



Legally Speaking

CONTEMPORARY
AMERICAN
CULTURE AND
THE LAW

Helle
Porsdam

Speaking

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American Culture
and the Law

Helle Porsdam

UNIVERSITY OF MASSACHUSETTS PRESS Amherst

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Printed in the United States of America
LC 98-54186
ISBN 1-55849-207-0 (cloth); 208-9 (pbk.)
Designed by Milenda Nan Ok Lee
Set in Adobe Garamond
Printed and Bound by BookCrafters, Inc.

Library of Congress Cataloging-in-Publication Data

Porsdam, Helle, 1956–

Legally speaking : contemporary American culture and the law / Helle Porsdam.
p. cm.

Includes bibliographical references and index.

ISBN 1-55849-207-0 (cloth : alk. paper). — ISBN 1-55849-208-9 (pbk. : alk. paper)

1. Law—United States. 2. Culture and law. I. Title.

KF385.P645 1999

349.73—dc21

98-54186
CIP

British Library Cataloguing in Publication data are available

This book is published with the support and cooperation of the University of
Massachusetts Boston.

For my parents, Inge and Kjeld Porsdam

Acknowledgments

I have incurred numerous debts in the course of researching and writing this book. First and foremost, I wish to thank Lewis Sargentich and Alan Trachtenberg. The initial support and continuing encouragement offered by these two mentors, colleagues, and friends meant everything to me—it is not too much to say that without their help I would not have been able to publish this book. Leo Marx deserves thanks too for believing in the book from the very beginning. Venturing as I was into unknown territory, it was invaluable for me to be told that I was on the right track. Thanks also to Jane Marx for taking good care of me and my family during our 1992–93 stay in Boston.

Several Danish and American colleagues read parts of the book and provided me with much-needed advice and information along the way. I wish to thank Marcus Bruce, Dale Carter, David Cowart, Isi Foighel, Mark Gibney, Clara Juncker, Martha Minow, David Nye, Carl Pedersen, Thomas Pettitt, Joel Pfister, Jan Gretlund, Lars Ole Sauerberg, Claus Schatz-Jakobsen, Nils Arne Sørensen, Christen Kold Thomsen, Jens Vedsted-Hansen, and Robert Wells.

Portions of chapters 2, 4, 6, and 9 were previously published in my articles: “In the Age of Lawspeak: Tom Wolfe’s *The Bonfire of the Vanities* and American Litigiousness” (*Journal of American Studies* 25.1 [1991]: 39–57); “Law as Soap Opera and Game Show—The Case of *The People’s*

Court” (*Journal of Popular Culture* 28.1 [Summer 1994]: 1–15); “‘Embedding Rights Within Relationships’—Gender, Law, and Sara Paretsky” (*American Studies* 39.2 [Fall 1998]); and “Doing What Comes Naturally?—Fish, Posner, and the Law and Literature Enterprise” (*American Quarterly* 44.3 [Sept. 1992]: 494–505). I want to thank the editors of these journals for their help.

Last but not least I wish to use this opportunity to express my thanks to my parents, Inge and Kjeld Porsdam, and to the two men in my life, Matthias Mann and Sebastian Porsdam Mann. It was their love and support that gave me the emotional energy to keep going.

Preface

As a graduate student and teaching assistant in the American studies department at Yale University in the mid-eighties, I used to wonder why so many of the bright young undergraduates in my sections wanted to go to law school after they finished their bachelor's degrees. When I asked them what motivated their interest in pursuing a career in the law, only a few would answer that it had to do with the lucrative salaries and prestige attached to practicing law. For most, the choice of law had something to do either with a wish "to do good" in some general, nonspecified way, or with a wish to defer till some later date any crucial decisions about the future. To these latter, earning a law degree seemed a wise move to make for a young aspiring person in that, rather than predestine you for one particular kind of career, such a degree could get you started on any number of different career paths. With a law degree, there was no telling where you would end up. By going to law school, these students, most of whom were history, English, American studies, or political science majors, told me they would in fact get an extra three years' worth of liberal arts education. This was news to me. None of my friends back home in Denmark who had studied law had ever described their area of study as anything close to general *Bildung*. On the contrary, they considered the law a very specialized, even narrow field of inquiry. If, as a Danish student, you did not exactly know what to do with yourself, you would tend to gravitate

in the direction of, say, history, Danish, or political science—certainly *not* in the direction of law.

