

# Madness and Law: An Introduction

*Martha Merrill Umphrey, Austin Sarat,  
and Lawrence Douglas*

Why conjoin the categories of law and madness? After all, in principle legal institutions work hard to keep these two notoriously slippery terms separate. As a normative matter we posit madness as outside the law—something that should be the obverse of what the rule of law is understood to represent. If madness signals the loss of rationality and a resulting disorder, then law epitomizes the engagement of reason for the promotion of order; if madness is signified by the breakdown of language,<sup>1</sup> law is power exercised in and through language employed with great precision; if madness marks a space where meaning is absent, in law meanings are intensified by the capacity to enforce them violently.<sup>2</sup> From that perspective madness appears to be law's foil, the chaos that both escapes law's control and justifies its existence.<sup>3</sup>

And yet this volume's provocation is to link the two terms, and to see what that linkage generates. Our very title—"law's madness"—suggests a connection that is both possessive (madness as it is defined by legal discourse and institutions) and constitutive (a madness that resides in law). The essays that follow address both of those understandings, and in doing so signal the panoply of questions and meanings that can arise from the conjunction of "law" and "madness." It is not the claim of this volume that law is in some way definitionally "mad"; rather, we use the trope of "madness" to signal an unstable, disrupting, indeterminate, yet constitutive *relation*—the relation between that which is imagined *as law* and that which is withheld or masked *as something other than law* in order to produce that imagining.

Thus on the most general level, our contributors sketch the ways in which law takes its definition in part from that which it excludes, sup-

presses, or excises from itself, and attend to the “symptoms,” whether rhetorical, institutional, or theoretical, that signal the repressions necessary to those definitional gestures. In that light, this volume engages in an archaeological project: what, we ask, must be disavowed or forgotten for law to be sustained? Is it, as our contributors suggest, law’s deep engagement with narrativity, with psychiatric discourses, or with history and origin themselves? In addressing these questions, our contributors explore the instability and permeability of the distinction between inside and outside, law and not-law, and the ways in which law—or perhaps we as legal subjects—attempt to recuperate law’s authority and legitimacy in the face of its own ineffability. Perhaps, these essays suggest, law’s insistent claims to knowability and to autonomy, to rationality and to moderation, are symptoms of a deep anxiety about this very instability and about contamination by other discourses and discursive forms.

### *Varieties of “Madness”*

What are some of the more specific manifestations of this general relation that might give rise to such a theory of law? On the most concrete level “madness,” understood as severe mental illness, is positioned as external to the sphere of law’s authority and operation. Though the history of the insanity defense suggests that the concept of “mental illness” has no fixed meaning,<sup>4</sup> legal recognition of insanity, however the term is defined, sets limits on the reach of law’s power to punish. The classic modern test for insanity, which remains in effect in almost half of the nation’s state jurisdictions, is the 1843 English *M’Naghten* rule: in order to be excused from criminal responsibility on the basis of insanity, a defendant must prove that at the time of the alleged criminal act he or she was unaware of the nature and quality of the act, and that it was wrong.<sup>5</sup> The Model Penal Code modifies that strict standard in light of changing conceptualizations of insanity so that a defendant is excused “if at the time of the crime as a result of mental disease or defect the defendant lacked the capacity to appreciate the wrongfulness of his or her conduct or to conform the conduct to the requirements of the law.”<sup>6</sup> Under either standard, decision makers do not condemn a person who cannot, for physiological or psychological reasons, stand in a responsive relation to law’s commands—that is, one who

cannot respond to reason, who can neither be deterred from, nor repent, wrongdoing.

In this imagining of the relation between law and madness, trial courts and legal doctrine are set apart from the unruly realm of the insane and partially cede their authority to another discipline—medicine—which governs and controls the world of unreason. As both Elizabeth Lunbeck and Jonathan Simon demonstrate, that legal recusal is a fraught one, subject to the vagaries of public opinion, scientific credibility, and politics at any given historical moment. But however the line between law and medicine is drawn, such limits on legal authority are necessary and foundational to any liberal legal system whose theories of punishment presume a world of reasoning, self-governing individuals who can respond to legal imperatives and legal punishments.<sup>7</sup>

That rather flat view of the self and the social world has been contested famously on a conceptual level by a wide variety of scholars interested in puncturing, on the one hand, the idea of the autonomous self<sup>8</sup> or, on the other, the presumption of rationality as the basis of human action.<sup>9</sup> Within the framework of the latter arise questions that go to the very heart of the liberal legal enterprise. What if in most criminal cases defendants' actions are determined by forces, whether biological or environmental, beyond the shaping capacity of human will? What if, at critical moments, humans act impulsively rather than rationally? What if decision makers themselves act at least in part on the basis of prejudice, intuition, or human impulse rather than with reasoned deliberation?<sup>10</sup>

Thus if, in the classical age, Aristotle famously defined law as "reason unaffected by desire,"<sup>11</sup> contemporary examinations of law's workings increasingly address the role emotion and psyche play in shaping doctrine and informing judgment. New scholarship interested in law's relation to emotion focuses not on the inner world of mental illness, but rather on law's relation to everyday emotions and, more generally, on the effects the emotional landscape of the public sphere has on the workings of law.<sup>12</sup> "Emotion pervades the law," Susan Bandes argues, and to that extent law's capacity to constrain the excesses of human passion are paradoxically compromised by the mechanisms and makeup of law itself.

Indeed, analyzing this paradox highlights our investment in conjur-

ing the domain of law as a space where emotion is kept at bay.<sup>13</sup> To the extent that emotion is one of the human qualities law is designed to mediate, the assertion that emotion permeates the inner workings of law is a very threatening one. In his work on victim impact statements and public responses to trials, for example, Paul Gewirtz worries that public passions signal a kind of irrational politics of feeling that have the capacity to contaminate and sully the deliberative and discursive spaces of law. "The mob may have their faces pressed hard against the courthouse windows," he argues, "but the achievement of the trial is to keep those forces at bay, or at least to transmute their energy into a stylized formal ritual of proof and judgment."<sup>14</sup> For Gewirtz, "the relentless incursion of the tumult of ordinary life" places a destabilizing pressure upon law. Increasingly, he claims, our cultural tendency—fueled by various forms of media—is to judge in accordance with hot feeling rather than cool reason,<sup>15</sup> and the kind of "public opinion" produced by that tendency can "assault and undermine legal processes."<sup>16</sup>

In both these examples—of the insanity defense and of the role of emotion in law more generally—the normative gestures defining the law are simultaneously gestures of exclusion: legal spaces are spaces of reason and constraint, set apart from the roil of the irrational, which is external to the proper domain of the legal. Yet other imaginable relations between "law" and "madness" might more properly be understood as internal to law rather than in and of themselves boundary-drawing, and they point to certain fundamental tensions, even paradoxes, in the constitution of law itself. Two in particular can serve to illustrate our more general theoretical claims about the problematics of defining law by exclusion or, more precisely, repression: the first might be called the paradox of embodied sovereignty, and the second, following Robert Cover, the "moral-formal dilemma."<sup>17</sup>

