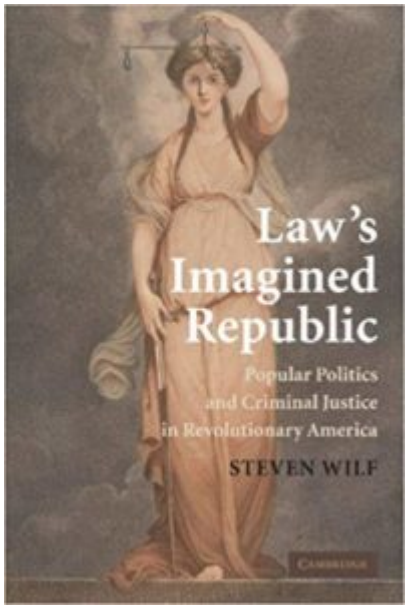
Imagining a Democracy

In this lively little book, Steven Wilf, the Joel Barlow Professor of Law at the University of Connecticut, encourages Americans to re-imagine a time when legal discourse was not just confined to the courts. Since the nineteenth century, most ideas about the legal legacy of the American Revolution have put the Constitution front and center, privileged the story of the rise of court-based jurisprudence, and especially the importance of constitutional interpretation through judicial review. The Revolution, the story goes, created a nation dedicated to the rule of law. Yet in a provocative cultural and literary analysis, Wilf compels us to look closely at the proliferation of "law talk" across the colonies in the era of the American Revolution—a legal language that was both elite and popular, spanned different forms of expression from words to rituals, and drew on fictive and real ideas of law. And, because this law talk emerged simultaneously with the imperial crisis, a "revolutionary legal language became intimately intertwined with politics" and transformed America's legal institutions. While we may now remember a less contentious outcome, Wilf makes a compelling case that we would do well to recall the "untidy" origins of American law in an era when the Constitution is America's "most important export" (195).



To make his case, Wilf zeroes in on the intersection of criminal law, politics, and language and takes a refreshingly creative approach in thinking about the law as an act of storytelling as much as it is about constitutionalism, statutes, and sociohistorical understandings of compliance with laws and legal norms. In an entertaining, rich, and wide-ranging chapter named after Tocqueville's later assertion that "the language of law is a vulgar tongue" (56), for example, Wilf explores popular commentaries on criminal cases found in hanging ballads, bits and pieces of iconography, pardon petitions, diaries, and accounts of punishments, mock punishments, and execution narratives and

juxtaposes them against court documents and legal treatises. These criminal legal narratives could and did create new forms of law, and such stories were created by non-professionals as much as professionals as they engaged in contested imaginings of what the law ought to be. Wilf does an admirable job in teasing out and showing how ordinary people imagined how the laws might work or should work as they staged mock executions, dreamed up punishments, proposed reforms, read execution narratives, created their own real and fictive criminal narratives, and hanged and burned effigies.

In their law talk, Americans had to grapple with difficult questions such as the purpose of punishment, the right to judge, and the authority of lawgivers. When, in turn, colonists began to question political authority, this law talk laid the basis for a much more radical re-imagining of what the law could be. Indeed, as colonial protests grew over imperial reforms after 1763, Americans drew upon this repertoire of legal language in their political protests. The two mutually reinforced each other as both argued for what today we would call greater transparency, and the participation of common people in deciding right and wrong. Law talk energised Revolutionary resistance. As Wilf concludes, in a Revolutionary moment, suddenly "interpreting doctrine, judging cases and controversies, and inflicting punishment must be seen as a radical assertion of sovereign powers" (8). In making this argument, Wilf is keen to close the gap between constitutional scholars, who focus on constitutional issues and (elite) patriot theories of rights in the lead-up to independence, and those who emphasize extralegal actions on the street. The two were intimately related.

