The Practice of Law and the Love of Philosophy
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My name is Martha Franks and I am a Johnnie. I admit that I am powerless over my interest in philosophy.

I am also a practicing lawyer, having spent a career specializing in the arcane world of water law, a kind of law that raises strong passions in the desert Southwest of Santa Fe. I wanted to give this lecture because St. John's students considering law school have sometimes asked me about my experience. Those conversations have caused me to try to think and speak clearly on a question that these students often ask; that is, how I see the practice of law relating to my first intellectual love, the love of philosophy.

I did not see much relationship at first, beyond the number of books involved. I decided to go to law school after graduating from SJC Santa Fe mostly because I couldn't think of anything else practical to do. I assumed with some grief that I was leaving philosophy behind for something smaller, less elevated and less interesting. At St. John's I had enjoyed the luxury of learning for its own sake but in law school, I told myself grimly, there would be none of that, only the task of buckling down to dull reality in order to acquire the tools to make a living.

That depressing assumption proved to be wrong. I found that law and philosophy have a fruitful conversation. Law, it seems to me now, serves as a kind of laboratory for philosophy, forcing ideas into practical situations that show where they are sound or unsound. In a book, an idea may stand in isolation, untested and therefore unclear. But when an idea erupts into the world – as when it is cast into a law that demands obedience – it both acts and is acted upon. Abstract principles are acted upon by the unpredictability of human conflicts, giving rise to new analyses that are then challenged again by some new turn of the world. What comes about as a result of ideas working themselves out in the world can be surprisingly – and sometimes happily – different from what their originators expected.

Not only does the world change ideas, but, of course, ideas change the world. In this way, law can act like an art, shaping the medium of society as an artist's conception shapes marble or paint. Human beings are a particularly slippery medium, in my experience, and the art of law does not contain our infinite variety. As with all arts, though, the continued effort to impose ideas on unruly material can lead to extraordinary expressive achievement.

I have come to believe that the law, far from being small, is a magnificent accomplishment because of this conversation between principle and practice. W. S. Gilbert, the lawyer-turned-lyric-writer in the team of Gilbert and Sullivan, calls it "the true embodiment of everything that's excellent." And so it is.

From the moment I entered law school, my Johnnie habits led me to look for an accounting of what law means and where it comes from. I suppose I was imagining someone asking Socrates whether law can be taught, and Socrates insisting that he could not answer that question until he knew what sort of thing law was. Almost immediately I bumped into the same kinds of questions we study here at the College. The biggest is the legal version of whether there exists a source of Truth, separate from opinion. We meet this question in our first year at St. John's, reading the *Meno* with its argument that knowledge is not created but remembered and that we will be better, braver and less helpless people if we try to tether our opinions to knowledge. Many of us fall in love with at least one of the experiences on which that argument is based, the sense of clean, elegant, satisfying conviction of Truth that Euclidean geometry gives. When the slave boy in the *Meno* follows the geometrical argument and agrees that his first notions of how to double the square were wrong, it seems that there must be something more than mere opinion in the world, some actual Truth that he and we can recognize if we are clear and logical enough. Even if you think that Socrates has led him there, it is the slave boy himself who has the moment of personal realization of the Truth of the geometrical relationships. I remembered the *Meno* one day when listening to an argument between two friends of mine, a lawyer and an engineer, regarding technical aspects of water deliveries under a certain legal document. After a long exchange the engineer finally said, exasperated, "I can explain it to you, but I can't understand it for you!"

In the *Meno,* the question about Truth turns on whether learning means uncovering understanding already buried within us, waiting to be revealed, or whether learning consists rather of having facts imposed upon us – hard, alien bits of knowledge that demand our assent on the say so of Egyptian priests or other external authorities. The corresponding distinction in the legal world is whether Law is something written in the universe, natural, unchangeable, and discoverable, or whether Law is a set of opinions that some humans impose on other humans by the exercise of authority. The first of these positions is called Natural Law theory and its proponents, notably St. Thomas Aquinas, argue that societies must seek to make legislation and judicial actions match, as much as possible, the timeless structures of Truth. Natural law theories often assert that the law has a divine origin, as in

Moses' receipt of the law from God's hand, or the Roman King Numa's consultations with the goddess Egeria.

