

A POETICS OF JUSTICE from the Revolution to the Civil War

CALEB SMITH

The Oracle and the Curse

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Caleb Smith

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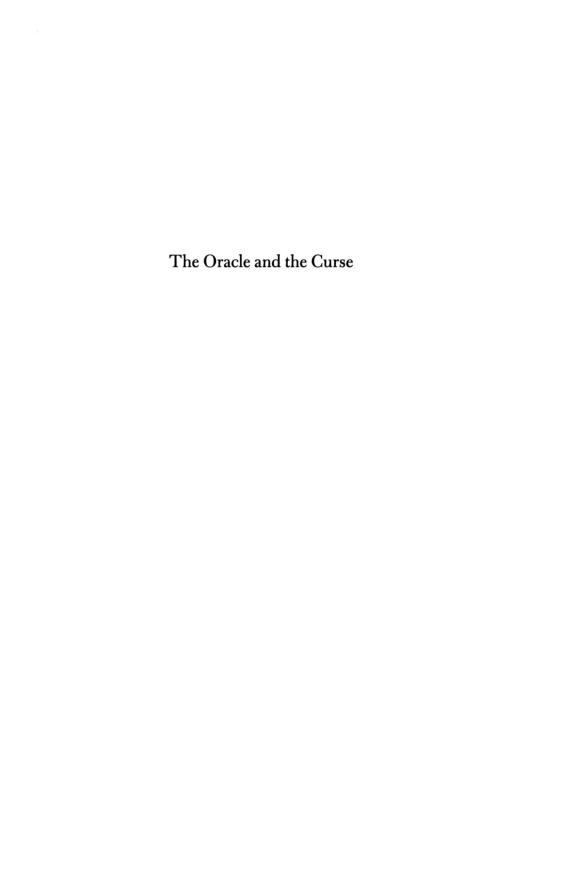
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For S.A.S.

Preface

ong before today's secular justice system confronted the resurgence Jof so many violent fundamentalisms, the developing legal order of the post-revolutionary United States reckoned with the incendiary speech acts of dissenters, militants, and self-styled martyrs who invoked a "higher law." The Oracle and the Curse reconstructs the law's public sphere, from the age of revolution through the slavery crisis, as the scene of this unresolved conflict. An impersonal rule of law and a religiously animated resistance: these two enemies sometimes appear to come from different worlds or different times. I argue that they belong to a single, modern formation that emerged when the ceremonies of justice were refashioned for circulation in popular literature and the developing mass media. My archive includes some familiar essays, novels, and poems, as well as many other texts-legal treatises, execution sermons, criminal confessions, convicts' autobiographies, trial reports, and slave narratives—which invited their readers into rituals of judgment and punishment. My aim is to introduce a historical poetics, or an account of the varieties of nonrational persuasion that these documents were thought to exercise on their first publics.

Early American legal institutions prided themselves on reason and a freedom from religious dogma, but they depended nonetheless on elaborate ceremonies. Criminal trials, especially, were occasions for the legitimation of state power. Addressing publics which had come to be imagined as sovereign peoples, the courts secured their authority by invoking natural order and popular customs. Judges suppressed their own voices so that a transcendent justice could speak through them; they

played the living oracles of law. In time, though, some offenders learned to use oracular performance in other ways, vindicating themselves in the name of a higher justice and weakening popular support for legal institutions. The oracle was answered by the curse.

In its broad contours, the history of these two speech acts is not difficult to see. Over the course of a century, the foundations of legal authority in the United States were secularized. During the earliest decades under consideration here, the clergymen and judges who presided over ceremonies of justice still sometimes posed as the ministers of a sacred order. By the middle of the nineteenth century, the courts had recast themselves as the enforcers of a rational code, written and published by the people's representatives; they no longer claimed to be following the commandments of the Almighty. In the meantime, the moral sanction that had been abandoned by the courts was taken up by dissenters who used it to call for legal reform, for principled acts of civil disobedience, or, in the extreme case of a Nat Turner or a John Brown, for militant resistance. Often dismissed as the vestiges of an earlier, unenlightened age, the antebellum period's martyr figures were really the unruly children of a coldly rationalized modernity. As the oracles gave up their claim to a righteous, vengeful justice, the curse began to make itself heard.

