

# POPULAR TRIBUNALS, LEGAL STORYTELLING, AND THE PURSUIT OF A JUST LAW

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By Susan L. Waysdorf\*

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"I will . . . establish a tribunal, a tribunal to endure for all time . . ."<sup>1</sup>

"Law has been threatened by the disintegration of the public values in the larger society, and its future can only be assured by the reversal of those social processes. In order to save the law we must look beyond the law . . . . The analytical arguments wholly internal to the law can take us only so far. There must be something more - a belief in public values and the willingness to act on them."<sup>2</sup>

## I. Introduction

The current and historical realities of the U.S. legal system are best characterized by the contradiction between justice and order. Is this an irreparable rift? Have alternative forums for the pursuit of justice, contrary to the entrenched and formal legal system, emerged from community, political, or academic initiatives? What have been the social costs of the legal system's failure to deliver its intended good - justice? What examples exist of alternative justice systems from other countries and other times, from which we can create a visionary mosaic of possibilities towards a more just and ethical legal system? Is there a role for the excluded voices of the oppressed and for legal storytelling?

I intend to show in this article how legal storytelling, in serving a concrete and quasi-legal function, can help us to address these broader jurisprudential questions.<sup>3</sup> The goal is more than an academic exercise. Rather, this article emerges from the dialogue, about diversity and the role of public interest law, currently engaging many at law schools across the country. This dialogue is itself part of the process of developing morally effective and politically responsive lawyering for the next decade and beyond.

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3. The term "legal storytelling" is taken from Richard Delgado, Mari Matsuda and others, who form a sector of the "Law and Literature" movement that focuses on the excluded voices of the dispossessed and oppressed, the victims of social injustice - those whose voices are not ordinarily allowed expression or validation within the formal legal system. See, Symposium on *Legal Storytelling*, 87 MICH. L. REV. 2073 (1989). Legal storytelling is the use of the narrative in legal process - the otherwise silenced voices tell their own first-hand stories of oppression and struggle.

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1. Athena, quoted in EUMENIDES by Aeschylus, as cited by David Luban, *Some Greek Trials: Order and Justice in Homer, Hesiod, Aeschylus and Plato*, 54 TENN. L. REV. 279, 296 (1987).

2. Owen Fiss, *The Death of the Law?*, 72 CORNELL L. REV. 1, 14 (1986).

It is the contention of this article that legal storytelling can provide the nexus between justice-seeking values and the narrative form, within the context of more traditional legal discourse. In this way, legal storytelling can play a constructive role in mediating the tension between justice and order, by drawing on the popularist and community values of people in struggle with the legal system. My central claim is that it is the social responsibility of progressive lawyers, legal scholars, teachers, and law students to help generate, develop and nourish forums for legal storytelling and the public justice values which they create and promote. By doing so, we ourselves learn, while becoming better advocates and helping to empower those silenced by the formal legal system.

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To the extent legal storytelling can provide more than a humanistic gloss to the rigidly defined terrain of the legal system and the process of adjudication, it can actually serve areal jurisprudential function. In fact, the concept of legal storytelling has engendered one of the most compelling and innovative methodologies in recent times for changing the legal system from within, while challenging it frontally, from without. As a methodology, legal storytelling is also having an impact on legal education, as shown by recent works embracing and analyzing "narrative jurisprudence"<sup>4</sup>.

The premise that legal storytelling can actually play a concrete jurisprudential function is illustrated by the example of popular tribunals.<sup>5</sup> These tribunals have served, both in this country and in other, more progressive societies, to relate real life and struggle to the law itself, through legal storytelling. Popular tribunals, and the struggles out of which they arise, keep the pursuit of justice alive within the current constructs of this unjust society. They can be understood as examples of how "law is the projection of an imagined future upon reality."<sup>6</sup> Legal

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4. See, *Pedagogy of Narrative: A Symposium*, 40 J. LEGAL EDUC., Numbers 1&2 (Association of American Law Schools, March/June 1990).

5. People's tribunals, or popular tribunals, are generally speak-outs, gatherings to which people come to hear and to give witness, to provide oral testimony, to chronicle stories of oppression, to share common grievances, and perhaps to chart common plans for resistance. They can take many different forms, as the examples given in this paper will reflect: they can be part of the actual justice system of a country, such as the Cuban Popular Tribunals; they can be extra-judicial, but officially sanctioned, emergency forums, such as the Nicaraguan Popular Anti-Somocista Tribunals; or they can be community-initiated, informal gatherings, entirely independent of the formal legal system, such as those which have occurred in the U.S. However, they all share key features, perhaps most notably a level of informal, non-hierarchical structure, popular participation, and testimony from the people themselves as the centerpiece of the presentation.

6. Robert Cover, in *Violence and the Word*, 95 YALE L.J.

storytelling also has its own historical legacy in this country, most particularly in the 1960s, the lessons of which are a background to the ideas presented in this article.

The contention here is that there is a significant value to legal storytelling, as well as to the conscious and organized promotion of this narrative form. Legal storytelling may actually contribute to transforming and humanizing the law, as well as the value system around which and out of which the law operates. As a progressive methodology, legal storytelling can provide a vehicle to legal practitioners who refuse to participate in a system which silences the oppressed. By choosing instead to support and help empower those whose voices are silenced by the system, lawyers participate in reviving the value and potential of the law itself. It follows that justice might therefore be a more realizable goal.

It is my aim here to gain a clearer understanding of the well-entrenched contradiction between justice and order in the U.S. legal system, and how it is that the system has become so divergent from, and antithetical to, the true pursuit of justice.<sup>7</sup> I intend to do this by first discussing the lessons from "people's lawyering" of the 1960s for the challenges facing legal practitioners, justices, and legal academics today.

Second, I explore the jurisprudential constructs of several legal scholars, including Owen Fiss, Mari Matsuda, Robert Cover, Robin West, Richard Delgado, and David Luban, and their arguments within the "interpretive debate" of the "Law and Literature" movement, as applied to the issue of justice versus order. Third, I will discuss legal storytelling within this context, as an important model which gives expression to those voices ordinarily excluded from the legal system, and as a concrete way of mediating the tension between order and justice.

Finally, I will compare and contrast models of people's or popular tribunals from Cuba, Nicaragua, and the United States, as effective examples of legal storytelling and as alternative pursuits of justice. I will conclude with the suggestion that within these examples of relatively informal and alternative forums for legal storytelling lies a compelling, and inherently empowering, critical

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1601, 1605 (1986) argued that martyrdom, rebellion and revolution are all alternative responses of groups that have "failed to adjust to or accept domination while sharing a physical space . . . [and] are alternative responses when conditions make such acts feasible, and when there is a willingness not only to die but also to kill for an understanding of the normative future that differs from that of the dominating power." My claim is that people's tribunals, as struggles for justice outside the established bounds of the formal legal system, are also valid examples which fall squarely within Cover's definition of alternative responses to domination.

7. Robert Cover discussed the core of this contradiction in the following way:

Thus, because law is the attempt to build future worlds, the essential tension in law is between the elaboration of legal meaning and the exercise of or resistance to the violence of social control. "[T]here is a radical dichotomy between the social organization of law as power and the organization of law as meaning."

Id. at 1602, note 2 (quoting Cover, *The Supreme Court, 1982 Term - Forward: Nomos and Narrative*, 97 HARV. L. REV. 4, 18 (1983)).

justice value.

## II. The 1960s: A "Jurisprudence of Insurgency"

The political and social struggles of the 1960s clearly reflect the profound tension between justice and order in this country. Social control has historically been pursued by the government and power elites in order to maintain order. Domestic social control has included the suppression of rebellion and political organizing, the regulation of "crime," containment of the oppressed, and the maintenance of dominating cultural and political forces, such as racism and sexism. All too often, the legal system (and more particularly, the criminal justice system) has played a direct role in maintaining social control.

"People's lawyers" of the 1960s and early 70s practiced a "jurisprudence of insurgency," along with those activists from the movements for social change whom they defended.<sup>8</sup> These lawyers and legal workers directly challenged the collaborative and repressive role of the legal system. They supported tens of thousands of activists who confronted state repression, U.S. counter-intelligence forces, and the police and military. The experiences of "people's lawyers" and legal workers shed light on the choices they made, and the opposition they encountered, while practicing a jurisprudence of insurgency.

These lawyers challenged the privileges of their profession. They broke ranks with the establishment by taking legal direction and political lessons from their activist clients. These realities of the 1960s are the background to the ideas presented here. That is, they are the context for my concerns as a social activist and now lawyer-in-training, who believes that legal activism can be used as a vehicle for social change.

Why then, if I believe that the law and legal system can be used as a vehicle for social change, am I looking outside of the traditional and formal system, to a model which is not only alternative in purpose and form, but also in content? First, there is a continuum upon which public interest or civil libertarian activist/lawyers always travel, to some degree or another, variously rejecting or embracing the law and the legal system as it currently exists.

This tension of seeing the law both as part of the problem and as part of the solution has been succinctly described by Professor Mari J. Matsuda:

There are times to stand outside the courtroom door and say "this procedure is a farce, the legal system is corrupt, justice will never prevail in this land as long as privilege rules in the courtroom." There are times to stand inside the courtroom and say "this is a nation of laws, laws recognizing fundamental values of rights, equality and personhood." Sometimes . . . there is a need to make both speeches in one day.<sup>9</sup>

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8. The term "jurisprudence of insurgency" is borrowed from Michael Tigar & Madeleine Levy, *LAW AND THE RISE OF CAPITALISM* (1977).

9. Mari Matsuda, *When the First Quail Calls*, 11 *WOMEN'S RTS. L. REP.* 7, 8 (1989).

Secondly, popular tribunals provide a forum for the unheard and typically excluded voices of the oppressed and the under-represented classes of U.S. society: women, Black and other Third World people, lesbians and gay men, prisoners, those affected by unemployment, substandard housing, homelessness, AIDS, police brutality, political repression, imprisonment and institutionalization. From these voices, I believe we can and must better understand the problems themselves, and the nature of the tension between justice and order.

These are not voices of stereotypically passive victims. They are voices of the actors in the struggles against racism, sexism, economic disparities, the AIDS plague, the "drug war," and the endemic abuses of this society. As a result, they are the parties who most often find themselves up against, and trapped within, the legal system, most notably the criminal justice system and its prisons. They are also the same people who are increasingly locked out of the formal legal system, though they are the most in need of its protection and remedies. Consider, for example, the fact that it has become increasingly difficult for the poor and people of color to utilize the U.S. legal system as a vehicle for achieving relief of oppression and for seeking civil rights.