### *Embodied Sovereignty*

Ernst Kantorowicz's classic *The King's Two Bodies*<sup>18</sup> analyzes the English legal fiction of the "corporation sole," a theory of sovereignty positing the indivisibility of the "body politic" (or the policies and government of the nation) and the "body natural" (the mortal body) of the king. In this medieval fiction, the king, it was said, was essentially immortal and invincible because his body politic could never die, could do no

wrong, and existed everywhere in the land. Quite obviously, his body natural (the lesser of the two) could and did fail, but because it was subsumed into his body politic, it could not in its frailties and disabilities frustrate or invalidate the actions of body politic.<sup>19</sup> The disruptive body natural of the king was, by virtue of this fiction of incorporation, enveloped and in effect negated by the more perfect body politic. Thus the death of a king was instead labeled his “demise,” signaling a separation of his two bodies and the transfer of his “body politic” to his heir, another body natural.<sup>20</sup>

This dual nature of sovereignty highlights a critical internal instability that must be negotiated constantly in order for the state to maintain its legitimacy. Consider the problem as it is raised in the film *The Madness of King George*,<sup>21</sup> a text that plays on the instability between body politic and body natural as it represents the power struggles surrounding the onset of madness in England’s King George III. The film portrays King George from the outset as a mercurial, distracted, and comic ruler whose eccentricities are tolerated as part of the prerogatives of kingship. But when we see him running through fields in his night-dress at 4 A.M., forcing himself upon a mistress in front of his wife, and defecating in the middle of a crowd, we are made to know that King George has “lost himself,” crossing the line separating eccentricity and madness.

The severity of George’s illness in effect threatens to unravel his sovereignty at the moment that the proper distinction between public and private fails. Physically tortured by quacks and separated from his beloved wife, the king’s “body natural” is literally hidden away by his foppish son, who maneuvers to have himself declared regent in order effectively to ascend to the throne in spite of the immortality of the king’s “body politic.” The parsonlike Doctor Willis, once he has taken the case, offers a precise definition of sovereignty and a diagnosis of the illness affecting the state: until you can govern yourself, he tells the not-quite-King George, you are not fit to govern others. And to govern oneself means recognizing the distinction between public duty and private desire or necessity, and keeping mortal urges in check while performing the public role of king of the body politic. Legitimate sovereignty is thus predicated upon an act of repression.

In their own ways, both medieval English legal doctrine and this contemporary English film suggest that sovereignty itself is consti-

tuted by a dual gesture: on the one hand a recognition of the distinction between public and private, between body politic and body natural; and on the other the subsumption of the private into the public. Perhaps more disturbing, the film suggests that the structure upon which sovereignty is predicated is a great deal more fluid and unstable than we might wish. At the moment of his introduction to a thoroughly abject King George, Willis asks whether there is, after all, a meaningful distinction to be made between madness and the arbitrary exercise of sovereign power. The state of monarchy and the state of lunacy share a frontier, he says as he wonders what ought to be understood as "normal" in a king who is offered a "daily dose of compliance." Following Willis, one might wonder further whether it is precisely because arbitrary power resembles madness that the body mortal must be denied, disavowed, and repressed in England's "corporation sole" theory of sovereignty. Detached from its immortal, infallible status, sovereignty resembles nothing more than might. The repression demanded by this theory of sovereignty is in effect a willed forgetting, on the level of legal theory, of the violent, mortal origins of kingship.<sup>22</sup>

### *The Moral-Formal Dilemma*

Robert Cover begins his study of antislavery judges in the antebellum era with a discussion of Herman Melville's novella *Billy Budd*.<sup>23</sup> For Cover, *Billy Budd* captures perfectly the predicament arising from conflicts between positive law and individual conscience that Northern abolitionists on the bench faced prior to the Civil War. At a critical moment in Melville's novella, Captain Edward Fairfax Vere addresses the drumhead court he has assembled aboard his ship *Bellipotent* to judge and sentence the handsome sailor Billy for the sudden and unpremeditated killing of the ship's insidious master-of-arms Claggart. Billy, struck dumb with rage, has killed Claggart with one great blow after having been accused falsely of mutiny, and it falls to the tribunal to determine his guilt and punishment. The proper course of action is clear enough to Vere, but the court members appear hesitant to apply the English Mutiny Act of 1842, "war's child" as Vere calls it, which commands the death penalty for any killing aboard a navy ship, intentional or otherwise. "I . . . perceive in you," says Vere, "a troubled hes-

itancy, proceeding, I doubt not, from the clash of military duty with moral scruple—scruple vitalized by compassion.”

If, mindless of palliating circumstances, we are bound to regard the death of the master-at-arms as the prisoner's deed, then does that deed constitute a capital crime whereof the penalty is a mortal one? But in natural justice is nothing but the prisoner's overt act to be considered? How can we adjudge to summary and shameful death a fellow creature innocent before God? I too feel that, the full force of that. It is Nature. But do these buttons that we wear attest that our allegiance is to Nature? No, to the King. . . . Would it be so much we ourselves that would condemn as it would be martial law operating through us? For that law and the rigor of it, we are not responsible. Our vowed responsibility is this: That however pitilessly that law may operate in any instances, we nevertheless adhere to it and administer it.<sup>24</sup>

This passage can easily—perhaps too easily—be viewed as a moment of the triumphal assertion of a positivist vision of law.<sup>25</sup> Vere's insistent legal formalism—his claim that the law governing Billy Budd's case is knowable and easily applied—in his mind binds him ineluctably to that recognition.<sup>26</sup> Hence his disavowal of responsibility both for the consequences of the act's commands and, much more disturbingly, for its divergence from the laws of nature. The troubling, perhaps immoral violence demanded by the Mutiny Act against Billy, the embodiment of natural innocence, cannot in this view of law play any part in the determination of his legal guilt. “The existence of law is one thing;” argues John Austin, “its merit or demerit is another.”<sup>27</sup>

And yet Vere's insistence on the binding power of formal law is in this critical moment so overdetermined that the reader cannot help but identify with the equitable position that Vere disavows. Indeed Vere raises the stakes of obedience to law by according enormous status to human sympathy: it does not emanate simply from the realm of sentiment, but rather from the realm of innate morality. He addresses the court:

Something in your aspect seems to urge that it is not solely the heart that moves in you, but also the conscience, the private conscience.

But tell me whether or not, occupying the position we do, private conscience should not yield to that imperial one formulated in the code under which alone we officially proceed?<sup>28</sup>

Rather than embodying an unrelenting embrace of positivism, this passage illustrates a fundamental ambivalence in the legal subject's relation to the law and in law itself, an ambivalence born of the moral tension here between command and conscience. Law presents itself disavowing this ambivalence and, in a very real sense, is constituted by that disavowal. We know that we are bound by the law only at the moment when we would do otherwise than the law would have us do, when we would give in to the dictates of the heart. In Captain Vere's view, private conscience must yield to the progeny of war. War establishes the conditions that give birth to summary "justice" under martial law; the violence of war spawns the violence of the Mutiny Act because mutiny, like war, threatens the very existence of the sovereign. In that context, law must be pitiless because the very survival of the regime that promulgates it is at stake. And yet Vere is not solely the embodiment of imperial dictate; rather, Janus-faced, he is also a compassionate, Freudian father figure to Billy Budd. If, in the moment after Billy kills Claggart, that fatherly compassion is eclipsed by the "military disciplinarian,"<sup>29</sup> Vere once again plays the role of father to the young sailor the night before his execution. Curiously, Melville veils this second encounter between Vere and Billy. "It was Captain Vere himself," remarks Melville's narrator, "who of his own motion communicated the finding of the court to the prisoner . . . [but] what took place at this interview was never known." He continues:

[Vere] was old enough to have been Billy's father. The austere devotee of military duty, letting himself melt back into what remains primeval in our formalized humanity, may in the end have caught Billy to his heart, even as Abraham may have caught young Isaac on the brink of resolutely offering him up in obedience to the exacting behest.<sup>30</sup>