We all have experiences that seem to support a Natural Law standard, along the same lines as what Socrates demonstrated in the *Meno*. We have deep-seated feelings about Justice. These are not – or do not seem to us to be – arbitrary choices that we make or personal whims. They appear to us to be as immovably true as any fact. It is *wrong* to kill; it is *wrong* to steal. Even a two-year-old, given a smaller piece of cake than her brother, somehow knows to shout "That's not fair!" with a strength of conviction that matches the certainties of Euclid. A sense of Justice seems grounded deeply within us, recognized as readily as the truths of geometry. If that is the case, the business of legislators should be to enact laws that reflect Justice and the business of a lawyer is to persuade courts and juries to recognize and follow the sense of Justice within.

This is an accounting for what law means and where it comes from that is very attractive to those of us who are bitten by the philosophical bug. It is wonderful to contemplate beautiful, divine, logical structures governing human society.

On the other hand … in the law, there is always another hand … on a day-to-day basis, the grand shining standard of Justice-with-a-capital-"J" can seem far away, not just because we are mired in cynicism and surrounded by unscrupulous characters, but because large principles often just don't speak to the particularities that we confront. Thus, despite the attractiveness of Natural Law theory, it is perfectly clear that some laws are just agreements, contracts that don't invoke intrinsic Justice. There's no Platonically based ideal rule about which side of the road to drive on, for example. People have just chosen something arbitrary, and that arbitrary choice is then enforced. You can go to jail for ignoring traffic laws just as much as for stealing. No one will let you off the hook because traffic laws do not reflect divine Justice.

This second kind of law is important to a functioning society. If there were no rule at all about which side of the road to drive on there would be unending clashes among travelers. Oedipus experienced this. As a lawyer I have often reflected that the whole Oedipus cycle could have been avoided if there had been traffic laws in Ancient Greece to prevent the conflict between Oedipus and his father. We need this kind of law, these social agreements on arbitrary rules, and they can be reached without having to undertake the daunting task of determining what Justice is.

Looking to this second type of law, some legal philosophers argue that *all* law can be understood that way, as a matter of agreements. There's no need to ground the law in divine Justice, these thinkers claim. Even laws against murder and theft—or unequal cake slices—can be seen as the consequence of a bargain. I agree to accept such laws because I want myself to be protected from murder, theft and too little cake. I am willing to give up my own impulses toward crime and greed in exchange for that protection.

For matters like which side of the road to drive on, which simply needs an arbitrary decision, appealing to Justice can seem a little silly. Once I argued what's called a "procedural motion" to a judge, which means that the issue we were arguing about was not much concerned with Justice, but only with the order in which a lawsuit would proceed. I offered my argument, opposing counsel offered his argument and when we were done, the judge turned his chair around so that he was facing the back wall of the courtroom. As we watched the back of his chair we saw a coin rise into the air and fall again. I *think* the judge was joking, expressing irritation that we had made him listen to arguments on an issue that we really should have been able to agree upon, but I am not sure.

This contract approach to law is, at the level of foundational government, an application to the field of law of Social Contract theory, a theory of government offered by Hobbes, Locke and Rousseau, philosophers we read in the junior year at St. John's. Under this theory, the foundation of society is an implied contract according to which each of us gives up some freedom in exchange for social benefits. Each of us, by being born into a society, are assumed to have implicitly agreed to the laws that exist there, just like we drive on the left side of the road when we find ourselves in Australia. If we see law in that way, then legislators don't spend their time seeking Justice but instead they make and apply law according to the agreements that have been achieved among the particular powers that exist in a society. Under a theory that law is a matter of agreements, a lawyer arguing a case looks only to the actual language of the agreement, not to a separate standard of Justice, and tries to persuade the judge that his or her side of the case more perfectly upholds the meaning of that agreement as fully expressed within, as lawyers say, "the four corners of the document."

It is easiest to see how this works in the field of business law and contracts, a topic that is a very big deal in a modern American law school**.** The professor who teaches the subject of Contracts is understood to be the center of a first-year student's experience. The subject of Contracts explores how agreements can bind individuals in ways that do not require any independent standard for Justice. If two

people have entered into a contract and one claims that the other has breached the contract, the lawsuit that follows will be concerned with what the *contract* says and means, not with capital J Justice. Thus, if someone entered into a contract to pay a dollar a widget to a widget-supplier, it does not matter if the actual market price for widgets is seventy-five cents. Society has a policy interest in enforcing contracts, even if they are not entirely fair, so that commerce can be reliable. Another way to look at it is that Justice as between those two people is *defined* as their agreement expressed in the contract, and no other standard of Justice is required or relevant. Either way, the contract requires the dollar.

