quite straightforward. America's Revolution, we have been told, distinguished itself from other political upheavals by elevating law to a dominant position. Rule of law ensures equal protection under a rational legal regime. Through Constitutional decision-making, moreover, it commands obedience to legal doctrine as a central means for resolving societal disputes. There are many different versions of the rule-of-law tradition. But the essential narrative remains much the same. After the American Revolution, popular sovereignty became inscribed in a written form of fundamental law, the Federal Constitution. Its enduring authority has often assured recourse to legal norms rather than factitious politics. In a famous passage, Tocqueville describes how legal language originates with judges and judicial proceedings, extends to lawyers who bring it to bear on public life, and descends to the common people so that "it so to speak infiltrates all society, it

[1] Thomas Paine, "Common Sense," in *The Complete Works of Thomas Paine*, ed. Philip S. Foner (New York: Citadel Press, 1945), p. 29; John Adams, "Novangelus" in *Works of John Adams*, ed. Charles Francis Adams, 10 vols. (Boston: Charles C. Little and James Brown, 1851), 4:106.

descends into the lowest ranks, and the people as a whole in the end contract a part of the habits and tastes of the magistrate."[2]

This book suggests a different sort of founding. The subject of this book is the outpouring of law talk in America between the conclusion of the Seven Years' War in 1763 and the end of the eighteenth century. Criminal trials, as in our own time, best captured the public imagination, and many of these were the subject of discussion in taverns and coffee houses – which might span the gamut from raucous gossip to serious legal analysis. This expressive legalism was readily communicated across different levels of society and across different geographic regions. Its symbolic idiom ranged from imagined punishments as a form of political protest to hanging ballads to serious proposals for criminal law reform. During the Revolutionary period, Americans did not simply draw upon law as a language of politics and social criticism, but also learned to read law differently. While certainly they employed a panoply of techniques for interpreting legal expression during this period, one stands out – intertextuality. Cases were read against other criminal law cases, text was read against the narrative of its political context, and the American legal doctrine was read comparatively against its English counterpart.

In a certain way, then, it is possible to speak of the criminals at the core of such stories as founders. These founders – who would have been surprised to be granted such a title – included petty thieves, over-the-hill housebreakers, and a motley array of blackguards. In their own, self-interested ways, late-eighteenth-century criminals were subversive. Nevertheless, they were reluctant founders of sorts because their stories, often artful-dodger sort of tales – and the debates about justice, public legal interpretation, and the role of English legal authority that constitute the connective tissue of American legal debates – depended upon their punishment. Such stories did not borrow from the "habits and tastes of the magistrate." Often vulgar, they might be described as the late-eighteenth-century version of kitsch legalism.

Quite recently, the problem of law's relationship to revolutionary upheaval has animated a way of thinking about contemporary law, "popular constitutionalism." As identified by Gary D. Rowe and Larry Kramer, and presaged by an extensive examination of customary law by John Reid, this discussion has focused upon the constitutional authority

[2] Alexis de Tocqueville, "On What Tempers the Tyranny of the Majority in the United States," in *Democracy in America*, eds. Harvey C. Mansfield and Delba Winthrop (Chicago: University of Chicago Press, 2000), pp. 257–258.

of late-eighteenth-century Americans.[3] Kramer argues that ultimate constitutional authority was once vested in the people, though it increasingly became the purview of Federalist-controlled courts by the early nineteenth century. Seeing constitutional authority as belonging to the people themselves, of course, has important consequences for how we view the current power of the United States Supreme Court, especially judicial review.

Nonetheless, too much of popular constitutionalism has been concerned with the issue of who holds the reins of legal power – the courts or the people. By investing the "people themselves" with the role of judicial review, popular constitutionalism envisions a late-eighteenth-century constitution remarkably like our own, but with the power of courts and people differently calibrated. The very notion of an earlier, unformed common-law constitution would have been familiar to eighteenth-century Anglo-Americans. Imposing the legal category of constitutionalism as seen today, however, is an anachronistic enterprise, which is not terribly helpful for understanding this formative period. It presumes that settled constitutional principles were embodied at the popular level while providing less attention to the diffuse, contradictory, and often maddeningly imprecise ways that law was expressed in a period brimming over with all sorts of law talk.

In contrast, I have focused upon criminal law as language, not upon eighteenth-century debates about governance, because it was this form of law with all its high drama, sometimes vulgar and sometimes elevated, where so much of the creative legalism of the period resides. Occasionally, law at the popular level was articulated in constitutional terms. It was more often simply an intoxicating mix of gossip, politics, sensationalism, tales of murder, and astute attention to the procedural norms that make law matter. As contemporary lawyers periodically rediscover, law is ultimately about stories and language as much as it is about straightforward rules. My hope is that by returning to the well-spring of law talk – recovering how late-eighteenth-century Americans mixed criminal law and politics and used this intoxicating combination as a means to mobilize citizens, both elites and common people, within a revolutionary context – we can elucidate how Americans ultimately transformed the rule of law into a dominant cultural feature of the Early Republic.