"What remains primeval in our formalized humanity": in this phrase we are reminded of the constitutive presence of sentiment, an "irrational" element of human behavior that can never fully, finally, or completely be expelled from the province of legal judgment. The Vere

presented here is an imaginary father, one ready to embrace his son even as he lays him on a sacrificial altar, and the narrative presentation of this scene—as veiled and hypothetical—suggests that whatever compassion may lie in the heart of law must be kept from view.<sup>31</sup> The scene of compassion as an expression of justice must be repressed in order for law to retain its authority in times of crisis.<sup>32</sup> We might wish to dismiss this imagined encounter as a projection of the narrator's hopes—as a fantasy of justice—were it not for the clear manifestation of symptoms that etch the effects of this repression on Vere's face, which a witness describes as "the agony of the strong."<sup>33</sup>

Vere's symptoms of internal struggle suggest the anxiety and tension inhering in the act of judgment, and the strength demanded to ward off his impulse toward compassion redounds back into and magnifies the tenaciousness of his intent to condemn Billy Budd. If we can understand Vere's tenaciousness as an effort of repression in the psychoanalytic sense of the term—that is, as the effect of the effort to disavow or refuse uncomfortable instinctual impulses (in this case *eros*)—then we can explain the mystery of his otherwise inexplicable deathbed words: "Billy Budd, Billy Budd."<sup>34</sup> The narrator says that these are not "the accents of remorse"; rather, they can be understood as "the return of the repressed," an eruption that signifies the inevitable miscarriage of repression gone too far.<sup>35</sup>

Indeed the story suggests, in the narrator's words, that "the condemned one suffered less than he who mainly had effected the condemnation."<sup>36</sup> As evidence for that proposition the narrator recounts the haunting execution of Billy Budd. Billy's own agony abated, says the narrator, because of "something healing in the closeted interview with Captain Vere,"<sup>37</sup> and, in the last moment of his life, Billy almost inexplicably cries out "God Bless Captain Vere!"<sup>38</sup> In "resonant sympathetic echo" the crew responded in kind—"God Bless Captain Vere!"—following which, the narrator tells us, Captain Vere (either through stoic self-control or "a sort of momentary paralysis induced by emotional shock") "stood erectly rigid as a musket in the ship-armorer's rack."<sup>39</sup> Rigid, paralyzed, stoic, disciplined: Vere as the embodiment of law is all of these things; and yet it is the hidden side of law, the balm Billy feels after his veiled encounter with Vere, that produces the ringing legitimation of his own sacrifice. If Vere is bound *by* the law, and suffers for those ties, Billy, enthralled by Vere the father figure, is bound *to* the law in its paradoxical constitution as that which both

represses and reveals the irrational pulls of conscience, love, and madness itself, endorsing his own destruction without equivocation.<sup>40</sup> The authority and legitimacy of Vere's judgment thus depend upon how he negotiates the constitutive and dynamic tension between the imposition of violence and the exercise of compassion.

Robert Cover's brilliant work on antislavery judges who enforced the antebellum Fugitive Slave Acts provides a real-world example of just this kind of clash. Indeed Cover has speculated that Melville wrote *Billy Budd* as an allegory about the dilemmas his antislavery father-in-law, Massachusetts Chief Justice Lemuel Shaw, faced prior to the Civil War. Cover argues that the "moral-formal" dilemma faced by Shaw and others produced a kind of cognitive dissonance that one can see coded in their written opinions. These judges faced the moral horror of collaborating in the return of escaped (and sometimes released) slaves to a state of bondage. Asserting that they were bound *by* the law, these judges also bound themselves *to* it: like Vere, they imagined law as clear and confining; but they also embraced their judgments returning people to bondage, however immoral, as the greater good, the law being in their view the only line between order and anarchy, peace and the literal dissolution of the state in civil war.<sup>41</sup> Cover sees these arguments as not just rationalizations but symptoms of psychic disturbance—in our terms, of repression. Repression may not be the same thing as cognitive dissonance, which is a term emerging out of cognitive rather than Freudian psychology; but they are clearly related concepts. Those judges were, in the terms of Cathy Caruth, haunted by moral qualms they refused to honor but could not utterly disavow.

### *Law as a Psychic System*

To read law this way is to read it symptomatically, as if it were itself a kind of psychic system. In that light, though not every essay here employs it, the language and conceptual tools of psychoanalysis can help us to generalize about and theorize the dynamic of disavowal as constitutive of law as much as of the individual subject. Though psychoanalysis has not yet established a strong foothold among contemporary legal theorists, we are certainly not the first to note its suggestiveness for the field.<sup>42</sup> The legal realist Jerome Frank first drew upon Sigmund Freud's work to develop a psychoanalytic theory of law in 1930, arguing in *Law and the Modern Mind* that the legal subject's relation

to the law is defined by a yearning not for reason per se but for an inflexible father-substitute that can provide us with clear, knowable, and immutable rules.<sup>43</sup> More recently, a number of scholars including Pierre Legendre,<sup>44</sup> Peter Goodrich,<sup>45</sup> Alain Pottage,<sup>46</sup> David Caudill,<sup>47</sup> and Anne Dailey<sup>48</sup> have argued, with perhaps more subtlety than Frank, for the relevance and theoretical acuity of psychoanalysis as it has developed in the late twentieth century. Their work poses several general questions about the operations and effects of law. What is the constitutive relation between that which is asserted consciously and overtly in law and that which it disavows? How is the public image of law fashioned through the dynamic exchange between the evident or visible and the repressed or disruptive? What might reside in law's unconscious?

Goodrich has suggested that symptomatic readings of law should attend to the desires that underpin it, the most central of which is to establish and promulgate order.<sup>49</sup> Indeed, Freud makes a similar claim in his analysis of the development of civilization. In *Civilization and Its Discontents* Freud claims that "civilization," that state of advancement that distinguishes us from our animal ancestors and regulates our social relationships so that we may live in relative peace with each other, is dependent upon the sacrifice and disavowal of instinct—specifically our drives toward aggression and toward individual sexual satisfaction. Civilization is produced out of the disavowal, or repression, of those drives. Law, in turn, is a premier engine and signifier of civilization: it assumes the right to punish in order to prevent the "crudest excesses" of individual desire.<sup>50</sup>

This dynamic of state repression and punishment resembles the relation within an individual psyche between superego and id. The superego develops in an individual as he or she internalizes the edicts of an outside authority (which Freud typically figures as the father). Thus as Freud conceptualizes it, the superego is the instinct toward aggression internalized and turned against itself as a means of producing and preserving a self capable of living in society. It is punitive, judging and censoring desire, and standing as a watchman who drives instinctual desires back from the threshold of the conscious mind into the unconscious by producing a sense of guilt.<sup>51</sup> To the extent that law can be said to function as a social superego, it is thus implicated by virtue of that role in the very violence and desire it seeks to contain.