It looks like a pure philosophical (or perhaps theological) issue, which of these two possible foundations for law is right. But the issue is not fought out in the world on the basis of pure philosophy. Natural law theory, when tested in the laboratory of actual human situations, shows some practical shortcomings.

Suppose you want to know the Natural Law for the authority of kings. There was no more important question in the West at the time of Thomas Hobbes and for many years afterwards. Lots of people offered answers saying, for example, that God had given kings a divine right to rule and to be obeyed without check. Others argued that the Natural Law of the authority of kings arose from below, and God was on the side of the people. Neither position, however, *commanded enough agreement* at the time of the English Civil War to shore up a peaceful society. Whichever one was the Truth, society was falling apart.

You might say, disapprovingly, that people *ought* to agree on the Truth (or what God wants). But the practical reality is that they don't. And when both sides of a disagreement believe in the ideal of Truth, the conflicts can be particularly terrible. If Truth is at stake there is no possibility of compromise. Those conflicts are to the death, even to a king's beheading.

In this state of affairs, people began to wonder whether, with regard to government (as opposed to geometry) agreement might be more important than Truth. Maybe we can bypass the terrible conflicts around Truth if we instead make agreement our ideal. If an agreement is held up as the ultimate standard for law, then perhaps the temperature of the argument can go down and conflicts can be more easily resolved.

It's a valuable thing, this bringing down of the temperature, transforming what might have been violent struggles into courtroom arguments, and even into exchanges in which it is established that what could be hostile feelings will be

expressed as jokes and become the possibility of friendship. I was on the way into the courthouse one day when I found a marble on the steps. Picking it up, I walked over to opposing counsel, also on his way into court. "Here," I said, offering him the marble, "I think you lost this." He didn't skip a beat. He took the marble and replied, "Thanks. It was my last one."

These two approaches to law, Natural Law theory and law based on a theory of contract or agreement, are both still with us. They may look like they cannot co-exist, but in fact they do, in the practical, rough and ready world of the law as practiced. A Natural Law theorist, even Thomas Aquinas[1], will concede, for example, that while some law is based on intrinsic Justice, it is fine to have arbitrary, agreed-upon rules about traffic laws or contracts. A contract law theorist might try to be more radical in claiming that there is no such thing as intrinsic Justice, but in legal practice Natural Law theories continue to crop up. Although a contract should, under agreement-oriented theory, be the final word on what will be enforced between two entities who have signed it, there is a Natural Law-sounding check on that rule. If the contract is *too* unfair, a judge will overturn it on the grounds that—and this is a formal legal standard embodied in both statutes and law cases-- it "shocks the conscience of the Court." *E.g. Figueroa v. THI of N.M. at Casa Arena Blanca Ltd. Liab. Co.*, 2013-NMCA-077, 306 P.3d 480. A court's internal sense of Justice—a standard that we first meet as children wanting our fair share of cake--can cancel a contract.

The United States Constitution reflects the differing theories about the foundation of law. On its face the Constitution looks like a contract, with no pretentions to be anything but an agreement. In the Preamble to the Constitution, for example, there is no language about Truth, or God or Natural Law. Instead there is a statement of purposes, as is common in a contract:

> We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

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[1] Summa Theologica, Prima Secudae, Q. 104 Concerning the Judicial Precepts: "As is evident from what we have stated above (I-II:95:2; I-II:99:4), in every law, some precepts derive their binding force from the dictate of reason itself, because natural reason dictates that something ought to be done or to be avoided. These are called "moral" precepts: since human morals are based on reason. At the same time there are other precepts which derive their binding force, not from the very dictate of reason (because, considered in themselves, they do not imply an obligation of something due or undue); but from some institution, Divine or human: and such are certain determinations of the moral precepts."