The invocation of impersonal justice by a judge or an offender was a speech act, but it was not easily consigned to a preliterate past. One of my premises is that the distinction between orality and literacy, as paradigms of culture, is of little use in analyzing the law's public sphere. In the early United States, even intimate talk (a confession, a promise) was often scripted according to the conventions of writing. More significantly for a poetics of justice, the printed word itself came to be endowed with the dangerous power to mystify the people or to summon an insurrectionary movement. Exploring the period's own ways of understanding the publication, circulation, and reception of popular legal literature, I recover luminous fantasies of sovereign peoples enchanted into submission, of dissenting factions called to arms, by texts which carried the scene of judgment far beyond the courthouse and into an indefinite future. Along the way, I join other revisionist critics in suggesting that the history of the public sphere, that imaginary space where the legitimacy of state institutions is judged by the sovereign people, has been too

narrowly focused on representative legislation and deliberative reason. To make sense of the public culture of justice, even in a secular modernity, requires thinking about the rituals of law and the self-justifying prophesies of martyrs, the oracle and the curse.

I began my research with an interest in the summoning power of these self-abnegating modes of address, their capacity to constitute moral communities by calling people to a side in a struggle over justice. Oracular address, it seemed to me, was a style of dominion more enchanting than ideology. The curse was a style of protest more dangerous than critique or sentimentality. The conflict between the oracle and the curse was more furious than any debate about sovereignty. As I worked on the book, though, I saw that many of the most vivid depictions of justice's performative invocations had come from authors who took an interest in regulating their power. One example was already apparent in the rationalization of the law's theoretical foundations. In refusing to call down the wrath of God, judges displayed their own reasonableness. They distinguished themselves from the priestcraft and lawcraft of a despotic, superstitious past. They were perhaps not so much forsaking the summoning power of oracular address, though, as reinventing it under the signs of reason and popular sovereignty; they preserved the ceremonial function of the legal ritual by seeming to purge it of its much-disputed theological content. Another, less predictable example involved the suppression of fanaticism within the rising social movements and reform crusades of the early nineteenth century. Even those who appealed to a moral law, hoping to expand the boundaries of the public sphere and to save the country from such "crimes" as slavery, were careful to police themselves against an incendiary, militant enthusiasm. They wanted to redeem the national community, they said, not to rend it into factions.

Much of my work, then, developed into a study of the curiously productive suppression and chastening of certain menacing styles of public address. In some cases, these procedures took on the character of legal rituals in their own right. My middle chapters explore the popular literature that emerged from the prosecution of the word crimes known as blasphemy and evil speaking. Associated with the undisciplined voices of social classes that were normally disenfranchised and dispossessed, these two offenses made the dynamics of factionalizing speech a

matter of explicit controversy in the Jacksonian period. These conflicts over justice, that is, were also struggles over access to publication and over the meaning of public address itself. Carried on at a time when the infrastructure of print circulation was dramatically expanding, they were about who had the right to speak before the people, and in what style, and with what effects. As the actors in these legal dramas tried to silence the blasphemer or to speak out against oppression, to bridle the evil speaker's tongue or to give voice to God's will, to smother the incendiary or to move the hearts of their brothers and sisters—as they waged their campaigns for justice, they were also redefining the relations between language and power.

More subtly but also more deeply, the regulation of the curse shaped the development of distinctly literary subcultures. According to one familiar account, literature in the conventional sense, as a semi-autonomous field with its own standards of aesthetic value and moral truth, emerged in the United States by slowly, fitfully extricating itself from the authority of the ministers and lawyers who had once controlled the press. By the mid-nineteenth century, authors like Nathaniel Hawthorne and Herman Melville were publishing fiction preoccupied with the injustices of law, exposing the hypocrisy of judges and the martyrdom of moral innocence. Unlike the public ceremonies of trial and punishment, the introspective literary imagination could explore the ambiguities of consciousness, the subtleties of desire, and the mysteries of the heart.

Staking its claim to autonomy in such terms, however, literature tended to withdraw to the margins of the public sphere, to concern itself above all with matters of conscience. Even Harriet Beecher Stowe, whose novels were expressly designed to bring about legal reforms, linked the persuasive ambitions of her most famous book to the influence of women's voices, speaking in the private space of the kitchen or the fireside. Stowe defined her literary endeavor against the calculating rationality of legal authorities, but she wanted no association with the obscene, public performances of ranters and exhorters. When they invoked a moral standard in opposition to the law's institutions, most of the other canonical authors of the antebellum period also identified literature with a private sphere. And when they represented a martyr's curse, which they often did, they were careful to distance themselves from its incendiary power.

To account for the law's public sphere, then, it was not enough to narrate the decline of the oracle and the rise of the curse. I also had to describe the regulation of incendiary speech acts within the reform movements and to consider the role of literature in that precarious operation.