Here, then, was an interesting cultural difference between Denmark and the United States. The law, as a field of study, a career choice, and a general area of interest, clearly meant something different to Americans than to Danes. The main difference, it became clear to me as I started paying more attention to the ways and workings of American law, lay in people's expectations from the law and lawyers. Whereas in my home country the law is viewed solely as a technical means to achieving a certain end, for Americans the law, in addition to performing such a technical function, also carries a very important symbolic meaning. Unlike Danes, Americans are persuaded that the law, beyond protecting their rights and preserving their liberty, will provide them with truth and meaning—Justice of a higher kind. When a couple of years ago I showed an excerpt from the television show *The People's Court* to my father, a Danish jurist who has been educated in the legal positivist tradition of Danish legal scholar Alf Ross, his reaction was one of stunned silence. Judge Wapner's demeanor and rhetoric reminded him, he then said, more of a priest delivering a sermon to his congregation than a judge handing down a decision. To this day, he also cannot quite believe that what he saw before and during the television show were actually commercials by lawyers and law firms!

It is the role law plays in the formation of American myths and ideologies that is so puzzling to foreigners. American law and American courts have always performed what Kenneth L. Karst calls "a dual constitutional role: not just delimiting the boundaries of individual autonomy and governmental power, but maintaining the institutional base for our nationhood."¹ Much has been thought and written about the law as an instrument of power. From an American studies perspective, however, the role of law in maintaining the American nation and identity is of paramount interest and deserves more careful attention than it has hitherto received.

It is my hope that this book may serve to emphasize the importance of the law to the study of American culture and society. While writing the book, I was struck by the fact that the majority of the people whose work I had been reading and was now quoting were legal scholars. And

1. Kenneth L. Karst, *Belonging to America: Equal Citizenship and the Constitution* (New Haven: Yale University Press, 1989), 215.

when, several years ago, I spent a year as a liberal arts fellow at the Harvard Law School, I was surprised at the number of courses taught that focused on the role of law in the formation of American identity and might just as well have been offered in an American studies department. What has only recently begun to register with us in the humanities, it would thus seem, the legal community has been aware of for quite a while: in the discussion of what it means to be an American, the law necessarily forms an important component.

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Introduction

Law figures prominently in American culture and society. The current favorite pastime of “lawyer-bashing” testifies to the ambivalence most Americans feel toward lawyers, but when things come to a head it is to jurists, rather than to politicians or even members of the clergy, that Americans turn in their search for answers. All the most important political, social, and cultural discussions are carried out in a legalistic vernacular, aptly termed *rights talk* by Mark Tushnet and Mary Ann Glendon.¹ Regarded by many as the only remaining carrier of the few moral understandings that are still widely shared by an increasingly diverse citizenry, the law has become “the terrain on which Americans are struggling to define what kind of people they are, and what kind of society they wish to bring into being.”² What in other countries may be seen as merely legal or political-legal expressions and analyses in the United States become the articulation of the ideas and aspirations that define the national identity. Indeed, Sanford Levinson

1. Mary Ann Glendon, *Rights Talk: The Impoverishment of Political Discourse* (New York: Free Press, 1991). Mark Tushnet, “An Essay on Rights,” *Texas Law Review* 62.8 (May 1984).

2. Glendon, *Rights Talk*, 3. See also David Ray Papke, “Law in American Culture: An Overview,” *Journal of American Culture* 15.1 (1992): 3: “As Americans find and construct meaning in their culture, they are more likely than others to use law, legal premises and legal images to guide them.”