The rest of the version of the Constitution that was ratified in 1788 assigns roles and powers in a way that looks like the same process by which later legislatures create traffic laws. The Congress does some things, the President others and the Courts others. There's no claim of intrinsic Justice in the Constitutional pattern of three branches of government with duties divided as they are. These were matters of agreement, apparently arbitrary agreement based at most on prudential concerns. For example, members of the House of Representatives serve two-year terms, so that the whole House is subject to election every two years. Members of the Senate, by contrast, serve staggered six-year terms, so that only a third of the Senate is up for re-election every two years. The Framers may have chosen for there to be this difference between the two houses of Congress because they thought it prudent for the Senate to have more continuity than the House of Representatives. The precise numbers, however, were simply chosen—there's no reason they could not have been different. There are plenty of other such things. The President must be at least 36 years old, for example, and, infamously, some persons, enslaved Black persons, only counted as three fifths of a person in determining how many representatives a state would have in Congress. Now *there's* a shameful departure from Justice. Some argue that the three fifths provision was prudent in that there was no other way to get agreement to the Constitution. Even if that were true it only demonstrates that prudence is a very different thing from Justice.

As an aside, although there are likely people in this audience who are more qualified than I to talk about the historical effects of Social Contract theory, I do want to mention that the documentation around the drafting of the Constitution reflects that the Framers were intimately familiar with philosophers associated with Social Contract theory, such as Hobbes and Locke. The U.S. Constitution was the first complete, written national constitution, perhaps intended as an explicit Social Contract, although some might argue that the theory of the Social Contract extends beyond the structures of government into cultural matters, so that the Constitution is not the entire Social Contract. Still it was a good deal more explicit than had been done before. Most nations arise untidily out of deep time and custom, with their social contract implied discreetly far in the background. It was unusual, perhaps shocking, and at the time unique to try to say articulately, exactly, and comprehensively what the agreement was that held together the government of the new nation.

Thus, the version of the Constitution that was originally ratified in 1788 leans heavily toward a contract theory of the foundation of law. Yet the language of

Natural Law theory was quickly added to the Constitution and was certainly part of the events that led to the creation of the United States. The Bill of Rights, the title of the first ten amendments to the Constitution, was ratified by the states on December 15, 1791, just three years after the ratification of the original Constitution. These first ten amendments to the Constitution, as well as some of the later ones—notably the 13th and 14th amendments, which were added shortly after the Civil War--take an approach to law that looks much more like Natural Law theory. They employ phrases like "due process," and "equal protection," which are undefined, leaving the courts to consult some internal sense for what they mean. *E.g*. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (where the United States Supreme Court overturned its own precedent simply by saying that no one can any longer believe that "separate but equal" education does no harm); *Loving v. Virginia*, 388 U.S. 1, ¶9 (1967) (striking down a law against interracial marriage, the USSC says that there is "*patently* no legitimate overriding purpose" for such a law). When lawyers and judges use words like "patently," "obviously," "clearly" in a legal document instead of quoting precedent or making an argument, it likely means they are appealing to a sense of Justice that invokes Natural Law theory.

Really, the very notion of "rights" suggests something with a stronger connection to Truth than mere agreement can have. The whole point of asserting that people have "rights" appears to be to say that no government has the power to make a law that infringes upon those rights.

A strong-minded and stubborn proponent of a contract theory for the foundation of the United States might argue that the recognition of rights in the Bill of Rights and other amendments to the Constitution is still contractual; that is, that these are not Natural Law Rights, but rights that the nation has agreed in its founding document to recognize and from which it could theoretically withdraw agreement. But the claim that government does not have the power to infringe upon certain natural rights was essential to the United States' understanding of itself even before the Constitution. It is the claim on which the fledgling country justified its revolutionary war against England. The Declaration of Independence, signed in 1776 by many of the same people who framed the Constitution, memorably used the Natural Law language that is missing from the Preamble of the Constitution (sorry about the gendered language):

> When in the Course of human events, it becomes necessary for one people to dissolve the political bands which have connected them with another, and to assume among the powers of the earth, the separate and equal station to which the Laws of Nature and of Nature's God entitle them, a decent respect

> to the opinions of mankind requires that they should declare the causes which impel them to the separation.
>
> We hold these truths to be self-evident [that is, they are "patently" or "obviously" or "clearly" true], that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.

Thus, both before and after the 1789 Social Contract-looking Constitution, the new United States of America embraced an idea of rights that inescapably invokes the language of Natural Law theory. The competing theories for the foundation of law, incompatible as they seem to be, both form essential parts of American Law.