Furthermore, it is worth noting that forums such as popular tribunals point us beyond the formal legal system for alternate "understandings of the normative future that differs from that of the dominant power."<sup>10</sup> This is the case precisely because the dichotomy between justice and order is a morally and socially unacceptable one, and because law is essentially political. As Robert Cover suggested,

Some systems, especially religious ones, can perpetuate and even profit from a dichotomy between an ideal law and a realizable one. But such a dichotomy has immense implications *if built into* the law. In our own secular legal system, one must assume this to be an undesirable development.<sup>11</sup>

In this vein, another lesson of the 1960s is that alternative forums such as popular tribunals concretely apply the participatory, narrative form of legal storytelling, in the struggle for justice. "Let the people speak," "giving witness," "testimony of the oppressed," "voices from behind the walls" — all of these phrases are descriptive of a conception and a vision, coined in the 1960s, of "people's justice." In the 1960s, "people's justice" was not found in the courts; it was not particularly pursued in the courts. "People's justice" was sought when justice could not be achieved within the legitimate channels of the legal system — in the streets, community forums, sit-ins, protest marches, speak-outs, strikes. For radical lawyers, struggling for people's justice, and practicing a jurisprudence of insurgency, sometimes resulted in their being held in contempt of court.<sup>12</sup> At times, the struggle to

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10. Cover, 95 *YALE L.J.* at 1605 (cited in note 6).

11. *Id.* at 1617.

12. The term "contempt of court" is itself illustrative of my claim. In the introduction to *LAW AGAINST THE PEOPLE: ES-*

have the activist-client's story be heard in the courtroom became a vehicle for forging power and building a movement.

In the 1960s, the Black civil rights movement, the anti-war and student movements, the Black rebellions which rocked hundreds of urban centers, the emergence of organizations for national liberation among Black, Puerto Rican, Chicano and Native American peoples, the insurgent women's movement, the prisoners' rights movement, and the radical legal community which supported these movements, together presented one of the greatest challenges in U.S. history to the American legal system. These movements and their participants have many lessons to share, many stories to tell.<sup>13</sup>

Today, the movements of the 1960s have been effectively de-mobilized by, along with government-exacerbated internal factors, state repression and counter-insurgency strategies, most notably the FBI's Counter-Insurgency Program (COINTELPRO).<sup>14</sup> This counterinsurgency strategy

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SAYS TO DEMYSTIFY LAW, ORDER AND THE COURTS (1971), Robert Lefcourt describes an interesting historical example of this phenomena:

When during the 1969 Chicago Eight Conspiracy trial, the lawyers for these "political and cultural dissidents" joined with their clients to protest the use of an unconstitutional riot statute to suppress dissent, the racism of the court in denying Bobby Seale the right to his own lawyer and the politically repressive role of the court in denying all the defendants their right to fully present their defense, they were charged with contempt and sentenced to prison. William Kunstler's statement . . . [was] an affirmation that the lawyer is a citizen whose grievances must be heard.

13. The legal struggles of the 1960s - radical lawyering, the National Lawyers Guild and "people's law" communes, such as the New York Law Commune and the People's Law Office in Chicago—could in themselves be the subject of many studies, books, and articles. For an insightful and exciting overview of the radical legal movement of the 1960s, see, LAW AGAINST THE PEOPLE: ESSAYS TO DEMYSTIFY LAW, ORDER AND THE COURTS (cited in note 12). Another passage from Robert Lefcourt's introduction is worth quoting at length. Here, he discusses the insurgencies of the 1960s, the significance of the historical moment and the role of "People's Courts" and "People's Justice":

All the lawyers contributing to this book . . . agree, as does a growing proportion of the population, that the legal system, like the system of education, the health and military establishments, and the political process itself, is collapsing and can no longer be saved in its present form. The process of radical change is not, as some would argue, devoid of direction. Continual challenge, such as periodic prison revolts, lawyer protests, and bail abolition demonstrations, cause confusion and disorder which can lead to a new order. The idea of People's Courts, as practiced in socialist countries, is one way of altering existing power relationships within the legal apparatus. Overall the institutions which only pay lip service to democracy, to people's needs, and to the survival of the planet will have to be taken over and transformed by those who have been excluded from and oppressed by their operation, that is, the majority of the people.

14. For readings on COINTELPRO and government repression during the 1960s and beyond, see the following sources: Ward Churchill & Jim VanderWall, AGENTS OF REPRESSION: THE FBI'S SECRET WARS AGAINST THE BLACK PANTHER PAR-

was complemented by daily police repression in Third World communities, and the cumulative, embattling effects of a reactionary legal system. As a result of state repression against the Black liberation movement, as well as the Puerto Rican, Native American and Chicano-Mexicano struggles, many activists were killed and hundreds of others imprisoned. This could not have been accomplished without the full complicity of the U.S. legal system.

Now, several decades later, many convicted under the government's repressive strategies of the 1960s still remain imprisoned as political prisoners. While the legal system is no less unresponsive to the increasingly marginalized sectors of the oppressed, the ranks of "people's lawyers" have dramatically decreased. The need for responsible lawyering is a critical one, and a serious issue facing the legal profession today. A critical look at the U.S. legal system today still requires intense scrutiny of the underlying social and political system.

As radical lawyer/activist and now law professor Michael Tigar wrote almost two decades ago, "fundamental change is necessary to fulfill claims to social justice."<sup>15</sup> The ideological conception of people's justice, for those of us who are still (or newly) committed and sensitized to these issues today, has meaning and purpose in relation to the demands and felt needs, the realities and conditions of life itself for the oppressed. The need not only to find an outlet for the excluded voices, but to reach justice and to find relief, is no less pressing today.

### III. Justice v. Order: An Irreparable Rift?

As noted, the U.S. legal system has to some lesser or greater degree always been an instrument for social control, that is, the maintenance of social order, of class, racial and gender hierarchies. In more recent years, this status quoism has clearly come to mean stark conservatism, reaction, a full, no-holds-barred turning back of legal gains won by the Civil Rights Movement and the Women's Movement, in particular. In addition, the marginalized and under-represented are increasingly prevented from seeking redress or airing their grievances in the courts.<sup>16</sup>

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TY AND THE AMERICAN INDIAN MOVEMENT (South End Press 1988); Roy Wilkins & Ramsey Clark, SEARCH AND DESTROY: A REPORT BY THE COMMISSION OF INQUIRY INTO THE BLACK PANTHERS AND THE POLICE (Metropolitan Applied Research Center, 1973); Brian Glick, WAR AT HOME: COVERT ACTION AGAINST U.S. ACTIVISTS AND WHAT WE CAN DO ABOUT IT (South End Press 1989); Michael Deutsch, *The Improper Use of the Federal Grand Jury: An Instrument for the Internment of Political Activists*, 75 J. CRIM. L. & CRIMINOLOGY 1159 (1984); Assata Shakur, ASSATA: AN AUTOBIOGRAPHY (Lawrence Hill Press 1987); George Jackson, SOLEDAD BROTHER: THE PRISON LETTERS OF GEORGE JACKSON (Coward McCann 1970); Ward Churchill & Jim VanderWall, THE COINTELPRO PAPERS (South End Press 1990).

15. M. Tigar, *Socialist Law and Legal Institutions*, in LAW AGAINST THE PEOPLE (cited in note 12).

16. These values are also clearly reflected in the legal profession itself, in legal education, and among today's law students. See, e.g., *High Pay Draws 1989 Graduates to Big Firms, Enlistment for Public Interest, Government Jobs Drops*, New York Law Journal, June 8, 1989; *Out of 11,000, 243*

Perhaps nothing speaks to this development more clearly than the dismaying reality of the Supreme Court today. Even the relative advances of the 1950s and 1960s have been virtually shattered in recent terms. By restricting the rights of women to reproductive choice and abortion,<sup>17</sup> and by virtually destroying affirmative action and the effectiveness of the Civil Rights Acts,<sup>18</sup> the Supreme Court has clearly allied itself with white racism and misogyny.

The specter, and indeed sure prospect, of civil unrest, social violence and the upset of established social and economic hierarchies has traditionally motivated the Court to set the priority of order, rather than the priority of justice.<sup>19</sup> The point is that the U.S. legal system has become truncated in purpose, turned on its head, a virtual sham. Upholding the norms and social values once thought to have been intrinsic to the ideal of social justice is just not the central value motivating the U.S. courts today.<sup>20</sup>

Some of the theoretical constructs which have emerged from the Law and Literature, Legal Storytelling and Narrative Jurisprudence movements provide useful mechanisms for examining this contradiction between justice and order. Professor David Luban has used Greek mythology as a vehicle to argue that there is a fundamental conflict between justice and order. As other progressive thinkers in legal academia today, Professor Luban suggests that the formal legal system is essentially an instrument for maintaining social stability, order, and con-

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Went Into Public Interest From The Top Schools, National Law Journal, August 8, 1988.

17. *Webster v. Reproductive Health Services*, 109 S.Ct. 3040 (1989).

18. See, *Wards Cove Packing Co. v. Atonio*, 109 S.Ct. 2115 (1989) (statistical evidence of racial disproportionality in employment promotional policy not enough to establish a prima facie case of disparate impact violating Title VII); *City of Richmond v. J.A. Croson Co.*, 109 S.Ct. 706 (1989) (Richmond's minority set-aside program not justifiable or necessary to remedy effects of past discrimination); *Martin v. Wilks*, 109 S.Ct. 2180 (1989) (white city employees not barred by earlier failure to intervene, from challenging affirmative action decrees); *Patterson v. McClean Credit Union*, 109 S.Ct. 2363 (1989) (42 U.S.C. §1981 only applies to racial discrimination in the making and enforcement of contracts, not to the conditions of employment). The Civil Rights Act of 1990, recently vetoed by President Bush, was, in part, a legislative response to these judicial setbacks.

19. Cases in which the Supreme Court has set the priority of order over justice are best exemplified by *Brown v. Board of Education* ("Brown II"), 349 U.S. 294 (1955), in which the Court cut back on its initial decision in *Brown v. Board of Education* ("Brown I"), 347 U.S. 483 (1954).

20. The term "social justice" is used in this essay to mean not the administration of the institutionalized, formal legal system, but rather the values of equity, impartiality and fairness, to resolve conflicting social claims and unequal distributions of power as they affect peoples' lives. In this sense, "social justice" is a principle and an ideal, not an institutional mechanism. However, justice has been achieved at different times and in different places, including within the legal system in the U.S. It is righteousness and truth; sometimes it comes in the form of redemption or even retribution. It can be a rectifying of wrongs. As this definition stems from a popular notion of justice, the terms "popular justice" or "people's justice" also define this same principle.

trol. Arguing "in favor of justice rather than order as the more central value realized by a good legal system,"<sup>21</sup> he contends that equity and justice should be the objects of a truly just system.

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*Peace without justice is not true peace at all.*

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Despite the ancient Greek context of his article, Luban's interest in the conflict is not merely historical. "[F]or the tension between law as an instrument of order (which may be achievable only at the expense of justice) and law as an upholder of justice (which may have to be purchased at the cost of social instability or dislocation) is of enormous contemporary importance."<sup>22</sup> It is precisely this perspective and concern which makes Luban's critique of the unrelenting tension between order and justice in the legal system so useful to today's progressive legal practitioners and legal educators.