At the same time, though, while acknowledging the constitutive relation among law, violence, and irrationality, one ought not as a

result conclude that law is somehow “only violence,” or purely irrational. Some contemporary scholars, such as Paul Campos, have argued that “in its more extreme manifestations, what Americans call the ‘rule of law’ can come to resemble a form of mental illness.”<sup>52</sup> In his recent book *Jurismania: The Madness of American Law*, Campos argues that there are no rationally determinable answers to the most difficult legal questions, and law’s “mania” for giving reasons is “the very essence of jurismaniacal excess, and indeed is the source of our culture’s irrational addiction to reason in general.”<sup>53</sup> We are “enchanted” with reason,<sup>54</sup> argues Pierre Schlag, but that very enchantment is symptomatic of our own investment in an unreal fantasy—a delusion.<sup>55</sup>

Yet psychoanalytic theory suggests that our enchantment with, or at any rate investment in, reason is less a delusion than a necessary feature of law and, more broadly, human civilization. Indeed we argue that what we understand to be *performances* of reason—the repeated, compulsory, yet in the end non-conclusive gestures of the judge and legislator—are absolutely necessary components of anything we call law. Of course, no system attempting to produce social order and deal with human iniquity can be one of pure reason because any such system, at least in liberal democracies, is vulnerable to the irrationalities of politics and emotion. But to argue, as we do, that law’s discourse of reason is performative is not to argue that it is a lie. Rather, it is a necessary posture of speaking that, nevertheless, cannot seal law off completely from the irrationalities that definitionally constitute it.

We turn to psychoanalysis as one way to draw together the insights of a number of strands of contemporary sociolegal theory that analyze law’s multiple and contradictory meanings and manifestations.<sup>56</sup> This new scholarship suggests that law’s paradoxes, far from dissolving into incoherence, in fact help to erect and sustain law.<sup>57</sup> Thus the essays in this volume explore, in so many words, the project or projects of legal self-fashioning. They ask: What face does law put on? How does it make itself up? What lies underneath that it anxiously wishes to cover? In response, the essays highlight the contaminations that constantly threaten to undermine law’s authority and legitimacy, illuminating both the desire to separate madness from legality and its constitutive force in legal doctrine, legal institutions, and legal practices.

We begin with “Policing Stories,” Peter Brooks’s provocative essay on the role of narrative in legal decision making. Adopting an explicitly

psychoanalytic approach to judicial rhetoric, Brooks argues that narrative is central and dangerous to law; that is, while narrative is a fundamental mode by which humans experience and understand the world both inside and outside law, telling all the “sordid story details” that underlie any given case can disrupt the coherent articulation of legal principles and the exercise of reason. Drawing upon Justice Souter’s majority opinion in *Johnny Lynn Old Chief v. United States*,<sup>58</sup> Brooks analyzes the ways in which judges work to keep narrative at a distance from law, as narrative is the suppressed antithesis of law’s reason. In *Old Chief* Souter argues that a defendant can stipulate to a prior conviction over the objections of a prosecutor who wishes to introduce the “full story” of the defendant’s past acts *precisely because* of the power the details of that story might exert on decision makers, luring them into convicting on the basis of bad character rather than the facts of the case before them. Paradoxically, *Old Chief*’s earlier encounter with the law is excluded because the inclination to connect past with present is *too* seductive, the “persuasive power of the concrete and particular” (as Souter puts it) so overwhelming as to become illegitimate in the courtroom.

Brooks argues that *Old Chief* is an example of the ways that law controls the disruptive potential of stories by formalizing the conditions under which they can be told and by excluding certain kinds of especially troubling stories (stories that might be “prejudicial,” forced confessions, and so forth) from the arena of proper legal speech.<sup>59</sup> Law’s relationship to madness is reenacted as narrative forced into the legal unconscious and is placed, in psychoanalytic terms, under negation. But far from being completely excluded, narrative continually enters and structures legal speech. It is put “under erasure”; traces of disruptive stories remain visible as evidence of law’s repression.

As further evidence of the constitutive nature of this repressive dynamic of law, Brooks offers symptomatic readings of the opinions in three well-known cases: *Palsgraf v. Long Island Railroad Company*,<sup>60</sup> *Rusk v. State* and *State v. Rusk*,<sup>61</sup> and *Francis v. Resweber*.<sup>62</sup> In each, the shape that judges give to the story of the case—the details they include, emphasize, banish to footnotes, or replace with abstract hypotheticals—in turn informs and structures their legal judgments. Brooks is concerned that this shaping process is largely unconscious in the judge’s mind, to the detriment of a clear (and more just) understanding of the processes by which defendants are judged and punished. The

desire to banish the particulars of narrative from legal rhetoric persists, however, because we continue to be attached to the fantasy that law can transcend the sordidness of everyday conflict and human iniquity, that it can govern on the basis of principle and reason and remain at a remove from irrationality, prejudice, and emotion. The narration of particulars, Brooks suggests, can risk a “veritable deconstruction of all legal argument.” Facts and details must in effect be censored by a legal superego that uses rhetorical sleight of hand in order to purify, and thus legitimate, a rhetoric of judgment invested in the performance of reason.

With this analysis, Brooks details the ways in which law sifts through and frames the kinds of evidence it deems relevant in order to try to exclude irrationalities and bolster its image as an ordered and principled means of judging. The cases he cites illustrate the ways in which law controls the materials of everyday life that it confronts, so that each individual adjudication can be connected coherently to a (fictive) larger whole. This display of mastery is dependent upon law’s capacity to incorporate successfully not only everyday experience, but also other forms of knowledge and expertise that can themselves challenge law’s coherence and authority to judge. This kind of conflict is particularly evident, in the modern era, in law’s relationship to scientific knowledge. Hence two of our contributors consider law’s relation to psychiatry as an external and competing source of judgment that puts into question law’s competence in an area that literalizes the problem of madness for law—responsibility and mental capacity.

Elizabeth Lunbeck’s “Narrating Nymphomania between Psychiatry and the Law” analyzes the narrative encodings of the nymphomaniac or “erotic liar” as she came into being and came to be represented in twentieth-century medical and legal texts. Nymphomania—an abnormal interest in sex on the part of a woman—was one of the emerging “personality disorders” promulgated by psychiatrists interested in the topography of the “normal” and “near-normal” beginning in the early twentieth century. Invoked in cases involving both mental competency (wills, estates, and the like) and testimonial credibility (particularly in rape cases), nymphomania marked a liminal space in law’s demarcations between sanity and insanity. Lunbeck’s analysis illustrates the ways in which law depends upon psychiatry even as the very distinctions law considers critical to the determination of legal incapacity or credibility make no sense in the language of psychiatry.

Lunbeck offers a sharp-sighted analysis of law's desire for clear medical truths to aid in its judgments and of its constant frustration at what she describes as the "vexing incompatibilities" of legal and psychiatric epistemologies. If, theoretically, law sharply distinguished between sanity and insanity, psychiatry understood nymphomania and other psychopathic tendencies like it to lie on a continuum between abnormality and normality. The indeterminacies of psychiatric language confused law's desire for a sharp distinction between "mad" and "bad," and placed any belief in a singular or knowable "truth" about the mental state of the nymphomaniac in grave doubt. And yet, Lunbeck argues, even given these fundamental differences, the figure of the erotic liar produced in psychiatric discourse found a comfortable home within a legal tradition wary of the power of women's words. In particular, science found easy entry and acceptance into law in early- to mid-twentieth-century rape cases, where defense attorneys took advantage of psychiatric diagnoses indicating that "nymphomaniacs" were unreliable narrators of sexual experience in order to discredit the testimony of female accusers.