Is this an embarrassing incoherence that demonstrates that I was right in my original notion that the Law is smaller than philosophy? As I said at the beginning, I have come to believe otherwise. The presence in our founding document of both theories about the foundations of Law forces them into a conversation. It's a conversation between the ideal of self-evident Truth, and the messiness of political clashes shot through with personalities and self-interest that can only be composed by agreement. Good and interesting things can come of this conversation.

These observations about law have been general, but everyone's experience of the law focuses on particular subjects and events. My own experience in the making, passing, following and interpreting of a particular law happens to involve water law in New Mexico. I want now to show how the conversation described above worked in a particular situation with which I am familiar.

In arid New Mexico, there are few subjects of more legal angst than the law of water. And because water flows, it doesn't fit easily within the common law system of ownership that was developed in water-rich England. So a special doctrine of water has grown up in the American Southwest, called prior appropriation law. Under this doctrine, the people who began using water first have senior priorities and are first in line for the available supply of water. If there is not enough water to supply everyone—and there is never enough water to supply everyone—the people who began using water later and have junior priorities get nothing. In order to work, this legal rule needs someone to divide up and distribute the water in accordance with priorities. Before that can be done, someone must make decisions about who has what priority date and how much water they have the right to use. New Mexico's statutes give those decisions to the courts. But court cases that try to sort out decades and centuries of water-rights claims take a very

long time; they make Jarndyce v. Jarndyce look like a fast-food order. In the 1990's, I was lead counsel for the State of New Mexico in one case that was filed the year I was born. I have moved on, but the case is still going strong.

Some of us water lawyers had the idea that there should be a law that allowed the water agency for the State, the Office of the State Engineer, to make provisional decisions and administer water in priority even if the court had not completed its work. I helped to draft a proposed law to do this. As we drafted the law, my colleagues and I spent a lot of time trying to make sure that we had thought of all the ways that the language we proposed could be read, hoping to head off misunderstandings and quarrels. My habits of critical reading cultivated at St. John's came in handy here. In the end, we did not just give the State Engineer the power to administer water, but required the OSE to first promulgate regulations to say exactly how it would be done. We thought of ourselves as acting on principle and trying to effect an ideal, making a change in the law that was necessary to make it meaningful, while also ensuring that the power we were giving to the State Engineer would be transparently exercised.

The next step was to bring the draft law to a legislator. We found one who thought this was a good idea and was willing to sponsor it, and then we began to lobby other legislators to see if there were or might be generated enough votes to pass the proposed law. When I acted as a lobbyist for my bill, I prepared extensively for reasoned debate on the merits of the proposed law. It happened once or twice, but I was mostly disappointed. Legislators' reactions were not usually based on the substance of the law but on their own political allegiances or their hopes of using the proposed law as a bargaining chip toward something else entirely. I'm not unsympathetic to this, really. There's no time to understand things fully in the practical world. Socrates would, I am sure, have slowed down government to the point of impossibility.

The political stars aligned for us and the bill progressed in the legislature. At every stage of being considered in various committees, then being voted on by both houses of the legislature and then going to the governor for signature there were political calculations, suggested changes and much happenstance. My law made it through these steps chiefly, I think, because the lobbyist who most opposed it did not get notice of a key vote in committee. He was furious, but it's hard to get a do-over in that pressured world.

When a bill survives all that, becomes law, and enters the statute books, everybody then finds out how it will actually work in the world. In the case of the law I was

working on, the Office of the State Engineer obeyed it by promulgating new regulations. Making regulations is just like making laws, only with a more detailed focus.

Finally, the statutory and regulatory language was in place. The attempt to distil ideals into specific, well-described powers was complete. Sometimes a law is given a little time to be applied in practical situations. In this case, no. Instead there was an immediate challenge to the constitutionality of both the law and the regulations in court.