In Luban's analysis of both ancient Greece and the modern U.S., the pursuit of peace has become synonymous with the pursuit of social order. Yet, peace without justice in a fundamentally unjust or hierarchical society is not true peace at all.<sup>23</sup> "Stability," argues Luban, "without legal justice is quite literally impossible," for unless justice is the primary and central value of a legal system, then civil peace and "sociability will ultimately be unattainable."<sup>24</sup> Drawing on his analogy to ancient Greece, Luban notes that "institutions of justice exist (paradoxically) to stabilize a society rather than to do justice."<sup>25</sup> Consider the implications for a society in which "[t]he purpose of the court is not to administer legal justice in an absolute sense, but to transform malignant persuasion into benign persuasion in the name of social peace."<sup>26</sup>

Indeed the costs of this sham are enormously and perhaps immeasurably high. By analogy, Luban notes that in the ORESTEIA, "in the name of prosperity and peace, an unjust verdict converts women into a permanent underclass of society . . . For Aeschylus, the price of order is that we abandon legal justice in favor of social control."<sup>27</sup> In the contemporary context, this legal/social dilemma inevitably raises profound ethical and professional responsibility issues for lawyers. As Luban points out, lawyers today are in fact required by the American Bar Association Code of Professional Responsibility to promote this sham.<sup>28</sup> "Suppose," Luban suggests, "a lawyer

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21. Luban, 54 TENN. L. REV. at 284 (cited in note 1).

22. *Id.* at 281.

23. It is worth noting that Luban's analysis is consistent with the slogan of the Black community in New York City in the struggle against police brutality and racist attacks. From Howard Beach, Queens in 1987 to Brooklyn in August, 1989, the demand of the Black community has been "NO JUSTICE, NO PEACE!"

24. Luban, 54 TENN. L. REV. at 294 (cited in note 1).

25. *Id.* at 321.

26. *Id.* at 311.

27. *Id.* at 313.

28. *Id.* at 321 (quoting from the Model Code of Professional

is convinced that the legal system does not deserve confidence, that it is profoundly corrupt; it sounds as though the lawyer could be disciplined for making these suspicions too public."<sup>29</sup>

Finally, Luban argues, the "human cost of renouncing the quest for justice,"<sup>30</sup> and abandoning justice for stability, involves the entrenchment of hierarchies and the furtherance of dominant interests. (In Aeschylus' ORESTEA this inevitably leads to the further subjugation of the Furies/all-women.) By contrast, Luban's hero, Hesiod, "unlike Aeschylus or Plato [or Homer], is writing from the standpoint of the victim."<sup>31</sup> In this way, Luban concludes by projecting a significant role for legal storytelling in empowering and giving expression to excluded voices. He also raises the ethical proposition that lawyers should help promote legal storytelling.

One can scarcely overstress the importance of this fact. The defining fact about legal institutions that do not do justice is that *they create innocent victims* . . . reconciliation often only means that the victim has silently swallowed his injury . . . . Once we determine to make justice a genuine goal for an open society . . . the victim's is the standpoint we can no longer ignore.<sup>32</sup>

#### IV. The Law As Deliverer of Justice: A Dream Deferred?

Importantly, the pursuit of social justice has not always been absent from the process of judicial decision-making in this country. Certainly the early civil rights decisions, best reflected in the initial *Brown v. Board of Education*,<sup>33</sup> which gave life to the Reconstruction-era Amendments, are a compelling expression of this. The notion that the "people" themselves have a role to play in the determination, distribution and deliverance of justice within the formal and legitimized adjudicatory legal system, lends some depth to the meaning of social or popular justice. It has seen some, if minimal and impermanent, reality.

The constitutional right to a jury trial of one's peers is another clear manifestation of this notion. "It is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community."<sup>34</sup> "Our notions of what a proper jury is have developed in harmony with our basic concepts of a democratic society and a representative government."<sup>35</sup> As recently as 1975, the Court held that a

state jury system could not systematically exclude women from jury service, while stating in significant dicta that:

The purpose of a jury is to guard against the exercise of arbitrary power - to make available the commonsense judgement of the community as a hedge against the overzealous or mistaken prosecutor and in preference to the professional or perhaps overconditioned or biased response of a judge [cite omitted]. This prophylactic vehicle is not provided if the jury pool is made up of only special segments of the populace or if large, distinctive groups are excluded from the pool. Community participation in the administration of the criminal law, moreover, is not only consistent with our democratic heritage but is also critical to public confidence in the fairness of the criminal justice system.<sup>36</sup>

Professor Owen Fiss has similarly advocated the notion that law itself is a public ideal, in that law arises from and reflects the values of the community. Fiss is critical of both the right and the left, that is, both the Law and Economics movement and the Critical Legal Studies movement, for uniting "in their rejection of the notion of law as public ideal . . . [N]either is willing to take law on its own terms, and to accept adjudication as an institutional arrangement in which public officials seek to elaborate and protect the values that we hold in common."<sup>37</sup>

Although Fiss readily recognizes that the legal system today is remiss in its mission to uphold society's values, he is critical of the two schools insofar as they give us nowhere to go. Because he is sympathetic to the egalitarianism of the Critical Legal Studies movement, he is particularly disturbed by its nihilism, its negative purpose. By way of his objective interpretivist analysis, which rests on a view of judges as being members of a legal "interpretive community," Fiss argues for an affirmative vision, albeit an idealistic one, of the judiciary and the law.<sup>38</sup>

Professor Robin West largely rejects Fiss's

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Responsibility, Canon 9 and EC 9-1 (1979): "Continuation of the American concept that we are to be governed by rules of law requires that people have faith that justice can be obtained through our legal system. A lawyer should promote public confidence in our system and in the legal profession."

29. Luban, 54 TENN. L. REV. at 321 (cited in note 1).

30. *Id.* at 324.

31. *Id.* at 324.

32. *Id.* at 324.

33. 347 U.S. 483 (1954).

34. *Smith v. Texas*, 311 U.S. 128, 130 (1940).

35. *Glasser v. United States*, 315 U.S. 60, 85 (1942).

36. *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975).

37. Fiss, 72 CORNELL L. REV. at 2 (cited in note 2).

38. Fiss's arguments are utilized for the purposes of this paper primarily as a useful critique of the nihilism and cynicism of the Critical Legal Studies movement on the one hand, and the mechanistic instrumentalism, conservatism and reaction of the Law and Economics movement on the other. Beyond this, however, Fiss's own views, or at least his earlier views, can be seen as too idealistic. His ultimate reliance on the written word of the law as an adequate reflection of morality simply doesn't work in this highly political and divided society. In this sense, I join with the claims of the Critical Legal Studies movement that "law is politics." In this country, so dangerously divided by classism, racism and sexism, there is no one set of "community values," as Fiss claims. The law and most judges have always represented the status quo and certain dominant interests. When judges set opinions, and interpret the law, they are giving their political and social views of the case before them. For further discussion of the subjective and objective interpretist schools, see also, Stanley Fish, *IS THERE A TEXT IN THIS CLASS?* (1980); and Owen Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739 (1982).

"Objective Interpretivism" approach.<sup>39</sup> She criticizes his idealist view of the law as a reflection of "community values," while re-stating the interpretive debate within the context of modern-day realities and contradictions. Professor West argues, "South Africa, Nazi Germany, Stalinist Russia, and the slave-holding South, if nothing else, have taught us that there is no moral guarantee in the idea of law."<sup>40</sup> Indeed, it gives false comfort to suggest that there is one unified and egalitarian set of communal values in the socially and politically torn United States.

Perhaps West is warning us not to fall easy prey to the righteous-sounding optimism of the "law as ideal" or the enticing warmth of Fiss's "community" notion. Legal and social activists, while looking for a vision to embrace, and stymied by the Critical Legal Studies movement's lack of direction and solution, can be misled by this rhetoric. In calling Fiss's objective interpretivism analysis a "justificatory illusion,"<sup>41</sup> West argues that to blur the distinction between the "law" that is and the moral ideal that ought to be reveals the irresponsibility of "viewing legal analysis as either an objective or subjective interpretive act."<sup>42</sup>

For in fact, West argues, the so-called "disciplining rules" which presumably hold the judiciary within the bounds of the "interpretive community's" morals, are essentially as disturbing as the nihilism Fiss is reacting to. West notes that Fiss's position is "marred by an undue optimism regarding community."<sup>43</sup> She puts this debate into contemporary reality.

Moral relativism is no alternative to the moral nihilism Fiss fears in subjectivism. The claim that it is, I think, rests upon an optimism regarding "community" and more specifically our own historical commu-

nity, which is simply unwarranted. Surely, from the perspective of those *most in need of the law's protection* — slaves, women, workers, children, the poor, the illiterate, the uneducated, dissidents and other members of that vast and silenced majority whom the "community" in its relative moral wisdom has at one time or another cast off — a relativism that ties justice to community norms and practices is as odious and even frightening as the "nihilism" Fiss imagines he sees in the deconstructive instincts of his opponents.<sup>44</sup>

Despite the inherent limitations and abstractions in Fiss's arguments, his theory inspires hope for the future. It is noteworthy that Fiss looks to the women's movement for a vision of that future. He concludes by arguing against traditional gender values and female subjugation (in the name of justice), in much the same way Luban concludes his essay which interprets the Greek trials. In fact, Luban recognizes that Fiss is with him in the camp favoring justice over peace.<sup>45</sup> Fiss's hope for the future of the law, his insistence that law can still represent social ideals, is shown by his strong support for the feminist legal critics. Feminists, Fiss argues, are unmasking the law, and struggling for a "critique . . . aimed at freeing law from the past."<sup>46</sup>

They, like the realists [of the 20's and 30's], are moved by an affirmative vision — if not liberty, then a true and substantive equality — and they appreciate how the law can be used to further that vision. But that is not critical legal scholarship . . . . Critical legal studies scholars are distinguished (if at all) from feminists and the legal realists of an earlier generation by the purity of their negativism.<sup>47</sup>

Fiss's argument, even if overly idealistic, is thus nonetheless compelling. In particular, his vision is ap-

39. Robin West, *Adjudication Is Not Interpretation: Some Reservations About the Law-As-Literature Movement*, 54 TENN. L. REV. 203 (1987).

40. *Id.* at 214.

41. *Id.* at 210.

42. *Id.* at 209.

43. *Id.* at 219. For further critique of Fiss's analysis, see, Paul Brest, *Comment on Fiss: Interpretation and Interest*, 34 STAN. L. REV. 765, 770 (1982). In raising doubts about the clear-cut and normative role which Fiss assigns to the Supreme Court, Brest cannot concur with Fiss's neutral view of the "interpretive community," nor its methods of "constitutional interpretation." Brest argues, "When combined with the authoritativeness of legal interpretation, the demographic composition of our 'interpretive community' presents normative problems in a democratic polity. The members of the legal interpretive community are mostly white, male, professional, and relatively wealthy. However humble their backgrounds, they are members of a ruling elite." Brest at 770-771. Troubled by the social basis for his own and Fiss's "commitment to the rule of law," Brest suggests that some honest introspection is called for. "I wonder whether our commitment to the rule of law, as to other 'public values,' is not related to our relatively fortunate status within this society." Brest at 772. Brest states, "the line separating law from politics is not all that distinct and that its very location is a question of politics. I do not think this is nihilism." Brest at 773. In contrast, popular tribunals, as discussed in this article, avoid the problems of "demographic composition" described by Brest, as by definition they are judges and juries of peers.