[3] Gary D. Rowe, Constitutionalism in the Streets, *Southern California Law Review* 78 (2005): 40; Larry Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* (Oxford: Oxford University Press, 2005). Even Christian G. Fritz's path-breaking study of the importance of notions of the people's collective role in legal decision-making focuses on its particular role in framing revolutionary constitutions rather than on popular

The social history of crime and punishment is also closely related to the themes in this book. Nearly a quarter of a century of historical investigation has uncovered much about the habits of ordinary criminals, the workings of courts, and the patterns of punishment in late-eighteenth-century America and England. Three excellent works on the subject by Daniel Cohen, Louis Masur, and Michael Meranze, for example, reflect the turn toward cultural history. Cohen describes the shifting of execution narratives from Puritan moralism to a genre of popular entertainment. Masur underscores the importance of hidden punishment for an increasingly refined American public culture. Meranze interrogates the ambivalence of liberal reformers to corporeal punishment even as they rely upon a broad array of disciplinary practices.[4] All three books, with their different approaches to the role of literary genre, private and public spheres, and disciplining of the body, seek to chart the broad social transformation from colonial America through the early nineteenth century.

My subject, however, is not the sociological, but the legal. I am interested less in felons and more in law itself – as it is conceived, expressed, and interpreted through different forms of reading. Literary scholars have long drawn the connection between the fictive voice in early modern criminal narratives and the rise of the modern novel.[5] However, hitherto the importance of criminal legal narrative for creating new forms of American law has been ignored. Law, I would contend, is as much about storytelling as it is about constitutionalism, statutes, and sociohistorical understandings of compliance with legal norms.

thinking about law. Christian G. Fritz, *American Sovereigns: The people and America's Constitutional Tradition Before the Civil War* (Cambridge: Cambridge University Press, 2008), pp. 11–46.

[4] Daniel A. Cohen, *Pillars of Salt, Monuments of Grace: New England Crime Literature and the Origins of American Popular Culture 1674–1860* (Oxford: Oxford University Press, 1993); Louis P. Masur, *Rites of Execution: Capital Punishment and the Transformation of American Culture 1776–1865* (Oxford: Oxford University Press, 1989); Michael Meranze, *Laboratories of Virtue: Punishment, Revolution and Authority in Philadelphia 1760–1835* (Chapel Hill: University of North Carolina Press, 1996).

[5] Lincoln B. Faller, *Turn'd to Account: The Forms and Functions of Criminal Biography in Late Seventeenth and Early Eighteenth Century England* (Cambridge: Cambridge University Press, 1987); John Richetti, *Popular Fiction Before Richardson: Narrative Patterns 1700–1739* (Oxford: Oxford University Press, 1992); J. Paul Hunter, *Before Novels: The Cultural Contexts of Eighteenth-Century English Fiction* (New York: W. W. Norton, 1990); Lennard J. Davis, "Wicked Actions and Feigned Words: Criminals, Criminality, and the Early English Novel," *Yale French Studies* 59: 106 (1980); Lennard J. Davis, *Factual Fictions: The Origins of the English Novel* (New York: Columbia University Press, 1983); Frances Ferguson, "Rape and the Rise of the Novel," *Representations* 20 (1987): 88–112; Gladfelder, *Criminality and the Narrative in Eighteenth Century England* (Baltimore: The Johns Hopkins University Press, 2001).

WHY CRIMINAL LAW?

When New York's Assembly in 1773 sought to stem a recent rise in counterfeiting, it envisioned an unusual statute. New paper money would be engraved with forms that would be hard to imitate. Creating something of a triptych representing the execution of counterfeiters, the proposed currency shamelessly borrowed scaffold imagery: an eye in a cloud, an execution cart and coffin, three felons on a gallows, a weeping father and mother with several small children, and a burning pit with human figures being forced into it by fiends. A caption would read "Let the name of a money maker rot." In Connecticut, a half-dozen years and a revolution later, a proposed 1779 bill suggested tattooing the figure of the gallows on the forehead of criminals guilty of robbery, burglary, and maiming. The gallows mark would be indelible.[6]

It is remarkable to think of everyday monetary transactions in New York being paid for with bills depicting the execution of counterfeiters or convicted Connecticut felons walking about with tattooed scaffolds on their foreheads like so many marks of Cain. Neither law was actually instituted. But these were serious proposals that reflected the abundance of execution iconography across the late-eighteenth-century cultural landscape. From the hanging of effigies to execution narratives and ballads hawked on street corners to the spectacle at the scaffold itself, early Americans encountered the predominant symbol of the criminal law: capital punishment.