A determination of whether a law is consistent with the Constitution is the province of the courts. The courts look at a law, make a judgment about what the legislature intended to do with it, and then develop an opinion on whether the law is consistent with the constitution (either the state or federal constitution, depending on which court—state constitutions cannot be in conflict with the U.S. Constitution and usually repeat much of the language of the U.S. Constitution, while adding a lot more). This is why the make-up of courts causes such passion in the political world. The court has the power to, in effect, cancel laws made by the legislature if the court finds that a law conflicts with the Constitution. The process reflects the extraordinary centrality of constitutions in American law and the importance of how people read them. Constitutions, including especially the United States Constitution, are not merely historical documents, but active sets of standards constantly consulted by courts. I have often thought about the ways in which this is a special kind of reading, different from how we read Plato or Shakespeare or Kant. Judges don't read the Constitution to assess whether its statements are true. They read the Constitution to use it to evaluate other laws. The only comparison is to the way some people approach the Bible, as the standard of truth against which other books and beliefs are measured.

Judicial analyses and interpretations of statutes are the mechanism by which ideas and practicality explicitly learn from each other, like writing up the data in a scientific experiment. When a court does an analysis and interpretation of a statute, the court publishes an opinion explaining its thinking and its conclusion. Those explanations are what fills all those law books. The books are not filled with laws; they are filled with judges explaining their analyses of what happened when the abstract language of a statute collided with the untidy particularities of the human beings it was attempting to control.

I am happy to report that, after a decade of litigation, innumerable briefs and several oral arguments, the law I helped to write was upheld as constitutional by

the New Mexico Supreme Court. *Tri-State Generation & Transmission Ass'n v. D'Antonio*, 2012-NMSC-039, 289 P.3d 1232 It was a wild ride. Had my law not been upheld, and whenever a law is held to be unconstitutional, the legislature could of course return to the same hoped-for ideal and try again to write a law, this time taking the judge's analysis into account. The wild ride begins again. It is, as I say, a conversation. Ideals to particulars to ideals again.

I think my favorite instance of this story of how laws are made, meet the world and are then assessed involved a statute that I was looking at as part of my work with Native American water claims. The statute was passed in the nineteenth century, when Congress had a paternalistic attitude toward Native Americans, and was concerned that real estate moguls from the East were coming out West and conning Native Americans out of their reservation land, taking advantage of a cultural difference in what it meant to own property. Native Americans were getting ripped off so that real estate moguls could get rich. Congress addressed this by passing a law stating that, in every transaction involving real property "in which an Indian may be a party on one side, and a white person on the other," the burden of proof in court is on the white person to show that the transaction was valid. This law is still on the books at 25 USC §194. The real estate moguls of the nineteenth century thought about that for about fifteen minutes and then hired a bunch of Black guys to go out West and enter into real estate contracts with Native Americans. This is the kind of thing that happens in the rough world of law, people finding ways around rules in pursuit of their self-interest. Law, unlike philosophy, is always dealing with people who make no pretense of being impartial and will look for advantage every way they can. Anyway, somebody then sued to get the benefit of a changed burden of proof in order to set aside a contract between a Black person and a Native American. The argument was that, despite the seemingly perfectly clear language of the law, Congress could not have intended to leave such a loophole, and the phrase "white person" should be understood to mean Black persons, too. The case wound its way through the appellate levels of courts and finally arrived at the United States Supreme Court. The Supreme Court, as it happened, found a way to avoid making a decision on the substance of the case by going off on a procedural question, which they love to do when they can. That meant that the substantive decision of the court just below the Supreme Court was upheld. The reason I like the case so much is that the end result of it did Justice and did Justice while providing an occasion for the United States Supreme Court to find that, at least for the purposes of this law, Black is White.

This story illustrates how, because Law is always dealing with people who make no pretense of being impartial, every effort to bring the laws of a society closer to

some good purpose, some hoped-for Justice, must bear cannily in mind all the possible ways in which that good purpose could be twisted to serve somebody's self-interest. It is an exercise in trying to get ideas and ideals expressed in highly recalcitrant material, like an artist trying to sculpt soap bubbles in granite. We keep chipping and we learn in both directions, about the durability of ideas and the malleability of stone.