Still, regulation was not the same as exclusion. It was a performance of self-discipline which gave writers access to special kinds of authority. The poetics of justice was most carefully described, most elaborately imagined, in the literary field. Detaching itself from legal authority, literature also discovered several postures, never identical to each other, which can be understood as modes of estrangement, enabling various modes of dissent. After all, the story does not end with a withdrawal into the sanctuary of conscience. By the time of Turner's insurrection in 1831, and especially after 1850, the crisis of slavery was profoundly straining the law's claim to legitimacy. In reactionary sermons and popular legal texts, obedience was once more demanded in the name of God and country. But the ongoing struggle also generated a fierce protest literature, animated by the principle of higher law and endowed with the incendiary power to ignite a factional war. The undead presence of the martyr's voice was reawakened, and its power idealized, in surprising ways. The oracle and the curse alike were ominously revived.

The Oracle and the Curse

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Introduction

The Poetics of Justice

In the fall of 1859, the abolitionist John Brown was captured and tried in Virginia. Badly wounded in the fighting with Robert E. Lee's troops at Harper's Ferry, he lay on a pallet in the courtroom, charged with high crimes—conspiracy, murder, treason. When the jury found him guilty, he took the occasion to address the court and the assembled public. "Now, if it is deemed necessary that I should forfeit my life, for the furtherance of the ends of justice, and mingle my blood further with the blood of my children, and with the blood of millions in this Slave country, whose rights are disregarded by wicked, cruel, and unjust enactments,—I say, let it be done!" Just afterward, the death sentence was pronounced. Brown would hang on December 2.

He spent his last days in the Charles Town Jail, praying over his Bible, receiving visitors, and writing letters to his friends and family. In the letters, as in his widely reprinted "Address to the Virginia Court," he freely confessed that he had broken the laws of the state, but he appealed to the higher code of justice he called the "law of God." "I feel no consciousness of guilt," he wrote, "nor even mortification on account of my imprisonment and irons." It was the wicked law and its enforcers, not the martyred rebels, who would be damned when the day of reckoning arrived. "I, John Brown, am quite certain that the crimes of this guilty

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land will never be purged away but with blood." Composed in his cell, just before he went to the gallows, this was his verdict and his sentence against the nation.²

In broadsides, in newspapers, and in such books as James Redpath's The Public Life of Captain John Brown (1860), Brown's prison writings were reprinted and circulated around the Atlantic.3 They helped to take his case far beyond the courthouse, transforming a legal process into a political event on a national scale. "With the Alleghany mountains for his pulpit, the country for his church, and the whole civilized world for his audience, he was a thousand times more effective as a preacher than as a warrior," Frederick Douglass remembered.4 The New York minister William Henry Fish, writing for the Liberator, was one of the many readers who responded to the power of the condemned man's prophetic words: "What a text John Brown has given us!" In the next century, W. E. B. Du Bois would call Brown's dispatches from Virginia "the mightiest Abolition document that America has ever known." "That John Brown was legally a lawbreaker and a murderer all men knew," Du Bois observed. "But wider and wider circles were beginning... to recognize that his lawlessness was in obedience to the highest call of self-sacrifice for the welfare of his fellow men. They began to ask themselves, What is this cause that can inspire such devotion?"6 Brown's works seemed to have called their audience to the cause of a justice higher than the statutes of the land.

Among Brown's readers was another well-known dissenter from the law, Henry Thoreau. A sworn enemy of slavery, Thoreau had felt, throughout the 1850s, a growing tension between legal obligations and the dictates of the moral conscience. In essays like "A Plea for Captain John Brown," he had explored the idea that violent action might be justified as a way to enforce the laws of nature in a corrupt world. On the Fourth of July, 1860, he was invited to speak at a memorial service in Brown's home village of North Elba, New York. Thoreau declined to make the trip—"for my own part, I commonly attend more to nature than to man"—but he sent some pages from his journal to be read aloud to the congregation. First published in *The Liberator* alongside eulogies by Douglass, Redpath, and others, "The Last Days of John Brown" now belongs to the canon of American protest writing, and of American literature in general. Thoreau hailed Brown as a fallen hero who was bound

for heaven. "Now he has not laid aside the sword of the spirit, for he is pure spirit himself, and the sword is pure spirit also." Most of Thoreau's memorial remarks, though, were less concerned with Brown's weapons than with his words, and with what happened to the people who encountered them. Thoreau's essay was a tribute to a martyr who had taken some of his own arguments about civil disobedience to a violent conclusion. It was also a reflection on the power of publicly circulating legal literature, the capacity of the printed word to call readers to a side in a struggle over justice.⁸

Thoreau observed two different circles of readers, two responses to Brown's writings. There was one audience that condemned the old man as a vigilante, a false prophet, and a disturber of the peace: "They read his letters and speeches as if they read them not. They were not aware when they approached a heroic statement,—they did not know when they burned. They did not feel that he spoke with authority, and hence they only remembered that the law must be executed. They remembered the old formula, but they did not hear the new revelation." These readers took the part of the judge and jury. They joined their voices to that of the Virginia court, condemning "an ordinary felon" who deserved to hang. Considering these responses, Thoreau saw how Brown's controversial trial had given the court an occasion to revive the democratic sanction of the rule of law. As the judge pronounced the death sentence, and as word of this sentence circulated in print, a reading public authorized the court's decision, retroactively, with its blessing. Suppressing his own voice, the judge became the oracle of the sovereign people.