Lunbeck's evidence suggests that for much of the twentieth century, at least in this area, law turned to science in order to shore up its authority despite the inexact fit between legal and psychiatric conceptualizations of mental capacity. But as cultural common sense about women's sexuality shifted in the 1960s and 1970s, law began to disown the figure of the erotic liar. Ironically, lying is now considered a symptom not of sociopathy but of rape trauma syndrome, proving the occurrence rather than nonoccurrence of rape. To the extent that legal "truths" about the credibility of women's rape narratives have shifted, law's earlier reliance upon psychiatric diagnoses of nymphomania appears collusive in the perpetration of injustice. While pointing to that injustice, Lunbeck's argument destabilizes the truth-status of any kind of authoritative claims framing women's stories about sex and violence, whether legal or medical. Here she returns us to the problematics of narrative that Brooks posed. If law's dependence upon certain kinds of unsupportable psychiatric diagnoses looks suspect from an early-twenty-first-century political perspective, law's continuing suspicion of psychiatry's insistence upon the primacy of individual patients' narratives indicates its own anxious investment in imposing categorical abstractions that cannot attend to the vagaries of human experience and the irrationalities of human desire.

Jonathan Simon's "'A Situation So Unique That It Will Probably Never Repeat Itself': Madness, Youth, and Homicide in Twentieth-Century Criminal Jurisprudence" also takes up the question of law's relation to psychiatry over the course of the twentieth century, addressing not the problem of testimonial credibility but the assessment of mental capacity in order to determine just levels of punishment. How and to what extent, asks Simon, have courts accorded "psy-knowledge"<sup>63</sup> authority as judges face the predicament of sentencing adolescent killers? Apparently (like the nymphomaniac) neither "insane" within the strict legal definition of the term nor fully responsible adult legal subjects, lethally violent young people elude law's capacity to fix and define their quantum of responsibility, posing ultimately unresolvable questions about proper levels of punishment. Simon contrasts medicolegal dialogue from the 1924 case of Leopold and Loeb and the 1999 case of Kip Kinkel, analyzing the claims and rhetoric of psy-experts, defense attorneys, prosecutors, and judges in both cases. In so doing, Simon invites us to consider the extent to which law cedes to medicine the authority to judge; that is, the extent to which law acknowledges its dependence upon and contamination by something external even as it performs the ultimate legal act of imposing punishment.

In each of these notorious cases, attorneys for the defendants first entered guilty pleas, then sought to convince their presiding judges to mitigate punishment by introducing expert testimony diagnosing their client's psychological states. Clarence Darrow's famous defense of Leopold and Loeb focused on the link between madness and youth, and the experts he called to testify stressed the defendants' abnormality at a historical moment when determinist-oriented psy-knowledge garnered a great deal of respect in the courtroom. Thus Darrow could argue credibly to the court that science, in speaking courageously about madness, was at the vanguard of advancing civilization, and that in forgoing the death penalty the judge in Leopold and Loeb's case could stand above the seething calls for vengeance issuing from the mob's unreasoning, uncivilized hatred. In a much more subdued defense, Kip Kinkel's attorney Mark Sabitt allowed that retribution was a legitimate element of the state's rationale for punishment and asked only for moderation in its exercise. In a shift indicative of a more general decline in the will to explain through psy-knowledge, the idea of civilization was redeployed; no longer

invoked to quell the violent retributive impulses of the public, protecting “civilization” became the implicit foundation of an argument to limit public risk.

If Leopold and Loeb were spared because Judge Caverly punished “in accordance with the dictates of enlightened humanity,” Judge Mattison made Kip Kinkel “pay the price” for his acts—111 years in prison—in order to protect society and fulfill demands for accountability. In this shift, Simon sees a return of *Gemeinschaft* and the imposition of a collective desire for vengeance. From a psychoanalytic perspective, one might be tempted to see this shift as a return of the repressed in law, a movement away from Freud’s vision of civilization. But as another symptom of repression one might point to the ambivalence with which law treats the psy-sciences, its competitor in judgment. Even in the Leopold and Loeb case, Judge Caverly simultaneously dismissed the testimony of experts as irrelevant to the task of sentencing and adopted Darrow’s argument that mitigation accorded with the march of civilization. Similarly, Judge Mattison allowed testimony about Kinkel’s delusions and hallucinations, yet dismissed it as unrelated to the twin goals of community safety and accountability and therefore irrelevant to his judgment.

In these mirror gestures of ambivalence we can see both judges struggling over the issue of law’s authority in relation to medicine, anxious about their capacity to judge correctly or legitimately in these cases. In contrast to the uneasy collusion of law and medicine on the subject of female sexuality, here we find explicit disavowals of science and its relevance to legal judgment: in both the Leopold-Loeb and Kinkel cases, the judges claimed in the end that medicine could not offer final diagnoses that would be meaningful in helping them to judge correctly.<sup>64</sup> If both decision makers were ultimately disappointed that the psy-sciences could not provide a firm basis upon which to ground judgment, their ambivalence about medical expertise points to a continuing desire for the kind of definitive external truths legal decision makers so often desire but can never obtain.

It is the history of anxiety about legal legitimacy—or the repression of that history of anxiety—that our final contributors address. Both Cathy Caruth and Drucilla Cornell are occupied with ways in which law remembers and forgets its foundations and origins, and in particular the consequences of willed disavowal for the exercise of justice. Caruth analyzes the denial of history in Restoration France, and Cor-

nell examines history's misremembering and mythologizing in U.S. constitutional discourse. Both view the negation of the past as a psychiatric symptom as well as a kind of tragic violence done by law to legal subjects; and yet both remain optimistic about the possibility of reimagining law's relation to that negation in ways that move it closer to the promise of justice and equality.

In "The Claims of the Dead: History, Haunted Property, and the Law" Caruth examines the cultural and legal implications of a remarkable legal decree of historical forgetting, the French Charter of 1814, as they reverberated through Honoré de Balzac's 1832 novel *Colonel Chabert*.<sup>65</sup> Louis XVIII's Charter, which in large part reiterated in modified form the legal legacy of the Revolution—Napoleon's Civil Code—nevertheless commanded the courts and citizens of postrevolutionary France to forget "all research into opinions and votes issued up to the Restoration." Balzac's *Colonel Chabert*, as Caruth reads it, is a meditation upon the ways in which that law is both a symptom and a repository of the traumatic past that Louis XVIII wished to repress. In the novel this impossible fantasy of pure law, of law without history, is disrupted by a haunting. The text's main character Colonel Chabert, a hero of the Napoleonic Wars, literally returns from the dead, having been declared killed in battle "as a matter of historical record." But, as Chabert tells the lawyer Derville who interviews him at the beginning of the novel, he in fact escaped from a pile of corpses to return to the world of the living only to discover that he has lost his identity—his title, his fortune, and his wife—as a result of legal mistake. Chabert is not recognized as human because he has lost his legal status as a propertyholder. One "death" has produced another.

The novel thus concerns the "dead" man's appeal to the law for a return to memory and for the redress of a wrong that resulted from a mistake of history. Derville—the only attorney to believe Chabert's narrative of death and rebirth—attempts to revive Chabert as a legal subject by contacting his wife, who has since his disappearance married a member of the nobility, in order to arrange a property settlement. Chabert's demand for property materializes the link between past and present; its bestowal would in effect constitute an act of remembrance precisely because it would recognize Chabert as a legal subject with a right to make a claim to the holdings and identity he once had. Acknowledging Chabert as himself would thus undo the traumatic rupture marking the era of Revolution and empire from that of Restora-

tion. But in an act of willed refusal of recognition, Chabert's former wife denies his claim to identity. In that repetition of Chabert's death, Caruth reads a double gesture in law: recognizing human beings *as rights-holders* signals the corollary possibility of the non-rights-holder's *non-recognition* before the law. If the law erases Chabert's identity it also denies his humanity as rights-holder.