44. West, 54 TENN. L. REV. at 218-219 (cited in note 39). Fiss himself, moreover, appears to question whether his position is somewhat overly optimistic. The following is from Fiss's *The Death of the Law?*, 72 CORNELL L. REV. at 11-12 (cited in note 2).

In this account of adjudication I recognize that I am making an empirical assumption about the richness of the legal system in a country such as the United States. I am assuming that our legal culture is sufficiently developed and textured so as to yield a body of disciplining rules that constrains judges and provides the standards for evaluating their work. This assumption is, of course, open to a factual challenge, as any empirical claim must be. Indeed, I advanced this theory a few years ago, and nowadays I wonder whether I am mistaken in making this assumption and whether I am guided more by a duty to see the best in life rather than by a tough assessment of the facts. The proponents of critical legal studies are not, however, prepared to disagree with me on these (mundane) terms. For their claim is . . . rather that law, by its nature, can never provide the constraint needed to achieve objectivity. Their idea is not that there are no right answers, but rather that there can never be a right answer.

45. Luban, 54 TENN. L. REV. at 282 (cited in note 1).

46. Fiss, 72 CORNELL L. REV. at 9 (cited in note 2).

47. *Id.* at 9.

pealing because it reflects a less cynical and more optimistically egalitarian view of human nature and the potential for the pursuit of justice.<sup>48</sup> In fact, Fiss's analysis is fueled by a vision of the 60s, when "we were drawn to law as public ideal, [while] in the next decade we took refuge in the politics of selfishness."<sup>49</sup> Despite my disagreements with Fiss's reliance on the word of the law and his belief in a singular and representative community morality, this vision of "the 60s" is a compelling one. The notion is in fact central to sustaining a belief that law can be salvaged and utilized as a vehicle for social change.

Finally, to Fiss it is not surprising that both the Critical Legal Studies movement and the conservative Law and Economics movement sprang up out of the decade of the 1970s, where "[t]he prospect of understanding and nourishing a common morality seemed hopeless."<sup>50</sup> For in fact, argues Fiss, "[b]oth movements can be understood as a reaction to a jurisprudence, confidently embraced by the bar in the sixties, that sees adjudication as the process for interpreting and nurturing a public morality."<sup>51</sup> Fiss himself counters hopelessness because he is sustained by this "historical vision — by remembering the 1960s and the role that the law, and specifically the Warren Court, played in the struggle for racial equality."<sup>52</sup>

Who, if anyone will carry on this legacy? Where do we look for justice to be delivered? Can law itself be appreciated as a generative force of our public life, as Fiss contends? Is it realistic or fair (to the women's movement) to look to the women's movement and feminism, as Fiss suggests, to fulfill the dream of the 1960s? For indeed, what is needed is a social force that will be "the instrument of social regeneration the law awaits[.] . . . Beyond that, it is difficult to know how a belief in public values might be regenerated."<sup>53</sup>

48. See also, Owen Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. at 750 (cited in note 38). Professor Fiss claims that "Viewing adjudication as interpretation helps to stop the slide towards nihilism. It makes law possible . . . I have explained how objective interpretation becomes possible in the law, even if it is not possible in literature."

Decidedly more optimistic in this earlier work, Fiss relies on the law as the ideal. He steadfastly espouses his own "commitment to the rule of law" and more specifically, the Constitution itself. In this work, Fiss concludes: "My defense of adjudication as objective interpretation, however, assumes that the Constitution has some meaning — more specifically, that the text embodies the fundamental public values of our society." 34 STAN. L. REV. at 762-763. This is precisely the framework that Paul Brest critiques in *Interpretation and Interest*, 34 STAN. L. REV. 765. (cited in note 43).

49. Fiss, 72 CORNELL L. REV. at 14 (cited in note 2).

50. *Id.* at 14. See also, Fiss's discussion of this issue in *Objectivity and Interpretation*, 34 STAN. L. REV. at 741 (cited in note 38). "The nihilism of today is largely a reaction to this reconstructive effort of the sixties."

51. Fiss, 72 CORNELL L. REV. at 14 (cited in note 2).

52. *Id.* at 14-15.

53. *Id.* at 15.

## V. Popular Tribunals: "Legal Storytelling" As a Criticism of the Law

To criminalize the telling of any story is to silence that voice.<sup>54</sup>

It is perhaps precisely because "[l]aw is a product of power"<sup>55</sup> that alternative forums for seeking justice arise out of grassroots struggles for self-determination, and against racism, sexism and classism. As a forum that is explicitly built on the use of the narrative or legal storytelling — the voices of the oppressed, those typically excluded from the hallowed courts of the formal legal system — popular tribunals are an alternative model for the pursuit of justice, although incomplete and insufficient in themselves as a permanent or long-term solution.

Both the concept of popular tribunals, and their concrete manifestations by communities in struggle, serve as useful counterpoints to the traditional legal system's almost complete rejection of the narrative form. By simple juxtaposition, the tribunal highlights the reality that the U.S. legal system has become separate from and even counter to the pursuit of justice, while it has become increasingly a tool of social control.

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*As a forum that is explicitly built on the use of the narrative — the voices of the oppressed — people's tribunals are an alternative model for the pursuit of justice.*

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The claim that people's tribunals are themselves a criticism of the law is consistent with the fact that the very need for people's tribunals is based on a recognition that fundamental social and political change is necessary in order to truly achieve justice. In other words, inherent in the existence of popular tribunals, is an underlying criticism of the law, and of the legal system. By participating in, witnessing or even acknowledging the need for such tribunals, we are forced to recognize the failures of the legal system, as well as its role as a vehicle for social control. Conversely, if the formal system of adjudication provided justice, there would be no need for popular tribunals and for legal storytelling. These alternative forums stem from a recognition that law is a product of power, and therefore must be met, with power, by a new vision. As Professor West argues:

By focusing on the distinctively imperative core of adjudication, instead of its interpretive gloss, we free up meaningful criticism of law. Adjudication, like all of law, is imperative — it is a part of politics . . . .

54. Toni Masaro, *Empathy, Legal Storytelling and the Law: New Words, Old Wounds?*, 87 MICH. L. REV. 2073, 2109 (1989).

55. West, 54 TENN. L. REV. at 277 (cited in note 39).

The criticism of law . . . cannot be grounded in yet another interpretation of what is. It must rest on a claim regarding that which ought to be, not a claim regarding that which is, or how power has been used to date. It must be grounded in the text we didn't write — the text of our natural needs, our true potential, our utopian ideals.<sup>56</sup>

As long as we exist in an unjust social and political system, wherein the formal adjudication process is played out on the "field of pain and death,"<sup>57</sup> popular tribunals will find their source in such "meaningful criticism." As such, they are themselves a criticism of the law and a part of the text of our "utopian ideals."

An essential feature of people's tribunals, whether in post-revolutionary Nicaragua and Cuba, or those stemming from grassroots struggles in the United States, is that the people themselves, usually the victims of social injustice, are the main players. They speak witness, weave oral histories and tell the stories of their oppression and their struggles. They share with those gathered an indictment of the forces who have wronged them — whether it is the police, a welfare agency, the U.S. military, an employer, the FBI, or the Ku Klux Klan.

This process is self-regenerating. In other words, the struggle to speak out is itself an empowering process, producing a strengthening of voices. These groups are what Professor Richard Delgado calls "outgroups, groups whose marginality defines the boundaries of the mainstream, whose voice and perspective — whose consciousness — has been suppressed, devalued, and abnormalized."<sup>58</sup> The "outgroups" of contemporary America include welfare mothers, pro-Choice advocates, AIDS activists and people who are HIV positive, homeless people, victims of police brutality, Black people struggling against racism, Central American sanctuary workers, targets of the political police (FBI), prisoners, people acting in solidarity against U.S. policies in Central America and South Africa.

These typically under-represented sectors are the potential participants in today's popular tribunals. They are the creators of legal storytelling, and they put it into practice. Yet their forums are not courtrooms. Ordinarily in opposition to the established powers and the legal system, these are communities of people in struggle. Their oral presentations "create their own bonds, represent cohesion, shared understandings, and meanings."<sup>59</sup>

Professor Delgado argues that legal storytelling

serves several key purposes. By telling their stories, the powerless and disenfranchised are empowered, for "[t]he cohesiveness that stories bring is part of the strength of the outgroup."<sup>60</sup> They educate those of us who are not immediately in their camp.

Stories, parables, chronicles, and narratives are powerful means for destroying mindset — the bundle of presuppositions, received wisdoms, and shared understandings against a background of which legal and political discourse takes place. These matters are rarely focused on. They are like eyeglasses we have worn a long time . . . Ideology — the received wisdom — makes current social arrangements seem fair and natural . . . The cure is storytelling (or as I shall sometimes call it, counter-storytelling). As Derrick Bell . . . and others show, stories can shatter complacency and challenge the status quo.<sup>61</sup>

Not only can legal storytelling, or in my suggested model, popular tribunals, challenge the status quo, empower those who speak out, and educate those who will listen, but they can serve a normative function as well. They build community and shore up value systems in times of oppression, disempowerment, and distress. Professor Delgado has suggested:

. . . stories build consensus, a common culture of shared understandings, and deeper, more vital ethics. Counterstories, which challenge the received wisdom, do that as well. They can open new windows into reality, showing us that there are possibilities for life other than the ones we live. They enrich imagination and teach that by combining elements from the story and current reality, we may construct a new world richer than either alone. Counterstories can quicken and engage conscience. Their graphic quality can stir imagination in ways in which more conventional discourse cannot.<sup>62</sup>

Legal storytelling can help a group to construct a shared reality. Speaking witness, by chronicling injustice, can help the group to formulate goals and strategies, to build a communal sense of outrage and to move people towards collective action. In this way, tribunals can be "[m]ore than just a narrative, [but rather] a call to action, a call to join . . . in destroying the current story."<sup>63</sup>

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*Storytelling is a form of healing, whereby both the teller and the listener are changed.*

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Furthermore, legal storytelling allows members of "outgroups" to preserve themselves psychically and to

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56. Id. at 278.

57. Cover, 95 YALE L.J. at 1607 (cited in note 6).

58. Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411, 2412 (1989). See also, Derrick Bell, *AND WE ARE NOT SAVED* (Basic Books 1987); Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320 (1989); Kim Lane Scheppelle, *Foreward: Telling Stories*, 87 MICH. L. REV. 2073 (1989); David Luban, *Differences Made Legal: The Court and Dr. King*, 87 MICH. L. REV. 2152 (1989); and Robert Cover, *JUSTICE ACCUSED: ANTI-SLAVERY AND THE JUDICIAL PROCESS* (1975).

59. Delgado, 87 MICH. L. REV. at 2412 (cited in note 58).

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60. Id. at 2412.