Gathering in opposition to the law's ideal public, in Thoreau's account, was another circle—the men and women who burned. To them, Brown had exposed a truth about justice that was ordinarily shrouded by the language of jurisprudence. "They saw that what was called order was confusion, what was called justice, injustice, and that the best was deemed the worst." Moved by Brown's incendiary revelation, they heard the institutions of state indicted according to a higher law. An editorial essay in the *Independent*, a New York paper sympathetic to the antislavery cause, foresaw that "the brief address of Brown to the Virginia court about to sentence him . . . will outlive that sentence, and in the opinion of mankind will make Brown the Judge and the Court the Criminal." If

the court's sentence could ratify itself by gaining the assent of one public, the rebel might appeal to a counterpublic for vindication.

Brown's prison writings did not persuade their readers through the rigor or the clarity of their reasoning. They performed a summoning. Thoreau wondered if "a new sect of *Brownites*" might be gathering "in our midst." The condemned man's address, he suggested, would lead these righteous people to feel that the slaveholding legal order had no foundation in their will. It would align the spirit of a new moral community with another, more just law that awaited a revolutionary founding. The doomed embodiment of the higher law would be remembered as a martyr. Its darkly prophetic invocation in language would be apprehended, by Thoreau and others, as a peculiar kind of performative speech-in-print that stirred up a dissenting faction against the laws of states. Oracular as a court's sentence, yet spoken from the other side of legal authority, this is the kind of utterance that I call the *curse*.

How was it that the addresses of a judge and of a condemned man, transmitted across the continent by the press, could seem to call together two irreconcilable moral communities? The Oracle and the Curse sets out to compose a critical genealogy of the conflict between human law and higher law, and of the juridical public sphere where it was waged, from the Revolutionary period to the Civil War. This is a book about scenes of judgment in American literature, very broadly defined, and especially about the popular genres that emerged at the boundary between legal institutions and the public at large, inviting common readers into ceremonies of justice. I gesture toward the broad scope and rich diversity of this body of work, some of which has been forgotten by literary historians, but I rest my claims on close, contextualized readings of a few especially self-conscious texts. Attending to the conceptions of public address and popular reception that were worked out in and around these documents, I set out to develop a historical poetics of justice—that is, to describe the styles of nonrational persuasion they performed and to analyze how they came to be understood as capable of summoning the assent or dissent of lawgiving publics, even of that elusive, chimerical audience known as "the people."10

The judges and offenders who spoke in these texts, I argue, appeared to suppress the private self so that the commandments of some transcendent,

impersonal power could speak through them. They sentenced their addressees to terrible, but just, fates. And they invited an audience to recognize their performances as expressions of its own collective spirit, indeed as the very medium of its community. Both the oracle and the curse, that is, were thought to convoke a collective subject which could grant them a retroactive legitimacy. I show how the martyr's curse emerged as the prophetic retort to the judge's oracular condemnation, but in the end I find that the perceived force of these two speech acts depended on common fantasies about persuasion and performative self-authorization through the circulation of printed texts.

Taking John Brown's martyrdom as its centerpiece, this introduction begins to tell the three stories that will be developed in the rest of the book. First is the story of the oracle, in which legal authorities position themselves as the mouthpieces of a law whose origins are elsewhere. It begins with the common law judges of the Revolutionary era, men who mystified their own power by invoking the commandments of God and the ancient customs of the people. It ends with the legal rationalists of the antebellum decades, the secular oracles of the rule of law. Second is the story of the curse, the invocation of higher law by unapologetic offenders, righteous dissidents, and defiant martyrs. It tells how the law of God, gradually abandoned by the secularizing courts, was picked up and wielded as an instrument of reform and rebellion in a diversifying mass press. Finally, there is the story of how the curse came to be imagined, from a distance, by writers like Thoreau. More and more estranged from the authority of legal institutions, literary authors saw how the laws of God might summon a faction, igniting a conflict over the foundations of justice. They were troubled by the violence of the curse, but they were also intrigued by its power, and from their encounter with the law's public sphere were conceived distinctive new ideas about the politics and pleasures of literature itself.

The Oracular Public Sphere

"He is no longer working in secret," Thoreau said on the occasion of Brown's capture and trial. "He works in public." As Thoreau knew well, the condemned man could not create a revolutionary movement