Thus negated, Chabert is a specter lurking in the law of the Restoration, which can neither escape nor encompass him. Ultimately he concedes the futility of his demand for a return to history as a legal subject. Instead, Caruth argues, in taking a new name and distancing himself from his heroic past, Chabert—however diminished—opens up new possibilities for freedom beyond the law. The law of the present is limited and delegitimated by its disavowals, and it becomes some future law's task, she suggests, to find a new way to recognize Chabert and bear witness to his, and its own, traumatic past. This optimistic reading of Balzac's tragedy should not be understood as a call for a new law, a new moment of founding; indeed the whole of the novel, and Caruth's analysis of it, highlights the misguided nature of such an enterprise. Rather, Caruth's call for new and more inclusive ways of recognizing legal subjectivity echoes Drucilla Cornell's appeal for reconceptualizing justice as a horizon of possibility, a new embrace of what, in this world, is labeled the ghostly, the irrational, the insane.

"In the case of law," Cornell argues, "there is reason to be afraid of ghosts," and the legal system's erasure of the mystical foundations of its authority is a horror story in need of telling. In "Rethinking Legal Ideals after Deconstruction" Cornell invites us to consider the question that shadows all of these essays: to what extent is law's investment in the appearance of reason, the appearance of coherence, the appearance of authority, and the appearance of justice a mad masquerade that denies us the capacity to judge law itself? Cornell's concern in this essay is twofold: to defend a deconstructionist theory of law against scholars who criticize such an approach as irrational and ultimately unable to articulate any positive justification or ground for the assertion of justice; and, at the same time, to illustrate the ways in which legal justifications for violence are always incapable of erasing a decision maker's ultimate responsibility for the imposition of that violence.

In his essay "Force of Law: The 'Mystical Foundations of Authority,'"<sup>66</sup> Jacques Derrida argues that there is no ultimate ground upon which law can depend to justify itself, and no way to describe justice in

relation to a set of established moral principles. Left-leaning critics of deconstruction such as Dominick LaCapra have worried that such a claim in the end leads to only one possible justification for law's authority: that might makes right. In defending and elaborating the deconstructionist position here, Cornell uses Justice White's majority opinion in *Bowers v. Hardwick*<sup>67</sup> to illustrate the ways in which deconstruction in fact opens up, rather than closes down, the possibility of justice.

White's attempts to justify denying a right of privacy to Hardwick on principled grounds necessarily fail, Cornell argues, because he conflates legal justification with an appeal to myth rather than to any objective external standard. White's opinion depends upon the interpretation of two silences: the silence in earlier privacy cases on the issue of homosexuality, and the silence of the Founders on the relation between homosexuality and "fundamental rights." He understands both of these silences to be exclusionary: because homosexuality is mentioned neither in the Constitution nor in any precedent, the Court is not empowered to extend the right of privacy to protect homosexual activity from state regulation. Cornell counters that claim by arguing against its mistaken presumption that silences are readable. The twin myths that support White's argument—the myth of originary foundation and the myth of "plain meaning" in the Constitution and in legal precedent—constitute in effect a repetition of the violence of law's founding—a violence that becomes self-conserving<sup>68</sup> without further capacity to justify itself on determinable legal and moral principles.

White's turn to "history and tradition" as a way to deny Hardwick constitutional protection reenacts the story of Colonel Chabert even as it represents a failure of the judicial responsibility to *judge the law*. Such responsibility inheres, Cornell claims, in the very act of deconstructing law's relation to justice, which cannot be one of equivalence because we can never finally know in a stable way what justice is. Rather, Cornell argues, deconstruction *is* justice insofar as, in positing the ultimate undecidability of any rationalization of violence or any final justification for its exercise, deconstruction makes clear a critical corollary: that because of this undecidability, law can never completely close the door against challenges to its authority. It is constituted by its relation to that which it disavows. Textual silence in this view no longer signifies the space of that which is excluded from law, but rather that which has not yet been put into words. And justice can be embraced not as a knowable destination, which is impossible, but as an aesthetic ideal that can

be compared with other aesthetic configurations and judged on that basis; it becomes a horizon of possibility to which law can constantly aspire if judges are bold enough to take responsibility for the violence they do in every instance of judgment.

Thus a deconstructive theory of law suggests that at bottom it is this responsibility to justice—to an account of the unprincipled particularities of human existence—that haunts the law. In effect Cornell argues in favor of exploiting for the sake of responsibility the agonistic relation between law's desires for coherence and foundation and its disavowed histories and negated narratives. Rather than "dressing itself up as justice" in a gesture that denies its relation to, and sometimes violent intervention in, the world of human experience, law would do well to attend to the doubts and inconveniences that disrupt its smooth functioning as a means of aspiring to do violence justly.

Taken together the essays in this book illuminate both the desire to separate nonrationality from legality, and the constitutive force of the nonrational in legal doctrine, legal institutions, and legal practices. Our contributors examine what we have called the various performances of repression that reveal the symptoms of a legal "unconscious"—the repeated denials and expulsions from law of conscience, compassion, narrativity, psychiatry, history, and deconstruction. These essays offer an opportunity to see in law's "madness" not the end of law, but a horizon of new possibilities.

## NOTES

1. See Nikolai Gogol, "Diary of a Madman," in *The Complete Tales of Nikolai Gogol*, vol. 1, ed. Leonard J. Kent, trans. Constance Garnett (Chicago: University of Chicago Press, 1985); see also Shoshona Felman, *Writing and Madness: (literature/philosophy/psychoanalysis)*, trans. Martha Noel Evans (Ithaca: Cornell University Press, 1985).

2. Robert Cover, "Violence and the Word," in *Narrative, Violence, and the Law: The Essays of Robert Cover*, ed. Martha Minow, Michael Ryan, and Austin Sarat (Ann Arbor: University of Michigan Press, 1992).

3. One can find this imagining of a prelegal chaos in a number of classical political theorists' writings, the most notorious of which is Hobbes's conjuring of the state of nature as a war of all against all. For a thorough overview relevant to this issue, see Austin Sarat and Thomas R. Kearns, "A Journey Through Forgetting: Toward a Jurisprudence of Violence," in *The Fate of Law*, ed. Austin Sarat and Thomas R. Kearns (Ann Arbor: University of Michigan Press, 1991).

4. See generally Thomas Maeder, *Crime and Madness: The Origins and Evolution of the Insanity Defense* (New York: Harper and Row, 1985); Donald J. Herrmann, *The Insanity Defense: Philosophical, Historical, and Legal Perspectives* (Springfield, Ill.: Thomas, 1983); and Allen Thiher, *Revels in Madness: Insanity in Medicine and Literature* (Ann Arbor: University of Michigan Press, 1999).

5. On the history of the *M'Naghten* test, see Richard Moran, *Knowing Right from Wrong: The Insanity Defense of Daniel McNaughtan* (New York: Free Press, 1981).

6. Model Penal Code §4.01. The MPC's looser standard for acquittal on the basis of insanity reflects a history of continuing critique of the *M'Naghten* standard as too stringent. Similarly, though the civil test for capacity (in testamentary and contractual transactions) is applied in such a way that it is easier to claim or assign insanity (which in a civil context must be proven by a preponderance of the evidence rather than beyond a reasonable doubt), as a general matter the language of the civil test mimics the *M'Naghten* concern with cognitive capacity: for example, a testator must have the capacity in executing a will to "understand the nature and extent of his/her property and how he/she is disposing of it and to recognize the natural objects of his/her bounty."