That is the vertical story of how law is made, in which ideals descend to particulars and go back up again. Most of us meet the law horizontally, so to speak, encountering a conflict and discovering only then that the law as it exists may differ from or match our ideals. I saw this type of encounter with law play out in an Endangered Species Act case involving a great many different people holding many different ideals. The Endangered Species Act, 93 P.L. 205, 87 Stat. 884, 93 P.L. 205, 87 Stat. 884 was passed in 1973 mostly because the bald eagle was threatened with extinction, an embarrassing fact that seemed to many a sign of the decline of America. Congress, filled with idealism and patriotic good purpose, passed the ESA forbidding people to kill, harass or harm animal or plant species that were in danger of going extinct. As this law encountered the world there were a great many surprises. I don't think that anyone in Congress understood when the law was proposed just how many animal and plant species were on the road to extinction as a result of the industrialization of the earth, how ubiquitous they were, or how affected by a huge number of human activities. Nor was it very real to Congress, I suspect, that a law written with symbolic and attractive animals in mind would apply by its terms to little, ugly, seemingly pointless creatures. The draconian power of the law was also obscure for some time. It is still astonishing in this largely cynical world that the United States Supreme Court in 1978 found under the Endangered Species Act that the Tellico Dam project, on which Congress had already spent an enormous amount of money, had to be halted because of a tiny little fish called the snail darter, which happened to live just there and only there. *Tennessee Valley Authority v. Hiram Hill et al.,* or *TVA v. Hill*, 437 U.S. 153 (1978). Ideals spectacularly won out over money in that case.

In New Mexico, the Rio Grande Silvery Minnow was listed as an endangered species in 1994. This fish has been greatly diminished by decades of human activity on the river, including the introduction to the stream of various non-native predatory species, the encroachment of human settlement into what were once broad meandering stretches of river, and deliberate human efforts (on the part of the federal government, no less) to get rid of what used to be known as "trash fish." Seven of the eleven fish species native to the Rio Grande are already extinct. The silvery minnow is very close to the edge.

With so much already lost forever, the environmental community in New Mexico felt a strong sense of urgency about changing water operations on the river and making sure that the river never goes dry--as it has done historically, whether as a result of drought or of human diversion. The environmental community argued that such diversions must stop, so that water is left in the stream to ensure the fish's survival. This argument hit the water world in New Mexico where it lives. Water in arid New Mexico is so very scarce. Suggesting an entirely new type of need, that water should be taken from existing uses and devoted to this small minnow, ran smack into entrenched and complicated human water interests along the river--farmers, cities, industries, ranchers. A century's worth of interstate agreements with Texas, contracts and water use permits would have to re-assess their supply of water if the ESA were applied in the draconian way it had been applied in the Tellico dam case.

I have sat at large conference tables in the company of people representing these seemingly incompatible interests, listening to them express such stark disagreement that anger often flared. I was afraid to look for lost marbles. In my experience, all at that table felt that they were operating out of idealism. The environmental community felt the urgency of the earth's crisis; farmers saw their historic way of life threatened, and they bridled at the notion that the crisis of the earth placed a disproportionate burden on their traditional livelihood. Cities were trying responsibly to provide drinking water for their citizens; the State was trying honorably to meet its obligations to Texas under an interstate agreement known as the Rio Grande Compact. Other actors had other ideals they sought to protect. I even heard one person express the religious belief that the Endangered Species Act is contrary to Biblical teaching, which says in Genesis that human beings have "dominion" over all the creatures of the earth. Layers upon layers of long-established legal arrangements, traditions, customs, beliefs and history shaped the feelings of everyone at the table about what Justice meant.

At the same time, all the people at that table without exception mixed some blindness and self-interest with their ideals, a mixture that I have tried to show characterizes every step of the process of making and applying law. All had motives in addition to their ideals, and no one was prepared to spend the time or commitment needed to sympathize with the positions of others. For one thing, that's not what they were getting paid for. So, interspersed with the passionate exchange of sincere ideals, the discussions included a lot of horse-trading that embraced some creative suggestions for agreements that would address the situation of the fish while minimizing the losses to human interests. It was a

mixture, I thought, that mapped on to the two types of legal theory present in the United States Constitution. Arguments from ideals are appeals to Natural Law theory. Horse-trading looks like an appeal to the possibilities of contract theory. Both ways of approaching the controversy were essential to reaching, finally, the shaky, fragile arrangement that ultimately came out of those meetings, an arrangement that has kept the minnow alive so far, although it may fall apart at any moment.