61. Id. at 2413-2414.

62. Id. at 2414-2415.

63. Id. at 2430.

lessen "their own subordination."<sup>64</sup> Storytelling is therefore a form of healing, whereby both the teller and the listener are changed.

The storyteller gains psychically, the listener morally and epistemologically. . . . By becoming acquainted with the facts of their own historic oppression — with the violence, murder, deceit, co-optation, and connivance that have caused their desperate estate — members of outgroups gain healing.<sup>65</sup>

The result, argues Delgado, need not necessarily be a violent call to action, but can be found in the realization itself of "how one came to be oppressed and subjugated. Then, one can stop perpetrating (mental) violence on oneself."<sup>66</sup> Delgado sums up the impact of legal storytelling:

So stories — stories about oppression, about victimization, about one's own brutalization — far from deepening the despair of the oppressed, lead to healing, liberation, mental health. They also promote group solidarity. Storytelling emboldens the hearer, who may have had the same thoughts and experiences the storyteller describes, but hesitated to give them voice. Having heard another express them, he or she realizes, I am not alone.<sup>67</sup>

Finally, legal storytelling helps oppressed groups because by communicating the story of struggle, the narrator actually affects the oppressor, in certain circumstances.

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*The struggle to speak out is itself an empowering process.*

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Not only do willing listeners, in some circumstances, enrich their own reality through re-education, but they may also acquire the ability to see the world through the other's eyes. "[S]hared words can banish sameness, stiffness, and monochromaticity and reduce the felt terror of otherness when hearing new voices for the first time."<sup>68</sup> The result is that by "seeking out story tellers different from ourselves and afford[ing] them the audience they deserve," we all benefit, for stories humanize us.<sup>69</sup>

Indeed, as Professor Matsuda has argued, "[t]he failure to hear the victim's story results in an inability to give weight to competing values of constitutional dimension,"<sup>70</sup> and in this way, serves to dangerously sustain the violent status quo. Viewed in this light, it is important to consider that lawyers have a social responsibility to promote legal storytelling, by helping to create and partic-

ipate in forums such as popular tribunals. In so doing, lawyers increase the empowerment of their clients. Lawyers, as legal activists, can also help bring willing listeners within range of the otherwise excluded and unheard voices. Finally, lawyers can dramatically improve their own lawyering by sensitizing themselves to the stories and analysis expressed by their clients.

Professor Matsuda has called this form of lawyering "Outsider Jurisprudence."<sup>71</sup> It has become an increasingly significant school of contemporary legal thought, methodology and political action.

This method is consciously both historical and revisionist, attempting to know history from the bottom. From the fear and namelessness of the slave, from the broken treaties of the indigenous Americans, the desire to know history from the bottom has forced these scholars to sources often ignored: journals, poems, oral histories, and stories from their own experiences of life in a hierarchically arranged world. . . . This methodology, which rejects presentist, androcentric, Eurocentric, and false-universalist descriptions of social phenomena, offers a unique description of law. . . . It accepts the standard teaching of street wisdom: law is essentially political. It accepts as well the pragmatic use of law as a tool of social change, and the aspirational core of law as the human dream of peaceable existence.<sup>72</sup>

Precisely because law is essentially political, the voices of the excluded, those whom we as lawyers represent, or with whom we may work side by side in community struggles, are our collective social conscience.

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*The voices of the excluded are our collective social conscience.*

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They are a mirror of, perhaps a reminder of, our own social responsibility, as we work within a fundamentally unjust and largely immoral legal system. For indeed, "[i]t is the narrative of social protest and moments of 'creative tension' that reminds us of unkept promises and of the moral emergency in which we live."<sup>73</sup>

#### VI. Examples of Legal Storytelling: Popular Tribunals in Cuba, Nicaragua and the United States Movement in Support of Human Rights for Political Prisoners

Finally, legal storytelling is perhaps best explained by example, that is, by telling a story about the storytelling. As I have suggested throughout this essay, popular tribunals are a practical application of collective legal storytelling. In each of the following examples, a

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64. Id. at 2436.

65. Id. at 2437.

66. Id.

67. Id.

68. Id. at 2440.

69. Id.

70. Matsuda, 87 MICH. L. REV. at 2376 (cited in note 58).

71. Id. at 2323.

72. Id. at 2324.

73. Luban, 87 MICH. L. REV. at 2224 (cited in note 58).

form of "outsider jurisprudence" has been utilized through popular tribunals, to right a wrong, to express a grievance otherwise untold, to move a group to action, and to educate. They are at one and the same time similar to and different from one another. In each of the following case studies — the Popular Tribunals of early post-revolutionary Cuba, the Popular Anti-Somocista Tribunals in contemporary revolutionary Nicaragua, and the tribunals held in support of political prisoners in the United States — a degree of people's justice has been won through popular participation.

### Cuban Popular Tribunals

The Cuban Popular Tribunals developed as an attempt to provide an alternative to the legal system which revolutionary leader Fidel Castro, himself trained as a lawyer, condemned as unresponsive and counter-revolutionary.<sup>74</sup> These Popular Tribunals were in operation between approximately 1964 and 1974. They had authority over lesser crimes, torts, juvenile delinquency cases, domestic relations disputes and minor labor problems. These tribunals functioned within a non-adversarial legal system, and in a newly socialist and egalitarian post-revolutionary Cuban society. The Tribunals had many purposes, but primarily they served to promote popular participation in the legal-ethical redevelopment of the new nation. They also served as a forum for popular education.

With the Cuban Revolution of 1959 came a transformation of Cuban society, which in turn had an almost immediate transformative effect on its legal system. These changes began with a series of fundamental revolutionary laws passed between 1959 and 1963. These laws affected the socio-economic relations of land-owning, schooling, the expropriation and nationalization of Cuban banks and U.S. corporate holdings, as well as agrarian reform.<sup>75</sup> Underlying these legal changes were socialist principles. These principles include the following jurisprudential premise which underlies what the Cubans call socialist legality:

People acquire understanding and respect for the law when they participate in the very formulation and administration of the law, when they participate in the very formulation and administration of the legal system.<sup>76</sup>

The Cuban Popular Tribunals, utilizing a form of narrative jurisprudence, participatory justice, and legal storytelling, served this central function.

By the early 1970s, when the Cuban Revolution was entering a new stage of development, the Popular Tribunals were no longer effectively serving their original purpose. The Popular tribunals were for the most part dis-

mantled, with the ratification of the Cuban Constitution in 1976. At that point, institutionalization of the legal system took place, and a more formal and regulated legal system, still in operation today, was put in place.<sup>77</sup> Yet, these early post-revolutionary Popular Tribunals, and the creative sanctions which they provided,<sup>78</sup> left a legacy concerning the role of narrative and participatory jurisprudence, in promoting normative values and the building of community.

It is noteworthy that the Popular Tribunals had lay judges who were not legally trained. These people's courts were located in community storefronts, occurred only in the evening after working hours, and encouraged total public participation. In this way, the Popular Tribunals were primarily a vehicle for popular education at a time when a new morality was being developed, and the old ideas and values of the Batista regime were being dismantled and replaced. They were intended to teach the Cuban population the laws in general and the new laws in particular, "as well as to instill in the people a revolutionary consciousness and a socialist mentality."<sup>79</sup> Night after night, the audience, the residents of the neighborhood zona, packed the informal storefront courtrooms to hear the stories of the disputes or crimes at issue, told in the words of their neighbors. Often there were not enough seats, and the crowd overflowed into the streets.

Based on his conversations with Cuban assessores,

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77. For more readings on post-revolutionary and contemporary Cuban legal system, see, Luis Salas, *The Emergence and Decline of the Cuban Popular Tribunals*, 17 LAW & SOC'Y REV. 587 (1983); Henry Dahl, *The Use of Arbitration in Cuba: International Solutions For The Resolution of Local Problems*, 20 U. MIAMI INTER-AM. L. REV. 681 (1989); Luis Salas, *The Judicial System of Postrevolutionary Cuba*, 8 NOVA L.J. 43 (1983); Harold Berman & Van Whiting, *Impressions of Cuban Law*, 28 AM. J. COMP. L. 475 (1980); Kennedy, *Cuba's Ley Contra La Vagrancia: The "Law on Loafing,"* 20 U.C.L.A. L. REV. 1177 (1973); Debra Evenson, *Economic Regulation in Cuba: The State Arbitration System*, 8 LOY. L.A. INT'L. & COMP. L.J. 371 (1986); Robert Cantor, *New Laws for a New Society*, Cuba Resource Center Newsletter 3,5 & 6 (1973).

78. I note these sanctions here because they provide an important window on the Cuban Popular Tribunals. They are noteworthy for their purely rehabilitative nature within the context of the Cuban non-adversarial legal system.

Briefly, the sanctions were: (1) public admonition (*amonestación pública*), in which the defendant would receive a warning or lecture; (2) educational improvement (*superación educacional*); (3) deprivation of rights (*privación de derechos*), in which the person sanctioned was deprived of the same "social right" which the Tribunal found his *conducta antisocial* had abused; (4) banishment from a specific place (*alejamiento*), in which a drunkard might be prohibited from entering a particular tavern; (5) confinement to a specific place (*confinamiento*), a relatively severe sanction reserved for those who would have been incarcerated; (6) sanction of relocation (*reubicación*); (7) confiscation (*decomiso*) of the fruits or instrumentalities of the offense; (8) sanction of indemnification (*indemnización*), which was used primarily to indemnify a victim for physical injuries; and (9) sanction of deprivation of liberty (*privación de libertad*), composed of interment, forcing the defendant to live and work elsewhere for up to 180 days, and non-interment (the doing of certain tasks). Berman, 69 COLUM L. REV. at 1329-1331 (cited in note 74).

79. Id. at 1350.

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74. Jesse Berman, *The Cuban Popular Tribunals*, 69 COLUM. L. REV. 1317 (1969).

75. John Carro, *The Structure of Legal Education and the Practice of Law in Cuba*, 94 REVISTA DE DERECHO PUERTORRIQUEÑO 89, 90 (1985).