Most legal actions involved the collection of debt; most criminal prosecutions were for misdemeanors. Nevertheless, popular legal imagination grasped at the symbolism of capital punishment. The nearly three decades from the close of the Seven Years' War in 1763 through the mid-1790s emerged as the high-water mark in Anglo-American scaffold imagery. Why did Americans in the Revolutionary period repeatedly draw upon executions as a political idiom? It might be simple to dismiss this use as simply a matter of convenience. Sanctions, after all, neatly express a rage to punish. But mock executions remain only one small example of the proliferation of criminal legal language and images, debates, and controversies during the last quarter of the eighteenth century. What do these

[6] "An Act to Remedy the Evil this Colony is Exposed to from the Great Quantities of Counterfeit Money Introduced to It" (1773) in the *Journal of the Votes and Proceedings of the General Assembly of the Colony of New-York 1766–76* (Albany: J. Buel, 1820), pp. 50–51; "Bill for Adding to Punishment of Atrocious Crimes the Puncturing of Forehead with Design of Gallows" (1779), Connecticut Archives, First Series, 6/100 (Hartford).

representations tell us about how the common people thought about law during this critical period when foundational legal norms were framed? And how did the complex, tangled relationship between punishment and politics change from the 1760s to the 1790s?

To answer these questions requires a different approach. Legal historians tend to confine their work to studies of codes, judicial decision-making, and, perhaps, the mutual influence of law and society. But I became intrigued by what stood outside of official legal boundaries: imaginary punishments, mock executions, stillborn reform proposals, fabular criminal narratives, and the ways that both sophisticated critics and the common people envisioned criminal law. Such a path departs from the traditional conception of law as a hegemonic power of the state. I instead would like to suggest that law as envisioned, formulated, and represented as a cultural artifact by a wide range of historical actors, including the common people, enables its later reinscription in official statutes and institutions.

Take, for example, the 1765 mock execution of a Massachusetts Stamp distributor. After hanging the effigy on the gallows, other punishments were conjured up as well: never-ending incarceration in prison or the invention of a Sisyphean cell where the prisoner has to constantly pump out water or drown. What is striking here is that these species of punishment, confinement and labor, would become the touchstones of legal reform two decades later. This particular fragment, then, hints at what I am trying to suggest. Law is imagined before it is enacted.[7]

Imagining law is the subject of this book. By imagination, I mean something less passive than simply *mentalité*, inherited beliefs, or participation in legal culture. But it is also less ordered than ideology. What

[7] My concern here with the imaginative in law is informed by the new historicism in literary criticism. See, for example, such works as Stephen Greenblatt, *Marvelous Possessions: The Wonder of the New World* (Chicago: University of Chicago Press, 1991) and, especially, John Bender, *Imagining the Penitentiary: Fiction and the Architecture of Mind in Eighteenth-Century England* (Chicago: University of Chicago Press, 1987). Steven Wilf, "Imagining Justice: Aesthetics and Public Executions in Late Eighteenth-Century England," *Yale Journal of Law & the Humanities* 5 (1993): 51–78; Peter Fitzpatrick, *The Mythology of Modern Law* (London: Routledge, 1992), pp. 146–211; and, of course, Robert Cover in a number of essays provide excellent discussions of the role of imagination in crafting broader narratives of law. Robert Cover, *Narrative, Violence, and the Law: The Essays of Robert Cover*, eds. Martha Minow, Michael Ryan, and Austin Sarat (Ann Arbor: University of Michigan Press, 1992). I address the methodological approach to the legal imagination in Steven Wilf, *The Law Before the Law* (Rowman & Littlefield, 2008), pp. 11–14.

I discuss here is largely a nonprofessional discourse taking place in the public sphere as opposed to the bounded sphere of courts and codes. This definition is purposefully broad. It includes using punishment as a symbolic language in the context of politics out-of-doors, legal storytelling, transforming trials into political contests, mythopoetic renderings of the origins of legal systems, and – if that were not capacious enough – any imaginative political readings of law or cases where legal norms are seen as representing something more than simply a means of restraining criminality.

Three more points should be made at the outset about legal imagination. First, imagination, is generative. Not only does legal imagining create novel interpretations of doctrine, but it also enlarges the domain where one imaginative notion might elicit another. For this reason, I discuss at length the formation of a public sphere for talking about law as well as the ideas within that sphere. Imagining law, secondly, is syncretic. New interpretations often emerge through appropriating bits and pieces of official rules. The result may be considered simultaneously *of* official law and – since extraofficial historical actors lack the status to establish governing rules – *beyond* or transcending official law. I have tried to avoid overdrawn distinctions between high and low legal cultures. Thirdly, it is important to emphasize the political significance of legal imagination. By its very definition, legal imagination challenges state and professional monopolies over law. In certain historical moments where political authority is contested, such as Revolutionary America, interpreting doctrine, judging cases and controversies, and inflicting punishment must be seen as a radical assertion of sovereign powers.