Those meetings caused me to return to a famous legal author whose work I had read in law school. Oliver Wendall Holmes, Jr. was a Justice on the United States Supreme Court in the late nineteenth and early twentieth centuries. He was known for his powerful defenses of the freedom of speech guaranteed in the first amendment to the Constitution, the first provision of the Bill of Rights. Those defenses of freedom of speech usually occurred in his dissent from more cautious majority opinions by other Justices on the Court. Justice Holmes had an amazing ability to see where law was going, though, and his dissents often became the majority opinion later, and thus the law. In his dissent in *Abrams v. United States*, 250 U.S. 616, 630 (1919), he remarked that the United States Constitution was "an experiment, as all life is an experiment."

Before he became Justice Holmes, he wrote a book called The Common Law, which set forth in more detail his vision of the experimental nature of law. The book begins with a passage that felt to me like a description of what I saw at the conference table in the silvery minnow negotiation (again, sorry for the gendered language):

> The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed. The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics. In order to know what it is, we must know what it has been, and what it tends to become. We must alternately consult history and existing theories of legislation. But the most difficult labor will be to understand the combination of the two into new products at every stage.
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> The Common Law (Little, Brown Publishing Co. 1881), Lecture I

I am especially moved by the final line about the combining of history and theory into new products. The conversation between theory, ideals and logic on the one hand, and the muddled chaos of history and self-interest on the other hand, is the cradle of new things in the world.

I want to conclude this lecture by talking about the Greek playwright Aeschylus' *Oresteia*, a book which, as I reflect on it after some decades practicing law, seems to me to agree with Justice Holmes. The *Oresteia*, just to remind people, is a trilogy of plays about King Agamemnon's son Orestes, who killed his mother Clytemnestra. In the final play of the trilogy the Goddess Athena invents the institution of trial by jury and conducts a jury trial to determine whether, as the powerful but hideous Furies argue, Orestes should be punished for killing his mother, or whether, as the God Apollo argues, the killing was excused because it properly revenged Clytemnestra's ambush and murder of her husband Agamemnon. The trilogy was admired and performed in Ancient Greece as a celebration of the importance of the structures of law in Athens, a city famous for its litigation.

When I read the play as an undergraduate, I didn't think I liked it much. Instead of clear heroics, as in Homer, it displayed actions that were ambiguous and motives that were murky. It was a relief to move on to Plato and talk of sunlight and Justice with a capital J. All the same, the plays stayed with me and even found their way into my senior essay. When I re-read the play now my respect for Aeschylus is boundless. For one thing, his skill at perfectly balancing the problem of being just to Orestes is astonishing. I once taught this play to high school students and we re-did the trial in class, adding arguments and witnesses and asking a classroom jury to make a new decision based on our new trial. In all three sections of the class the jury, voting anonymously, was perfectly split on Orestes' guilt, just as they are in the play.[2] Astonishing.

More importantly for the topics of this lecture, I now see Aeschylus as having offered a subtle and truthful view of how worldly circumstances interact with Justice, a more useful view, as Justice Holmes said, than one that approaches the matter through logic alone. In the trial as presented in the final play we hear the arguments of the Furies and of Apollo, but we do not hear the deliberations of the jury. That is, we hear the lawyers presenting the two sides of the issue of Orestes' guilt, but we do not hear anyone trying to analyze the evidence and reason about it disinterestedly, treating it as an abstract philosophical or logical problem. All we

[2] Well, in one class there was an uneven number of students on the jury, so there was a difference of one vote.

get is the fact that the jury's votes are evenly split. Modern jury deliberations are also done off-stage, *ob skene*, as the Greeks say. The sense of Justice is likely present in those hidden deliberations, but it is not made the explicit touchstone for the result.

This is distressingly clear when Athena breaks the tie and decides the case in favor of Orestes. She offers not the slightest pretense that it is capital J Justice that got her there. She might as well have turned her chair around and sent a coin up into the air. The whole sequence reminds me of the silvery minnow discussions and, in general, of the mixture of ideals and practical agreement that makes law work. Claims of Justice are made passionately in argument, and those claims are important to people's opinions. But when arguments based on Justice don't solve the problem a choice must be made, even if it looks arbitrary. Following that, as Aeschylus shows us in the play, there is a long, hard slog of Persuasion, where the party that lost the case, here the Furies, must be persuaded into an agreement that accepts the result. In the Oresteia this involves a great many concessions of worldly power and gifts. The resulting arrangement looks shaky and fragile, laced through with continued threats of the Furies' power, but it is a "new product" in the world, a new balance for the city. I find it beautiful.