76. Id. at 91 (quoting from *Blas Roca*, *Bohemia*, March 2, 1973).

or revolutionary lawyers, as well as with spectators at the tribunals, Jesse Berman concluded that the Popular Tribunals played two interrelated purposes:

they "function in the neighborhood, so that neighbors and acquaintances of those being judged can attend the trials and can make these trials truly public," and that the public trials "educate the new man[,] . . . secure the socialist laws" and "correct those who still keep the customs of the old oppressor society." [cites omitted] These ideas may be capsulized as popular involvement and popular education.<sup>80</sup>

In some cases which Berman observed, the ultimate in audience participation occurred: witnesses emerged spontaneously from the audience to speak out in support of or against their neighbor on trial. Sometimes, trials of particular import were held out of doors in village plazas. One case attracted as many as 5,000 persons in the town of Nuevitas.<sup>81</sup> This aspect has been criticized as being reminiscent of a public execution, for, as Berman queried, there "is some question as to whether all this popular involvement may not be taken by the people more as entertainment than as education."<sup>82</sup> However, despite this apparent fault, Berman concluded that "[a]s far as popular involvement is concerned, the Popular Tribunals have met with success both in theory and in practice."<sup>83</sup>

Perhaps equally important, the Popular Tribunals provided a forum — narrative, familiar and unformidable in form — for resolving disputes. Significantly, the forum was available and accessible to all Cuban citizens, "no matter how poor or uneducated,"<sup>84</sup> a dramatic change from the prior regime. Finally, the Popular Tribunals seemed to "be quite successful in reaching correct, fair results," that is, in administering justice.<sup>85</sup> In this sense, concluded Berman, the Cuban Popular Tribunals, although perhaps not "especially original within the realm of the socialist legal systems . . . [came] close to being institu-

tions which truly administer[ed] 'popular justice'."<sup>86</sup>

It is perhaps ironic that U.S. advocates of alternate dispute resolution mechanisms have turned in increasing numbers to study of the Cuban model, while the Cubans have themselves moved away from the informality of the Popular Tribunals "toward a system substantially more like traditional Western lower courts."<sup>87</sup> Professor Luis Salas has also chronicled the role of the Popular Tribunals, as well as their decline. He has noted the events which "marked the end of the popular courts and the renewed institutionalization of the lowest level tribunals within the judicial system."<sup>88</sup>

Within a few years, with the ratification of the new Constitution in 1976, Cuba was well on its way toward institutionalization of the Revolution as a whole. At that point, the popular educational value of the Cuban tribunals had become outdated. The change, Salas argues, was not only sorely needed, but it revealed a striking trend toward formalism and Cuban bureaucratization, in style as well as substance.<sup>89</sup> The Popular Tribunals, through their narrative form and informal structure, had "embodied the vision of how law should function that was held by [Ernesto Che] Guevara and his followers."<sup>90</sup>

The demise of Guevarism in the late 1960s removed the ideological underpinnings of these courts. . . . Ultimately, the issue for the Cubans was how this reform related to long-term revolutionary goals[.] . . . The most important of the goals [was] integrating the citizenry into the changing postrevolutionary order and, more generally, of socializing people to be good citizens. The Cubans were also, however, concerned with the costs of the system and its ability to adapt to political and ideological shifts.<sup>91</sup>

Although the Cuban Popular Tribunals served a temporary and transitional function, their impact is still felt in Cuban society today precisely because of the educational and community-building functions they served during the crucial, early post-revolutionary period. Clearly, when Popular Tribunals existed, they did not stem from an "outsider jurisprudence" in the sense that the Cuban citizens for whom they functioned were the dominant class (and only class) in the new, post-revolutionary society. The "outsiders," by virtue of the revolution, had become the "insiders." The parallels are nonetheless relevant to applying "outsider jurisprudence" in the U.S. today, because in the global sense, Cuba was and is an

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80. Id. at 1342.

81. Id. at 1343.

82. Id. at 1350.

83. Id. Berman goes on to observe that:

The Popular Tribunals meet in the evenings, when all can attend the trials, which are virtually all public. The judges are laymen from the neighborhood, and the cases deal with essentially local problems . . . Attendance is high, with the crowds actually overflowing the small courtrooms. The local residents view the Popular Tribunals as something of their own, not as a mechanism imposed on them from outside. At least some of the "spontaneous" witnesses are truly spontaneous — neighbors with personal knowledge of the case who want to offer their cooperation . . . there seems to be general respect for the Tribunals among the people.

84. Id. at 1351.

85. Id. at 1352. According to Berman, the "prime consideration in administering justice is that the results be correct — that the facts be determined accurately enough to lead to a verdict consistent with the equities of the case and to insure that the sanctions imposed or the remedies granted be appropriate."

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86. Id. at 1354.

87. Luis Salas, *The Emergence and Decline of the Cuban Popular Tribunals*, 17 LAW & SOC'Y REV. 587 (1983).

88. Id. at 593.

89. Id. at 610. Salas notes that now Cuban judges wear dark robes and other regalia, and other functionaries wear suits, rather than work clothes. The trials are now held in courtrooms, rather than public storefronts, plazas, or work centers. Yet the modern system, "while rejecting the form of the popular tribunal, still aspires to many of its goals," particularly that of community education.

90. Id. at 600-601.

91. Id.

"outsider."

Moreover, it is significant that post-revolutionary Cuba chose the legal process as a key forum for popular education, a forum in which socialization by the courts

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*The Cuban Popular Tribunals served many of the functions of legal storytelling. They helped to transform popular culture, to build community, to empower a previously disempowered citizenry, to educate the populace, and to build solidarity among the people.*

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and "[t]ransformation of bourgeois cultural patterns was a core goal".<sup>92</sup> For perhaps, as has been suggested, this radical experiment in socialist legality was only possible during the earliest years of the revolution, "when the primary goals were destruction of the old and survival of the new."<sup>93</sup> Once the revolution entered the stabilizing stage of the early 1970s, these transformative qualities were no longer primary or even necessary. Fidel Castro's reflections on the tensions of this historical development mirrors the premises of "outsider jurisprudence" expressed by Mari Matsuda, noted earlier in this article:

In this revolutionary process there is a paradox characterized in the first phase by iconoclasticism in relation to laws . . . We now have two truths: the first is that capitalist legality must be destroyed and the second is that we must establish a socialist legality. And to us revolutionaries corresponds this dual role of abolishers of laws in one phase of the revolution and creators and defenders in another phase of the revolution. And this is in agreement with another law: the dialectic of history.<sup>94</sup>

Although the Cuban Popular Tribunals eventually declined in response to changed social conditions, they served many of the functions of legal storytelling outlined by Delgado. The tribunals helped to transform popular culture, to build community, to empower a previously disempowered citizenry, to educate the populace, and to build solidarity among the people. They instilled a value system that was different from the (previously) dominant one, while actually administering popular justice. They helped to transform Cuban society, by utilizing the judicial system as a vehicle and mechanism for social change. As a positive example of legal storytelling and the use of alternative "legal" forums for popular education and com-

munity-building, the Cuban Popular Tribunals provide significant lessons to this day.

#### Nicaragua's Popular Tribunals

After the 1979 Sandinista revolution in Nicaragua, the new government passed the Fundamental Law, which repealed the old U.S.-backed Somoza regime's constitution. By decree, the new law created Tribunales Especiales (Special Tribunals). These extra-judicial tribunals, fueled by revolutionary activity, lingering turmoil, and popular concerns for a new social order, were used to judge more than 6,000 former National Guard soldiers and other persons connected with the notorious Somoza government.<sup>95</sup> These special tribunals were set up outside of the ordinary court system, and were largely modeled after the Cuban Popular Tribunals. These tribunals also served a "manifestly political function [as they] provided a popular forum in which to expose by open trial the much publicized crimes of the Somoza era."<sup>96</sup> After completing their task of administering "revolutionary justice," these special tribunals were abolished in 1981.<sup>97</sup>

In a move that created intense controversy and debate in the international legal and diplomatic communities, the popular tribunals were reinstated in mid-1983, in the form of the Popular Anti-Somocista Tribunals, or TPAs, in response to the intensifying *Contra* war. They were needed in order to judge suspected counter-revolutionaries, during the State of Emergency created by the renewed war. Critics of the tribunals claimed that they lacked independence from political forces and sufficient insulation from executive power, as the TPA judges were selected by the Nicaraguan President for an indeterminate term.<sup>98</sup> The Nicaraguan government answered that the increased intensity of the *Contra* war necessitated an "agile" juridical alternative to the regular courts, "capable of rapidly processing the increasing number of cases related to the *Contra* war."<sup>99</sup>

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95. Robert Steinberg, *Judicial Independence in States of Emergency: Lessons from Nicaragua's Popular Anti-Somocista Tribunals*, 18 COLUM. HUM. RTS. L. REV. 359, 360 (1987). The original name of these courts is, in Spanish, *Tribunales Populares Anti-Somocistas*, or TPAs. The TPA system consisted of trial and appellate courts, both of which had national jurisdiction. They were created under the Public Order Law, as emergency courts, to exercise jurisdiction over alleged crimes by members of the Somoza regime against the Nicaraguan people.

96. *Id.* at 372.

97. *Id.* at 377. At the time of the dissolution of the Special Tribunals, the Nicaraguan government decided to grant unconditional release to the *Somocistas* still awaiting trial.

98. *Id.* at 379. According to Steinberg, two of the three judges on each TPA panel were lay members. Typically, they were selected primarily on the basis of their leadership in the local Sandinista Defense Committees (CDSs), which are community based organizations affiliated with the government party, modeled after the Cuban Committees for the Defense of the Revolution (CDRs). The Cuban CDRs played a similar role in the judicial selection to the early Popular Tribunals. For more on the Nicaraguan community defense organizations, see *Building Democracy Through Mass Organizations*, Central American Bulletin, Nov. 1984, at 7-10, reprinted in NICARAGUA, UNFINISHED REVOLUTION 351-354 (P. Rosset & J. Vandermeer eds. 1986).

99. *Id.* at 378. The decree establishing the tribunals stated

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92. *Id.* at 603.

93. Luis Salas, *The Judicial System of Postrevolutionary Cuba*, 8 NOVA L.J. at 69 (cited in note 77).

94. *Id.* at 69 (quoting from speech by Fidel Castro on the Tenth Anniversary of the founding of the Ministry of Interior, Verde Olivo, June 13, 1971 at 63).

This controversy was heightened when the popular tribunal, rather than the ordinary criminal justice system, was used in the trial and conviction of Eugene Hasenfus. Hasenfus, a U.S. citizen, was shot down over Nicaragua in October, 1986, while flying a *Contra* supply plane. He was the first American taken prisoner in the conflict with the U.S.-backed *Contras*. The Nicaraguan government made an explicit decision to try Hasenfus in the extra-judicial forum, rather than through the ordinary criminal

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*Through legal storytelling and resort to explicitly extra-judicial forums, the Nicaraguan people and government brought their pleas for justice and claims against the Contras to the world.*

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system. After being convicted of terrorism and violation of public security laws, Hasenfus was sentenced to a 30-year prison term on November 15, 1986. After one month in prison, Hasenfus was pardoned in a widely publicized action by Nicaraguan President Daniel Ortega. He was then allowed to return to the U.S.<sup>100</sup>

During the trial, dozens of victims of the *Contra* war told their stories, chronicling the human cost of the U.S.-backed atrocities. Before it was all over, the public trial of Hasenfus, telecast throughout Nicaragua and around the world, did more to spread the word about *Contra* terror than perhaps any other single event.

Critics of the *TPAs* have focused on the alleged built-in bias of the pro-Sandinista judges, their lack of judicial independence, and the claim that *TPAs* have been used to thwart political opposition of the government. Yet, the nature of the role played by the *TPAs* has in fact related primarily to the *Contra* war, and not to silencing political dissent.<sup>101</sup> Therefore, while a primary rationale for the special tribunals was "agility," that is, an immediate need in time of crisis to bypass the backlog in the judicial system, the popular tribunals, as exemplified by Hasenfus' trial, also clearly served another purpose, that of popular education. This purpose was consistent with Professor Delgado's analysis of "outgroup stories" and legal storytelling.