Stephen Greenblatt makes a distinction between the imagination at play, as mere entertainment, and the imagination at work.[8] The legal imagination described here worked very hard. It did more than simply invent fanciful tales about notorious felons or permit a voyeuristic gazing at fictive or actual executions. In this vein, literary critics see criminal narratives as precursors of the novel. Reading these as legal texts rather than as literary genre, however, uncovers aspirational visions of the law. During the second half of the eighteenth century, I will suggest, questions about legal possibilities became commonplace: What is the purpose of punishment? Who controls the right to judge? And might it be possible to create a legal order founded upon a less harsh regimen of sanctions?

[8] Greenblatt, *Marvelous Possessions*, p. 23.

But this was also an imagination at work because it needed to explain a great deal. A new understanding of criminal law emerged around the time of the American Revolution. Criminal justice was seen as a mirror that reflected truths about the surrounding political and social structure. Accustomed to Oliver Wendell Holmes's metaphor of law as mirror, we have forgotten how this might be a truly radical notion. It assigns a significant explanatory burden for a legal system. No longer were the outward guises of criminal law – penal codes, criminal procedure, modes of punishment, and the like – simply instruments for identifying and sanctioning offenders, they were also transformed into representational objects that inscribe and reinscribe a deeper political meaning about themselves.

REVOLUTION AND INTERTEXTUAL READINGS OF LAW

Revolutionary America was a seedtime for imagining the criminal law. This is not an accident. Revolutions are political moments when both critical and inventive faculties are unleashed. Part of the book's purpose is to recapture the excitement of imagining criminal law in a revolutionary period. Americans during this period drew upon a familiar repertoire of punishment symbolism rooted in early modern English popular culture – such as rough justice and the hanging of effigies – in order to create a new legal culture. But there was also a heightened focus on intertextual readings. Intertextuality, a term coined by Julia Kristeva, identifies every text as "the absorption and transformation of another text."[9] For legal texts, this can occur in all sorts of ways: the borrowing or transformation of a prior text such as a statute; court cases can be read with deep referencing of each other; law can be read against politics; or texts can be subject to parody.

At a certain level, moreover, there was a macrointertextual reading of American law against the legal forms of other regimes. The chronological parameters of the book reflect the importance of such comparative interpretive practices. Two sharply defined watersheds in transatlantic political history form its rough boundaries, the American and French Revolutions. It begins in 1763, a year before the Stamp Act Crisis with mounting tension between England and its North American colonies. In the midst of their protest, Americans drew upon the repertoire of legal language as political agitation began to couple criminal justice with

[9] Julia Kristeva, *Semiotike* (Paris: Seuil, 1969), p. 146.

popular politics. It concludes at the end of the 1790s when the French Revolutionary regime sentenced to death Louis XVI. Between these two great political upheavals lies the apotheosis of America's making criminal law the lingua franca of popular politics.

Most important, this discourse about law took place outside the boundaries of formal legal structures. It was open to people at all levels of society. Legal language was made simpler and more accessible. Such broad-based discussions reflected the rise of popular politics in the 1760s. Seeking to mobilize the population, American radicals widened the public debate over legal issues and used what might be called vernacular legal culture, such as criminal narratives and mock executions, to garner support. Americans rallied behind a new idea of criminal law with legal transparency and participation of the common people at its core.

During the 1780s Americans launched a full-scale attack on English criminal justice. They chose to critique English law at its most vulnerable point: the capital-laden statutes of the criminal code. Rejection of English law was part of a discourse of legitimization and delegitimization that surrounded the American Revolution. English publicists, as David Brion Davis has shown, dismissed American claims for liberty as coming from slave holders. Americans, in turn, sought to delegitimize England by representing it as a country with Tyburn as its iconographic centerpiece. According to this argument, England's reliance upon capital punishment suggests a social order badly in need of a repressive apparatus. Mid-century colonials praised English due process in contrast to minimal French protections. But now Americans compared England's legal system unfavorably with an idealized version of their own.

The 1780s was a period of legal myth-making. Americans reinvented their own legal past by claiming that England imposed its harsh legal regime upon the colonies against their will. Capital punishment took on remarkably powerful tropes of brutality and repression. Imagining the meaning of punishment, Americans, not surprisingly, turned to recasting their actual criminal codes. Statutes mandated prison sentences, which both replaced sanguinary punishment and curbed judicial discretionary use of pardons. Penal reform created an outward representation of the new republic, playing much the same role as health care or literacy programs for twentieth-century revolutions. The political authority of the nascent republic turned in part upon its remaking of criminal law.

But this emphasis upon a nonsanguinary system of punishment reflects only one facet of revolutionary legal discourse. In fact imagining justice was Janus-faced. On one side, it critiqued the violence implicit