7. See, for example, *Tison v. Arizona*, 481 U.S. 137 (1987), in which the Supreme Court equated the mental state of "reckless indifference to human life" with intentional killing in order to endorse the use of the death penalty in some felony murder cases; that is, cases in which the defendant on trial did not him- or herself actually kill anyone. Jennifer Culbert argues that in doing so, the Supreme Court acted to shore up the figure of the "normal person" in law, "normal" being associated in this instance with autonomy, rationality, and self-determination. Jennifer L. Culbert, "Beyond Intention: A Critique of the 'Normal' Criminal Agency, Responsibility, and Punishment in American Death Penalty Jurisprudence," in *The Killing State: Capital Punishment in Law, Politics, and Culture*, ed. Austin Sarat (New York: Oxford University Press, 1999).

8. Michel Foucault's work is exemplary on this point. See in particular *Madness and Civilization: A History of Insanity in the Age of Reason*, trans. Richard Howard (New York: Vintage, 1988); and *Discipline and Punish: The Birth of the Prison*, trans. Alan Sheridan (New York: Vintage, 1977). See also Nikolas Rose, *Governing the Soul: The Shaping of the Private Self* (New York: Routledge, 1990).

9. Quite obviously the psychological literature on this question is enormous. Sigmund Freud's work is the most relevant for the argument that follows. See in particular his two general introductory texts: *Introductory Lectures on Psycho-Analysis*, ed. and trans. James Strachey (New York: Norton, 1966); and *New Introductory Lectures on Psycho-Analysis*, ed. and trans. James Strachey (New York: Norton, 1964).

10. See in particular Jerome Frank, *Law and the Modern Mind* (1930; reprint, Gloucester, Mass.: Peter Smith, 1970); Stephen J. Adler, *The Jury: Disorder in the Court* (New York: Doubleday, 1994); see also Harry Kalven and Hans Zeisel, *The American Jury* (Chicago: University of Chicago Press, 1966); and Rita James Simon, ed., *The Jury System in America: A Critical Overview* (Beverly Hills, Calif.: Sage, 1975).

11. Aristotle, *The Works of Aristotle: Politica*, ed. W. D. Ross, trans. Benjamin Jowett (Oxford: Clarendon Press, 1921), bk. III, chap. 16.

12. See in particular Susan Bandes, ed., *The Passions of Law* (New York: New York University Press, 1999).

13. Bandes, 1–2.

14. Paul Gewirtz, “Victims and Voyeurs: Two Narrative Problems at the Criminal Trial,” in *Law’s Stories: Narrative and Rhetoric in the Law*, ed. Peter Brooks and Paul Gewirtz (New Haven: Yale University Press, 1996), 135.

15. Gewirtz, 152. Similarly, in his book *When Law Goes Pop*, Richard Sherwin decries what he sees as a convergence between the domains of law and particular forms of popular culture, and suggests that “legal meanings are flattening out as they yield to the compelling visual logic of film and TV images and the market forces that fuel their production.” Richard Sherwin, *When Law Goes Pop: The Vanishing Line between Law and Popular Culture* (Chicago: University of Chicago Press, 2000), 4. Sherwin argues that this logic—of association rather than ratiocination, of speed rather than deliberation—by its very nature undermines the legitimacy of the law itself.

16. Gewirtz, 149.

17. Robert M. Cover, *Justice Accused: Antislavery and the Judicial Process* (New Haven: Yale University Press, 1975).

18. Ernst Kantorowicz, *The King’s Two Bodies: A Study in Medieval Political Theology* (Princeton: Princeton, 1957).

19. Kantorowicz, 7–8.

20. Kantorowicz, 13. Should we be inclined to relegate this strange doctrine to the distant past, it might be worth considering the extent to which the more general principle of dual sovereignty is excavated when the “private” ethical failings of contemporary heads of state are made into a question of fitness for public office.

21. *The Madness of King George*, dir. Nicholas Hytner, Channel Four Films, 1994.

22. One can find a similar kind of forgetting in, for example, the self-imaginings of postcolonial states. Postcolonial scholars argue that the very identity of many modern Western nations is predicated upon a repression of the violence done to indigenous peoples at the moment of national origin, and the telling symptom of such repression, Peter Fitzpatrick has argued, is myth. To the extent that myths of origin authorize and organize specific legal orders by misrecognizing the violent actualities of founding, both Cathy Caruth’s analysis of legal hauntings and Drucilla Cornell’s meditation on the mystical foundations of authority (this vol.) highlight the central place of that misrecognition in that process of authorization and legitimation. See Collin Perrin, “The Postcolonial and the Rights of Indigenous Peoples,” *Law and Critique* 6 (1995): 55–74; Peter Fitzpatrick, *The Mythology of Modern Law* (London: Routledge, Chapman and Hall, 1992). On the impossibility of knowing origins, see also Peter Fitzpatrick, *Modernism and the Grounds of Law* (Cambridge: Cambridge University Press, 2001), esp. 16–20.

23. Herman Melville, *Billy Budd, Sailor and Other Stories* (New York: Pen-

guin, 1986). *Billy Budd, Sailor* is considered a late masterpiece by Melville and has generated a good deal of critical analysis. It was left incomplete at the time of his death in 1891 and finally published in unfinished form in 1924. For a chronicle and analysis of its writing, see Hershel Parker, *Reading Billy Budd* (Evanston, Ill.: Northwestern University Press, 1991). Richard Chase offers a psychoanalytic reading of the story in *Herman Melville: A Critical Study* (New York: Macmillan, 1949), chap. 11. For a good overview of the literary scholarship on *Billy Budd*, see Robert Milder, *Critical Essays on Melville's Billy Budd, Sailor* (Boston: G. K. Hall, 1989). Robert Ferguson links *Billy Budd* with mid-nineteenth-century legal positivism in *Law and Letters in American Culture* (Cambridge: Harvard University Press, 1984), 288–89.

24. Melville, 361–62.

25. As conceived by the English legal philosopher John Austin (in a work published just ten years before the enactment of his nation's Mutiny Act), law is a command, or "signification of desire," emanating from the sovereign and buttressed by an enforcing sanction. John Austin, "Law as the Sovereign's Command," in *The Nature of Law*, ed. M. P. Golding (New York: Random House, 1966), 81.

26. As Stanley Fish has characterized it, "Formalism is the thesis that it is possible to put down marks so self-sufficiently perspicuous that they repel interpretation; it is the thesis that one can write sentences of such precision and simplicity that their meanings leap off the page in a way no one—no matter what his or her situation or point of view—can ignore; it is the thesis that one can devise procedures that are self-executing in the sense that their unfolding is independent of the differences between the agents who might set them in motion." Stanley Fish, "The Law Wishes to Have a Formal Existence," in *The Fate of Law*, ed. Austin Sarat and Thomas R. Kearns, 161.

27. Austin, 95.

28. Melville, 362.

29. Melville, 350.

30. Melville, 367.

31. From a psychoanalytic standpoint, Vere-as-stern-disciplinarian is also symbolic father who lays down the law to his son, provoking simultaneous hatred and reverence. Indeed this scenario is Freud's primal scene of law. See generally Sigmund Freud, *Totem and Taboo: Several Points of Agreement between the Mental Lives of Savages and Neurotics*, trans. James Strachey (New York: W. W. Norton, 1950). Other scholars, including Frank and Legendre, also stress the "paternity" of law in this sense. See Frank, *Law and the Modern Mind*, esp. 3–23, 259–69, and Goodrich's synopsis of Legendre in *Law and the Unconscious*, 9. See also Peter L. Hays and Richard Dilworth Rust, "'Something Healing': Fathers and Sons in Billy Budd," *Nineteenth-Century Fiction* 34, no. 3 (Dec. 1979): 326.