The *TPAs*, and specifically the trial of Hasenfus,

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that this "exceptional situation requires agile judicial organs of temporary character which operate during the state of emergency to judge and punish those responsible for these crimes against humanity." (quoting *TPA* Judge Omar Cortes in the *Boston Globe*, Aug. 26, 1984, at 1, 4, col. 2).

100. Steinberg, 18 *COLUM. HUM. RTS. L. REV.* at 359 (cited in note 95).

101. *Id.* at 383. In fact, Steinberg reported that few cases "before the *TPAs* involve incidents of legitimate political protest or opposition. Most of the *TPA* defendants are accused of providing assistance . . . to the *contras*." Most of the relevant human rights reports and U.S. media reports fail to "discuss, empirically or on any other basis, the question of political defendants before the *TPAs*."

popularized a critique of the *Contra* war among Nicaraguans and throughout the international community. Through legal storytelling and resort to explicitly extra-judicial forums, the Nicaraguan people and government brought their pleas for justice and claims against the *Contras* to the world.

Furthermore, while the *TPAs* were formally dismantled with the signing of the Arias Peace Plan,<sup>102</sup> certain aspects of the extra-judicial tribunals may have a lasting effect on the regular Nicaraguan legal system. Specifically, the idea of "popular participation" has, according to Steinberg, "received continuous and vehement support"<sup>103</sup> from Nicaraguan leaders, as has the selection process and use of lay judges. Finally, it is noteworthy that the American Bar Association officially protested, through a "Rule of Law" letter, the use of the Popular Anti-Somocista Tribunal in the Hasenfus case.<sup>104</sup>

#### Popular Tribunals in Support of U.S. Political Prisoners

Finally, we consider the case of legal storytelling and popular tribunals in the struggles to achieve justice for political prisoners in the United States. Domestic human rights violations have increasingly received international attention over the last decade. Perhaps nothing has brought this more into focus than the issue of political prisoners in this country.<sup>105</sup>

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102. *Id.* at 416-417. Despite the criticism of the *TPAs* for their claimed lack of independence, the *TPAs* were ultimately abolished for different reasons, when in August 1987, Nicaragua joined Guatemala, Honduras, El Salvador and Costa Rica in signing the Central American Peace Agreement, known as the Arias Plan. Among its provisions, the agreement called for all states involved to abolish states of emergency and to restore the normal rule of law. Accordingly, Nicaragua lifted its state of emergency and dismantled the *TPAs*. Pending *TPA* cases were referred to the ordinary courts for further disposition.

103. *Id.* at 394-395 note 176. Steinberg states that "the Special Tribunals may have been regarded as the first success for the new ideal of popular justice in Nicaragua. Several years ago, the Justice Ministry began a pilot project, testing a new judicial system composed primarily of lay judges . . . Minister Borge exhorted the First Judicial Congress: 'We have to fight to bring about, in the short term, popular justice, to incorporate the wisdom of the masses in the administration of justice . . .'" (quoting from Borge, *Justice In Nicaragua is No Longer The Same*, in *NICARAGUA: THE SANDINISTA PEOPLE'S REVOLUTION* 264 (1985)).

104. Quoted in the *ABA Journal* of March 1, 1987, Michael Posner, as chairman of the International Human Rights Committee of the Section of Individual Rights and Responsibilities, had written on behalf of the ABA:

Far from being judicial courts, they are administrative tribunals that are subject to the Ministry of Justice and are composed of . . . militants or supporters of the Sandinista National Liberation Front, in other words, the political enemies of the accused . . . As a result, their impartiality, fairness, and independence of judgment are seriously compromised.

105. Political prisoners are those prisoners who are imprisoned because of their acts, associations, or beliefs in support of social justice, human rights or for national liberation. There are well over 100 such prisoners in U.S. prisons, some incarcerated since the 1960s. They include leaders of the Black libera-

While the U.S. government has consistently denied the existence of political prisoners in the U.S., a growing domestic support movement, as well as the international human rights community, has continued to press its concerns on the issue.<sup>106</sup> The United Nations and other international legal and human rights organizations have established minimum standards and criteria for the treatment of all prisoners, and also specifically for political prisoners.<sup>107</sup> These covenants condemn the use of political beliefs and associations as a basis for harsher treatment and torture. The U.S. government has at times used these standards to condemn other countries for their policies towards political dissidents.<sup>108</sup> Yet the U.S. government hypocritically denies that it has the same problem of human rights violations.

While the U.S. projects itself as the guardian of human rights worldwide, it stands charged with the violation of internationally protected rights, against many held in its own prisons.<sup>109</sup> It is therefore politically expedient for

the U.S. to take the position of denial and silence on the question of its own political prisoners. By officially denying the existence of political prisoners, the U.S. government can escape recognition of the larger injustices in U.S. society, as well as the existence of the movements for social change, from which the prisoners come.<sup>110</sup>

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The issue of justice for political prisoners in the U.S., by its very nature, has no forum, and no channels for recognition and validation within the formal and established U.S. legal system. Political prisoners, and their families, friends, loved ones, and supporters are truly "excluded voices." By the very nature of political repression and of prison isolation, theirs are voices which have been deliberately silenced, and which the government has a stake in keeping silenced.

The struggles for human rights and justice for political prisoners, including freedom from imprisonment, an end to isolation, and an end to particularly harsh conditions of confinement has not, for the most part, taken place within the courts. This struggle for justice has necessarily taken place among the prisoners' communities, families and supporters, and as such it is a jurisprudence of outsiders.

Popular tribunals have been a particularly useful form in achieving some meaningful level of justice in this struggle. The combined popular-legal campaign to shut down the control unit for women political prisoners at the Lexington Federal Correctional Institution in Kentucky, opened in October, 1986, is a case in point.<sup>111</sup> The

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the United States (unpublished 1990).

110. Many of the same claims can be made on behalf of all prisoners in the U.S. There is certainly valid debate about whether or not all those incarcerated within U.S. prisons are in fact "political prisoners". For purposes of this paper, the term "political prisoners" is not meant to be exclusionary. Certainly it can be argued that all prisoners are silenced voices, experience isolation, harsh conditions, and separation from their communities, and that they constitute an underclass of society. It is also a valid claim that the very existence of many prisoners is a reflection of the social injustices, economic disparities, and racial problems of this country. However, the issue of "political prisoners", defined here as self-conscious, self-identified political activists, has some separate integrity, as well. Special attention has recently been given to political prisoners largely because of the international focus, the concurrent exposure of U.S. foreign and domestic policies which the issue raises, and the blatant denial of their existence by the government. For more on prison conditions in general, and political prisoners in particular, see NEW STUDIES ON THE LEFT: THE PRISON ISSUE (cited in note 105).

111. For more on the Lexington Control Unit, see, Jan

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tion struggle; the Puerto Rican independence movement; the struggle for Native American sovereignty; Irish Republicans; Plowshares religious anti-nuclear activists; Sanctuary workers in support of the refugees of Central America; grand jury resisters; North American anti-imperialists; draft resisters; solidarity activists jailed for acts of civil disobedience, among others.

For more current information on the struggle to free political prisoners and POWs in the U.S. see the articles in this issue, Yale J. of L. and Liberation, by Dhoruba Bin Wahad, Julio Rosado and Yvonne Bushyhead. See also: Michael E. Deutsch & Jan Susler, *Political Prisoners in the United States: The Hidden Reality*, paper presented December 7, 1989, Hunter College Conference on Human Rights; CAN'T JAIL THE SPIRIT, POLITICAL PRISONERS IN THE U.S.: A COLLECTION OF BIOGRAPHIES (El Coqui ed. 1989); XIV NEW STUDIES ON THE LEFT, Nos. 1&2 (THE PRISON ISSUE) (VanderWall & Churchill eds. 1989).

106. See, for example, Amnesty International, THE HIGH SECURITY UNIT, LEXINGTON FEDERAL PRISON, KY (August, 1988); Dr. Luis Nieves-Falcon, *Criminalization and Persecution of Opponents to the Colonial Status of Puerto Rico: Human Rights Violations*, paper presented December 7, 1989, Hunter College, Human Rights Conference.

107. For the relevant international laws, see the 1949 Geneva Conventions on Prisoners of War; the Geneva Protocols of 1977 (to the 1949 Geneva Convention) (6 U.S.T. 3316, T.I.A.S. No. 3364); the Universal Declaration of Human Rights, Article 9; the International Covenant on Civil and Political Rights, Article 9 (999 U.N.T.S. 171, 1969); the American Convention on Human Rights, Article 9; the United Nations Convention on the Prevention and Punishment of the Crime of Genocide, 78 U.N.T.S. 277, and the United Nations Standard Minimum Rules for the Treatment of Prisoners.

108. See, for example, The Washington Post, July 25, 1990, A1, 16 (U.S. condemns the holding of dissidents in Cuban prisons).

109. For charges that the U.S. government is in violation of international laws concerning the detention of political prisoners, see: Leonard Peltier: *Native American Prisoner of War* in CAN'T JAIL THE SPIRIT (cited in note 105); Mutulu Shakur et al., *Prisoners of War: The Legal Standing of Members of National Liberation Movements* in NEW STUDIES ON THE LEFT: THE PRISON ISSUE at 116 (cited in note 105); Statement of Dr. Luis Nieves Falcon to Conference on Human Rights (cited in note 106); Amnesty International, 1989 Report; *Indictment*, "Before the Special International Tribunal On The Situation Of Political Prisoners And Prisoners of War Held in United States Prisons and Jails", Jan Susler, Esq., and Lennox Hinds, Esq., for the Petitioners, Political Prisoners and Prisoners of War in

Lexington Control Unit was essentially a behavior modification unit in which the Bureau of Prisons used sensory deprivation, extreme isolation, and sexual degradation to try to break the psyches of the women imprisoned there. The government's "mission" was to exert total dominance and control over the prisoners, and to ultimately break their spirits and reduce them to a state of submission. The first women sent to Lexington included Alejandrina Torres, a Puerto Rican activist and Prisoner of War, Susan Rosenberg, a North American anti-imperialist political prisoner, and Silvia Baraldini, an Italian national who had been imprisoned for her activities in the U.S. left movement.

These women prisoners were told that the only way they could leave this isolation unit and re-enter the general population was to renounce their radical politics and associations. Critics of the Lexington control unit also contended that the underlying strategy of the government, the Justice Department, and its Bureau of Prisons was to have the unit serve as a chilling example to other activists.<sup>112</sup>

Bureau of Prisons officials stated that the conditions of isolation and control in the unit were necessary in order to provide adequate "security" for women who were escape-prone, that is, those whose confinement "raises a serious threat of external assault for the purpose of aiding the offender's escape."<sup>113</sup> The criteria for incarceration in the unit were also explicitly political. In response to Congressional and human rights organizations' inquiries, Bureau of Prisons Director, J. Michael Quinlan, stated that "[A] prisoner's past or present affiliation, association or membership in an organization which . . . attempts to disrupt or overthrow the government of the U.S." was also a criterion for placement in the unit.<sup>114</sup>

A broad coalition of activists from the Puerto Rican Independence Movement, church groups, civil liberties and prisoners' rights attorneys, prisoners' rights activists, Amnesty International, and human rights, medical, educational and psychiatric professional organizations, as well as the women's and gay rights movements, and other grass-roots

community groups, joined forces to protest the existence of the unit.