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has suggested, the United States forms a “faith community,” the central sacred text of which is the Constitution. In America, rather than being a *consequence* of national history, constitutional history has *shaped* that history. To be an American means to be a member of the “covenanting community” of the Constitution.³

With the Constitution serving as the “constituent agent” of American identity and the central feature of American “civil religion,”⁴ it is no wonder that the law has come to make itself felt at virtually every level of American society. “In a nation lacking either an established order or an established church to produce the social cement of legitimate authority, from the beginning Americans turned the rule of law into a ‘civil religion’,” as Morton J. Horwitz puts it.⁵ In contemporary America, it will be argued in this book, the law has come to affect not only people’s everyday lives but also their consciousness or mentality, their way of thinking about and formulating social, political, moral, and cultural issues. Historian Jerold S. Auerbach describes the situation in this way:

By now the predominance of law as a cultural force is beyond dispute. It might be measured by the assertive role of the Supreme Court (whether heroic or villainous is beyond the point); by the hypnotic allure of the courtroom trial as a staple of national melodrama; by the astonishing attractiveness of the legal profession as a career choice. No longer is it possible to reflect seriously about American culture without accounting for the centrality of law in American history and society, and in the mythology of American uniqueness and grandeur.⁶

A number of aspects and facets of contemporary American political and social life testify to this “predominance of law.” New statutes and regulations are increasing at exponential rates at all levels of government. The same can be said of reported decisions by courts and administrative agencies. Statutory codes are becoming longer, more complex, and less comprehensible. “Hypernomia” is the name Ralf Dahrendorf

3. Sanford Levinson, *Constitutional Faith* (Princeton, N.J.: Princeton University Press, 1988), 95.

4. *Ibid.*, 5, 90.

5. Morton J. Horwitz, *The Transformation of American Law, 1870–1960* (Cambridge, Mass.: Harvard University Press, 1991), 193.

6. Jerold S. Auerbach, *Justice without Law? Resolving Disputes without Lawyers* (New York and Oxford: Oxford University Press, 1983), 115.

has given to this inflation of laws and to the accompanying growth of norms, sanctions, and institutions.⁷ Since 1980, the budget of the U.S. Department of Justice has more than quadrupled. In this period as well, the Justice Department's payroll has expanded from 53,400 to nearly 98,000, growing four and a half times faster than federal civilian payrolls as a whole.⁸ Likewise, in this century, the number of lawyers has grown twice as fast as the general population. In 1980, 541,000 lawyers were in practice; in 1990, the number was close to 800,000.⁹

Both in absolute numbers and in proportion to population, American lawyers constitute the largest legal profession in the world. They are also the wealthiest, particularly at the upper extreme but also on average. And they are the most politically powerful, dominating legislatures and executives, both national and state, more strongly than in any other country. Even culturally they are among the most prominent, ranging from mythic figures like Abraham Lincoln to the morally ambiguous but perhaps even better known characters in the mass media, such as the television serial "L.A. Law."¹⁰

Not everyone would agree with the long-running cliché that Americans are facing a litigation "explosion." Law professor Marc Galanter, for example, has posed a significant challenge to the popular assumption that the United States is going through a litigation crisis.¹¹ Nor would everyone agree that law functions as the keystone of American civil religion. Lately, there has been an increasing dispute, among political scientists especially, as to whether ordinary Americans are as deferential to judges and courts as particular public figures and scholars have maintained. Thus, Gerald Rosenberg has argued in *The Hollow Hope*, for example, that the Supreme Court played only a minor role in the great civil rights struggles of the 1950s and '60s, and that the importance of

7. Ralf Dahrendorf, *Law and Order*, The Hamlyn Lectures (London: Stevens and Sons, 1985), 146.

8. *Forbes*, Mar. 15, 1993, 91.

9. *The Economist*, Nov. 10, 1990, 28.

10. Richard L. Abel, *American Lawyers* (New York and Oxford: Oxford University Press, 1989), 3.

11. In one of his most influential essays on this issue from 1986, "The Day after the Litigation Explosion," even Galanter admits, however, that "law as a system of symbols has expanded; information about law and its workings is more widely and vividly circulated to more educated and receptive audiences" (*Maryland Law Review* 46.3 [1986]: 38).