32. This is precisely the point coeditor Lawrence Douglas makes, in somewhat different terms, in his analysis of Melville's narrative strategies in *Billy Budd*. Douglas argues that the veiling of this encounter between Vere and Billy

from an otherwise omniscient narrator marks the discursive limits of law; that is, it indicates the ways in which the judge (who in many ways resembles the narrator) and the condemned "exist in separate normative universes which cannot be discursively made one." As a result, the narrator cannot gain access to this encounter because, like Vere, he is aware that there are "structural limits that prevent omniscience from being transformed into persuasive authority." Effective judgment demands the cordoning off of explanatory space. Lawrence Douglas, "Discursive Limits: Narrative and Judgment in *Billy Budd*," *Mosaic* 27:4 (Dec. 1994): 152, 151.

33. Melville, 367.

34. Melville, 382.

35. Sigmund Freud, "The Psychotic Doctor Schreber," in *Three Case Histories*, ed. Philip Rieff (New York: Collier Books, 1963), 144.

36. Melville, 367.

37. Melville, 371.

38. Melville, 375.

39. Melville, 376.

40. Legendre understands this dynamic to be one of the "capture of the subject," the structure of whose entry into law is a structure of love. Goodrich, *Law and the Unconscious*, 20.

41. Cover, 199.

42. Anne Dailey has argued that despite scattered references to psychoanalysis, "the law has remained remarkably resistant to the methods and insights of psychoanalysis generally and the study of irrationality in particular." Anne Dailey, "Striving for Rationality," *Virginia Law Review* 86 (2000): 349, 350. See also Goodrich, *Law and the Unconscious*, 5.

43. Frank, 9. Frank argues that we create an ideal figure in the judge, whom we mistakenly imagine to be superhuman and passionless, and this father worship leads to a "noxious thralldom to mere authority." Frank, 143, 104, 245. For a recent commentary on these same themes see Austin Sarat, "Imaging the Law of the Father: Loss, Dread, and Mourning in *The Sweet Hereafter*," *Law and Society Review* 34 (2000): 3.

44. In addition to the Goodrich volume of his translated works, see Pierre Legendre, "The Other Dimension of Law," in *Law and the Postmodern Mind: Essays on Psychoanalysis and Jurisprudence*, ed. Peter Goodrich and David Gray Carlson (Ann Arbor: University of Michigan Press, 1998).

45. Peter Goodrich, *Oedipus Lex: Psychoanalysis, History, Law* (Berkeley: University of California Press, 1995).

46. Alain Pottage, "Crime and Culture: The Relevance of the Psychoanalytical," *Modern Law Review* 55 (1992): 421; "Recreating Difference," *Law and Critique* 5 (1994): 131.

47. David S. Caudill, *Lacan and the Subject of Law: Toward a Psychoanalytic Critical Legal Theory* (New Jersey: Humanities Press, 1997); "Freud and Critical Legal Studies: Contours of a Radical Socio-Legal Psychoanalysis," *Indiana Law Review* 66 (1997): 651.

48. Dailey, "Striving for Rationality."
49. Goodrich, *Law and the Unconscious*, 17.
50. Sigmund Freud, *Civilization and Its Discontents*, trans. James Strachey (New York: W. W. Norton, 1961), 70.
51. Freud, *Civilization and Its Discontents*, 86–100. See also Sigmund Freud, *Introductory Lectures on Psycho-Analysis*, trans. James Strachey (New York: W. W. Norton, 1966), 368.
52. Paul F. Campos, *Jurismania: The Madness of American Law* (New York: Oxford, 1998), ix.
53. Campos, 191.
54. On our faith in, and even deification of, reason in law, see Pierre Schlag, *The Enchantment of Reason* (Durham, N.C.: Duke University Press, 1998).
55. Janet Malcolm's *The Crime of Sheila McGough* (New York: Knopf, 1999) offers one example of a legal subject—in this case an attorney—arguably driven insane by her fetishization of legal rules. Of course in *The Trial* Kafka's Herr K. suffers more or less the same result from the opposite cause—the law's lack of relation to reason. Franz Kafka, *The Trial*, trans. Willa and Edwin Muir (New York: Vintage, 1937).
56. See, for example, Austin Sarat and William L. Felstiner, *Divorce Lawyers and Their Clients: Power and Meaning in the Legal Process* (New York: Oxford University Press, 1995); Patricia Ewick and Susan S. Silbey, *The Common Place of Law: Stories from Everyday Life* (Chicago: University of Chicago Press, 1998); Peter Fitzpatrick, *The Mythology of Modern Law* (New York: Routledge, 1992); Drucilla Cornell, Michel Rosenfeld, and David Gray Carlson, *Deconstruction and the Possibility of Justice* (New York: Routledge, 1992); J. M. Balkin, "Understanding Legal Understanding: The Legal Subject and the Problem of Legal Coherence," *Yale Law Journal* 103 (1993): 105–76; Stanley Fish, *Doing What Comes Naturally: Change, Rhetoric, and the Presence of Theory in Literary and Legal Studies* (Durham, N.C.: Duke University Press, 1989). Indeed the specific project of deconstructionist legal theory is bound up with this conceptualization of law to the extent that it also analyzes violence—the denial and suppression of the other—in order to uncover the outsider excluded or concealed by the operations of language. In addition to *Deconstruction and the Possibility of Justice*, see Drucilla Cornell, *The Philosophy of the Limit* (New York: Routledge, 1992).
57. Ewick and Silbey argue, "The multiple and contradictory character of law's meanings, rather than a weakness, is a crucial component of its power." Ewick and Silbey, 17.
58. 117 S.Ct. 644 (1997).
59. Brooks explores the complicated speech-act of the confession, both literary and legal, in *Troubling Confessions: Speaking Guilt in Law and Literature* (Chicago: University of Chicago Press, 2000).
60. 228 N.Y. 339 (1928).
61. 406 A.2d 624 (1979) and 424 A.2d 720 (1981).
62. 329 U.S. 459 (1947).
63. The term is from Nikolas Rose, *The Powers of Freedom* (Cambridge: Cambridge University Press, 1999).

64. Judge Caverly argued that to the extent that all criminals are abnormal, psy-knowledge could not offer any probative evidence in individual cases. Judge Mattison dismissed medicine as unable to guarantee Kinkel's future safety and understood judgment to be a gesture of guarantee that could not be compromised by such uncertainty.

65. Honoré de Balzac, *Colonel Chabert*, trans. Carol Cosman (1832; New York: New Directions, 1997).

66. Jacques Derrida, "Force of Law: The 'Mystical Foundations of Authority,'" in *Deconstruction and the Possibility of Justice*.

67. *Bowers v. Hardwick*, 478 U.S. 186 (1986).

68. On this distinction, which Derrida ultimately deconstructs in "Force of Law," see Walter Benjamin, "Critique of Violence," in *Reflections: Essays, Aphorisms, Autobiographical Writings*, ed. Peter Dementz, trans. Edmund Jephcott (New York: Harcourt Brace Jovanovich, 1978).