A focus of the coalition's early work was a People's Tribunal to Expose the Crimes of the Lexington and Marion Control Units, held in October 1987.<sup>115</sup> The Tribunal received national attention in the media and among human rights, legal, and social activists, as well as within church organizations. Speakers at the Tribunal included parents, children and other family members of the prisoners, activists in the coalition, ex-prisoners, church members, and other community members. Attorneys for prisoners confined in the control units gave testimony on behalf of their clients. They also described their personal experiences visiting the units, and shared their beliefs that the units violated human rights standards under international law and the U.S. Constitution. A panel of eight "people's justices" heard testimony from over 27 witnesses. At the completion of the tribunal, they found the U.S. government and the control units guilty of human rights violations.<sup>116</sup>

Compelled by stories shared at the Tribunal, by a growing sense of empathy and common purpose, and by a popular and collective notion of justice, those gathered formulated further plans for a national media and grass-roots campaign to shut the unit down. The Tribunal, as the campaign's centerpiece, was so effective that it sparked an international campaign of support for the prisoners. Consequently, international human rights activists and the press in the Soviet Union raised the question of political prisoners in the United States. Days before the May, 1988 U.S.-Soviet Summit Meeting in Moscow, press reports were filled with reports about United States political prisoners. Perhaps most importantly, it was widely reported that Mikhail Gorbachev was incensed at United States charges of Soviet human rights violations on the eve of the Summit. Gorbachev, and the Soviet media, called on President Ronald Reagan to examine his own violations against United States political prisoners, and specifically the human rights violations then taking place at the Lexington control unit.<sup>117</sup>

In March, 1988, several of the Lexington prisoners filed a major civil rights action against the U.S. government and the Bureau of Prisons, contending that their First Amendment and Eighth Amendment rights had been violated.<sup>118</sup> This litigation, undertaken collectively by the

Susler, *Women's High Security Unit*, 1 YALE JOURNAL OF LAW AND LIBERATION 31 (1989); *Through the Wire* (Film, producer Nina Rosenbloom 1989); Amnesty International, THE HIGH SECURITY UNIT, LEXINGTON FEDERAL PRISON, KY (August 1988); ACLU National Prison Project, "Report on the High Security Unit for Women, Federal Correctional Institution, Lexington, Kentucky" (1987); Richard Korn, *The Effects of Confinement in HSU: A Follow-Up*, 15 SOC. JUST. 25 (Spring 1988); Mary K. O'Melveny, *U.S. Political Prisons: Lexington Prison High Security Unit*, XIV NEW STUDIES ON THE LEFT 37 (1989); Susan Rosenberg, *Reflections on Being Buried Alive*, XIV NEW STUDIES ON THE LEFT 40 (1989); "Report of Visit by General Board of Global Ministries Team to High Security Unit for Women, Federal Correctional Institution, Lexington, Kentucky," (October 15, 1987).

112. See, generally, National Campaign to Shut Down the Lexington Women's Control Unit, *Buried Alive* (Brochure, 1986); *Through the Wire* (Film, producer Nina Rosenbloom 1989).

113. Memorandum from G.L. Ingram, BOP Assistant Director to BOP Regional Directors (September 2, 1986).

114. Letter from BOP Director J. Michael Quinlan to Congressman Robert W. Kastenmeier (September 30, 1987).

115. For more on the Marion Control Unit, see, Douglas Spaulding, *End the Marion Lockdown*, XIV NEW STUDIES ON THE LEFT 20 (1989); J. Michael Olivero & James B. Roberts, *Marion Federal Penitentiary and the 22 Month Lockdown: The Crisis Continues*, CRIME AND SOCIAL JUSTICE, No. 27 & 28 (1987); Amnesty International, ALLEGATIONS OF ILL-TREATMENT IN MARION PRISON, ILLINOIS, U.S.A. (May 1987).

116. See, Douglas Spaulding, *End the Marion Lockdown*, XIV NEW STUDIES ON THE LEFT 20, 28 (1989).

117. See, the following Soviet newspapers for May 27-29, 1988: Pravda, Trud, Izvestia. See also, *Reagan Cites Soviet Rights Gains But Calls For More; Moscow Questions U.S. Right To Judge*, Los Angeles Times, May 28, 1988, at A1; The Financial Times, May 28, 1988, at A1; UPI Moscow, May 27, 1988; *Violations Against U.S. Citizens Sent to Soviet Union*, UPI New York, May 26, 1988.

118. *Baraldini v. Meese*, 691 F.Supp. 432 (D.D.C. 1988),

ACLU National Prison Project, the Center for Constitutional Rights, and the women's private attorneys, was itself generated by the momentum of the grassroots campaign to shut down the control unit. In July, 1988, federal Judge Barrington Parker ruled that the women's First Amendment rights had been violated, and that they had been persecuted for their political beliefs. He ordered that the unit be immediately closed.<sup>119</sup> As a result, the U.S. and the Bureau of Prisons were forced to close the unit.<sup>120</sup> This legal victory was quite extraordinary. As a member of the judiciary, or, in Fiss's words, the "interpretive community," Judge Parker allowed the excluded voices of the women prisoners to break through the wall of silence. Judge Parker's decision expressed empathy for these silenced voices in a time of reaction in the federal courts; he criticized the government, while recognizing the right of the women, as political prisoners, to express their views.<sup>121</sup>

This temporary legal victory was as much a direct result of the campaign's work, and the persistence and determination of the women prisoners to have their voices be heard, as it was skillful litigation. The popular tribunal was effectively utilized as a method to "spread the word" and to empower the movement. As a result of this concerted effort, the issue not only gained international notice, but achieved significant recognition in the U.S. courts as well. This case shows that when excluded voices of those who are deliberately silenced begin to be heard in alternative, popular forums, then even the formal legal system and its jurists may have to listen and adjust their relationship to the issue.

As a next step in the continuing struggle for recognition and proper treatment of political prisoners in the

U.S., a special International Tribunal on human rights violations against U.S. political prisoners was held on December 7-10, 1990, in New York City.<sup>122</sup> This tribunal utilized an approach very similar to the other popular tribunals discussed in this article.

The purpose of the Tribunal was to bring to the attention of the international community and the American people the reality of political prisoners, and the continued violation of their human and civil rights. This is clearly an issue that has virtually no forum in the official courts of this country. In a criminal indictment to the special tribunal, nearly one hundred political prisoners charged the U.S. government, the Justice Department, the CIA, FBI and the Bureau of Prisons, with violating laws of international human rights, as well as the U.S. Constitution. After receiving extensive written and oral evidence from witnesses testifying in support of the indictment, the distinguished panel of jurists deliberated and found that, under international law, there are political prisoners and prisoners of war in the United States whose basic rights are being violated.<sup>123</sup>

## VII. Conclusion

Are popular tribunals, as illustrated in these examples, law? Do they produce law? Or, as a form of legal storytelling, do they simply help to mediate the tension between justice and order, by humanizing the law? In this way, does legal storytelling of this quasi-legal, yet informal, type, become part of the law or does it remain a critique of the law? I have attempted to show one way that legal storytelling, the narrative voice, and the movement for "outsider jurisprudence" can go beyond the academic context and serve meaningful, concrete, and political functions. In this way, legal storytelling and popular tribunals contribute to transforming the normative systems surrounding the law, the legal system, and perhaps most importantly, those of us who practice in the law.

For indeed there is a value in popular notions of justice, as shown in these examples, precisely because law is essentially political, rather than an abstraction. My suggestion has been that this popular notion revives the compelling nature of Owen Fiss's optimistic commitment to the law as an ideal which embodies the values of justice, equality, and true social peace. For the issue is not Fiss's

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*rev'd sub nom Baraldini v. Thornburgh*, 884 F.2d 615 (D.C. Cir. 1989).

119. *Baraldini v. Meese*, 691 F.Supp. at 439. However, the effects of the BOP "mission" continue. For example, after Silvia Baraldini's medical complaints had been ignored for months, she was found to be suffering from a rare form of uterine cancer. After two operations and radiation treatment, Silvia now awaits expatriation from Marianna Prison to her native Italy. Under the terms of an international treaty, the Strasbourg Convention, a citizen of one country who is imprisoned in another country is allowed to return to her native land to finish her sentence. A campaign in support of Silvia Baraldini, waged in the U.S. and Italy, is currently pressing the U.S. government to abide by the terms of the Strasbourg Convention, to which it is a signator. See, Council of Europe Convention on the Transfer of Sentenced Persons, codified in the United States at 18 U.S.C. § 4100 et seq.

120. Since then, the U.S. won a reversal of this opinion on appeal to the D.C. Circuit. See, *Baraldini v. Thornburgh*, 884 F.2d 615 (D.C. Cir. 1989). In reversing Judge Parker, the Circuit held that the Bureau of Prisons was free to consider a prisoner's politics when making decisions about their treatment and placement. Nevertheless, the Lexington control unit has not been re-opened. A new and considerably larger "maximum security" prison for women was opened in Marianna, Florida in August 1988. Women prisoners, both political and non-political have been sent there. The conditions at Marianna are being monitored by the Lexington lawsuit lawyers and women prisoners. Although the conditions are not those of Lexington's small control group isolation, there is a higher level of control at Marianna than at any other federal women's prison.

121. *Baraldini*, 691 F.Supp. at 439.

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122. A panel of eight internationally recognized jurists listened to testimony that substantiated the indictment. The panel's decision will be distributed to members of Congress and of the United Nations, as well as to international and domestic human rights organizations. The decision will be the basis for continued organizing efforts. This tribunal emerges from a long and significant history of international tribunals, beginning with the Nuremberg trials. These bodies have documented, investigated and condemned war crimes, human rights abuses and racist policies in countries around the world. See, Julio Rosado, *Political Prisoners in the United States: The Puerto Rican Charade*, in this issue of YALE J. OF L. AND LIBERATION at 43.

123. For a detailed report of the Tribunal's findings and verdict, see "Special International Tribunal on the Violation of Human Rights of Political Prisoners and Prisoners of War in United States Prisons and Jails" (Dec. 10, 1990), *reprinted*, this issue of the YALE J. OF L. AND LIBERATION at 47.

idealism, nor for that matter the radical visions of people's lawyers of the 1960s. The issue is our own collective need and responsibility to increase our levels of empathy for, and solidarity with, the silenced voices of today.

As we begin to listen to the excluded voices, support them, and even become part of the struggle to have them be heard, then perhaps some members of the "interpretive community" will also begin to be challenged. We must be moved to listen. In so doing, we may contribute to reviving the value and potential of the law itself, by using the law as a vehicle for social change, thus giving substance to the struggle for social justice.