Wilf then fast-forwards to the 1780s and 1790s. Here, he switches tack and focuses less on popular law talk and more on the efforts of different states to reform their criminal codes. Wounded by British publicists' taunts that slaveholders were hardly in a position to claim the mantle of liberty, many Americans pointed to English reliance on capital punishment to delegitimize English authority and claims to liberty. Yet if legal reformers sought to curb capital punishment and reform the penal system in the new republic, they did so in tension with more popular calls for public participation in the implementation of criminal justice. Reformers and legislators brushed aside popular execution rituals and ensured interpretive power lay increasingly in the hands of the legislatures and courts. In part, Wilf argues, this was in reaction to stories of popular violence emanating from the French Revolution: "Images of the guillotine from the French Revolution … underscored the dangers of involving the common people in questions of criminal justice" (11). Wilf thus describes a waning of vernacular law talk, participatory justice, and the mingling of law and politics in the 1790s—and the rise of court-based jurisprudence with which we are now more familiar. Yet curiously, he hesitates to describe this "waning" as a conscious repression of the radicalism of the 1760s and 1770s; rather, it is a "recasting" in light of events in France (10-11).

Such is the main argument advanced over chapters two and four. The other chapters zoom in to moments when particular communities wrestled with these

broad issues. Indeed, chapters one, three, and five are micro-histories designed to capture the richness, complexity, and immediacy of legal imagining—and how particular cases and controversies were coupled with politics. These are delightful case studies. The first juxtaposes popular uproar in Boston over the freeing of Ebenezer Richardson, a customs officer who accidentally shot a rioter in 1770, with that over the execution of career criminal Levi Ames for burglary in 1773. Imagining and inventing a new and more criminal biography of Richardson, Bostonians critiqued English justice and contrasted Richardson's pardon for the more serious crime of murder with the execution of Ames for burglary, and turned official law upside down. The second micro-history looks at the execution narratives of two post-Revolutionary Connecticut felons, a rapist and a murderer, and shows how local communities could turn self-justifying explanations of crimes against their authors to create alternate readings and demand punishment. The final story looks at the creation of a reform statute in New York that mandated post-mortem dissection of executed felons.

Though this short review cannot do justice to the details of these micro-histories, they are in fact wonderful stand-alone pieces that tell us much about the particular stories that Americans told themselves about the law. They also show us in rich detail the way that different kinds of narratives about the law might and did come together in changing the way that the law worked. At the same time, though, they also point to one of the major weaknesses of the book. These are very specific—but separate—case studies. They give us suggestive glimpses into the local worlds of law talk in different communities at different times. Yet they are too episodic and disconnected to make a compelling and convincing argument about change over time, particularly across Revolutionary America. Nor does Wilf help us connect the dots in the more wide-ranging chapters on pre- and post-Revolutionary law talk. Wilf jumps from the early 1770s to the late 1780s and we are suddenly confronted with a different set of sources, a different approach, and perhaps not surprisingly, a changed view of the political and legal landscape.

Equally importantly, perhaps, Wilf wants to make a case about revolutionary change, yet the Revolution—and especially the long and formative years of the war—is conspicuously absent in this account. Perhaps it was too messy to include, but in some sense that's what his story and initial methodology are driven by. The absence is more curious since closer attention to the Revolution, and more recent historiography on the Revolution, would have bolstered Wilf's case. The premise of the book, though Wilf might not phrase it as such, is a kind of lament that the unruly imagined republic, born in the political upheaval of the 1760s and 1770s, was contained in the post-Revolutionary settlement. Wilf attributes this to the violence of the French Revolution. Yet elite legislators and lawmakers throughout the states could more easily point to the violence of their own Revolution to justify new exclusionary legal forms. And they did so—they complained about popular resistance to conscription laws, militia laws, impressment laws, and new taxes imposed by the states. They were horrified at extra-judicial action taken

against loyalists, or suspected loyalists. They complained vociferously when extra-legal action of the kind Wilf finds in the pre-Revolutionary period was turned upon them in the dramatic lead-up to Shays' Rebellion. Many looked to the new Constitution to solve the problem of popular participation in the legal and political process. And it worked. As Wilf notes, it was only after the passage of the Constitution that law talk was confined to the courts: "Americans stepped back from the mingling of law and politics," he concludes. Though Wilf uses the French Revolution as the terror that made America pause, not all Americans agreed about the "dangers of involving the common people in questions of criminal justice" (11). Some continued to imagine a role for themselves in a real—if perhaps increasingly distantly imagined—democracy.

Still, if Wilf's provocative book does not convince, it does suggest a great deal. And we would do well to talk less and perhaps listen more to the vulgar tongue of the language of law in eighteenth-century America.