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Brown v. Board of Education of Topeka has been exaggerated by law professors who have a professional stake in overemphasizing the significance of what they professionally study.¹²

While Rosenberg concludes that it was the Civil Rights Act of 1964, not the courts, which put an end to segregation, he hardly takes into consideration the enormous *symbolic* meaning that the *Brown* decision had. Why was it, for example, that the executive and legislative branches did nothing before *Brown* was decided? And what was the impact of the case on African American leaders and the civil rights movement in general?¹³ As I see it, *Brown*—and other important Supreme Court opinions—put questions of race and equality on the social agenda, thereby contributing to long-term attitude changes concerning the meaning of American values. If only indirectly, the law influences what Lauren Edelman has called “the normative environment.”¹⁴

In what follows it is precisely the symbolic value of law, the attitudes, ideas, values, and beliefs that people hold about law and the importance they attach to legal decisions, that is of interest. The law provides a kind of “cultural glue,”¹⁵ I shall argue, that binds a diverse nation, serving as a focus of values and aspirations that define the American people. It is not just that the legal dimension of affairs is particularly prominent in the United States, nor just that people turn to the courts more often, on more matters, than elsewhere. Americans turn to the courts with a particular kind of faith, and hope, which survives at a deep level despite all the disappointments and frustrations of the legal process. Deep down, Americans are not just stuck with law, they want to be—all complaints about hypernomia, litigiousness, greedy lawyers, and the adversary system run wild notwithstanding.

If the cultural life of the nation may in any way be considered a reliable gauge, a cursory look at the number of films, television series, and books currently being produced and written suffices to diagnose the United States as a thoroughly law-permeated country. The television

12. Gerald Rosenberg, *The Hollow Hope* (Chicago: University of Chicago Press, 1991).

13. These are questions asked by Stewart Macauley, Lawrence M. Friedman, and John Stookey in *Law and Society: Readings on the Social Study of Law* (New York: Norton, 1995), 589.

14. Lauren Edelman. Quoted in Macauley, Friedman, and Stookey, *Law and Society*, 591.

15. The phrase is Kenneth L. Karst's. See his *Belonging to America: Equal Citizenship and the Constitution* (New Haven, Conn.: Yale University Press, 1989), 29.

series *L.A. Law*, Tom Wolfe's *The Bonfire of the Vanities*, and Scott Turow's *Presumed Innocent*—popular both as novels and as films—are but three examples of cultural products that appealed to the American public in the 1980s. In the 1990s, films such as *A Few Good Men*, *Philadelphia*, and *The Sweet Hereafter* have reflected American interests in law and lawyers. Books with titles such as *The Lure of the Law: Why People Become Lawyers, and What the Profession Does to Them* and *Lawyers and the American Dream* catch the eye at bookstores all over the country.¹⁶ Up through the 1980s and into the 1990s, one of the ten most popular syndicated television shows was *The People's Court*, presided over by Judge Joseph A. Wapner. Broadcast daily and seen by more than twenty million Americans, this mixture of fact and fiction became so popular that Wapner reached the status of a folk hero. *The People's Court* was revived in 1996. In the new version, which has also become popular, it is former mayor of New York Ed Koch who is the presiding judge. Last but not least, American television viewers have been presented with a new cable offering, the Courtroom Television Network, which broadcasts court cases live. Since Court-TV made its debut in 1991, it has had high daytime ratings, helped along by hotly publicized proceedings such as the William Kennedy Smith rape trial and the O. J. Simpson murder trial.

American commitments to the ideal of law are not new. Since lawyers figured prominently among the founders of the new republic, the country was based on law and on a legal system that centered on litigation. Indeed, with a Declaration of Independence that made not only a moral and political but also a legal case for separation, the Revolution itself was defined in legal terms.¹⁷ In *Rights Talk*, Mary Ann Glendon distin-

16. Richard W. Moll, *The Lure of the Law: Why People Become Lawyers, and What the Profession Does to Them* (New York: Penguin, 1990); Stuart M. Speiser, *Lawyers and the American Dream* (New York: M. Evans, 1993).

17. Cf. the point Robert Ferguson makes in “‘Mysterious Obligation’: Jefferson's *Notes on the State of Virginia*” that after having realized that the bulk of the New World remained too remote to allow the use of natural philosophy as the primary structural principle for his *Notes*, Jefferson “turned for relief to the mode of intellectual control he knew best, the law. What does surprise one is the rich implementation of this decision within the structure of *Notes*. The civic tones and disjointed forms of early republican literature take on fresh meaning when we realize that the legal philosophy of the Enlightenment gave Jefferson more than an alternative for discursive method; it also provided an ideal solution to his structural problems. Legal formulation assumed a pattern to incremental knowledge that enabled Jefferson to fuse the organizational needs of *Notes*