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*899 PIGS AND POSITIVISM

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In this Article, Professor Hendrik Hartog explores the practice of pigkeeping in 19th century New York City as a starting point for developing a larger and more general study of the legal significance of American customs. Professor Hartog uses two different-and competing-interpretive strategies to analyze a criminal prosecution for pigkeeping. One strategy regards the case as a legal text. Viewed in this manner, the case exposes several uncertainties in the legal structure of 19th century America. The other strategy visualizes the case as an episode of conflict between contending normative orders; pigs persisted in urban America, despite laws prohibiting their presence. The first strategy, Professor Hartog suggests, permits us to maintain our valued vision of law as a (single) text, but at the cost of suppressing the existence and relative autonomy of competing and conflicting socially constituted visions of legal order. An adequate account of our legal history, he concludes, should recognize the implicit pluralism of American law.I.

INTRODUCTION

Did 19th century residents have a right to keep pigs in the streets of New York City? In 1819, a court said no. But in what ways, if any, did that decision conclude the inquiry? Did it mean there no longer was such a right, implying that there once was? Did it mean that the law could never recognize such a right? What was the legal significance of the judicial denial of the right to keep pigs in the streets?

In this Article I will attempt to answer those questions using two rather different-and competing-interpretive strategies. The first, which I think of as the ordinary practice of American legal history writing, regards the case-and cases generally-as a text expounding and developing legal doctrine. The second, which I think of as characteristic of the practice of some social anthropology and some social history, visualizes the case as an instance or episode of conflict between contending normative orders. [FN1]

*900 My goal is not to prove one or the other the better strategy. [FN2] Indeed, I think that each of these strategies reflects a distinctive legal vision, true in part to the ways Americans have experienced and argued about law for the past two centuries. We cannot choose between them without denying important features of our legal culture.

My goals are substantive. I want to use these contrasting strategies to make sense of the claimed and denied legal right of some 19th century New Yorkers to keep pigs in the streets of the city. I hope this study will help provide a starting point for a larger and more general study of the legal significance of American social customs. The relative silence of American legal doctrine on questions of customary law, a silence trumpeted by the legal language that enveloped efforts to rid New York City of its pigs, strikes me as pointing to the need to explore the problematic relationship between our social pluralism-the multiplicity of our social practices and normative identities-and the values we impute to legal order. But such a grandiose project will necessarily rest on numbers of smaller studies of the legal regulation of particular social practices, of which the essay that follows is an example. And whether such a larger project can ever be carried to completion, I can begin by trying to set out the complex relations between legal argument and social and political practice as they were revealed by the 1819 pig case and its aftermath. If I can succeed at that, the rest can wait, or perhaps, will follow. [FN3]

II. THE PRESENCE OF THE PIG

It is 1808. Next to the office of New York City's Board of Health on Broadway a man carrying a shovel is engaged in conversation with a woman. Near them, a Black (?) woman—a servant, *901 surely—is hanging out the wash on a line tied between trees while she talks to a little boy. Meanwhile a huge pig walks by, attracting no one's attention.

Pigs were an ordinary part of the American urban landscape. How many residents kept them and how they were distributed around the different wards of New York City awaits some future student. [FN4] That they were present is incontestable. One would like to say that their place in the urban ecology is confirmed by the general silence about them. [FN5] Until the early 19th century, when swine were noticed, they were as natural a part of urban life as mud, manure, and the odors that once automatically accompanied increased human and animal density. [FN6]

Indeed, in a world without professional streetcleaners, a world in which private citizens were expected to provide the manpower (the term is in this context a misnomer) to remove the excrement and the wastes of urban street life, pigs assumed a necessary public role, particularly in wards whose residents lacked available servants. The result was, we might imagine, a peculiar urban ecological cycle, one which connected residents with their physical environment in a way that is difficult for us to imagine today. In brief, people ate pigs, and pigs ate the human and animal wastes and garbage which lined the streets of the city. [FN7]

*902 Pigs wandered the streets of early New York City, just as they have wandered the streets of many pre-industrial cities, 'prowling in grunting ferocity.' [FN8] We ought not to imagine that this more organic image of urban life had a sweetness and gentility that is lost to us. To the contrary, all accounts of early urban pigs confirm that they were mean, dangerous, and uncontrollable beasts, hardly an urban amenity. They systematically destroyed pavements, occasionally killed children, and behaved in public in ways that were inconsistent with even the relaxed standards of cleanliness and propriety of early modern urban street life. [FN9]

Yet their presence in the streets was a given. Letting one's pigs run and fatten on the streets was

an urban custom, just as letting pigs run in the woods and live on acorns was a rural custom, and it may be, although knowing whether it was is the problem of this essay, that city residents who kept pigs thought of themselves as owning a legal right to run their pigs in the streets of the city. They would have held, to use legal lingo, an easement over the streets, held by prescription or by customary right.

In a recent article on early 19th century New York City politics, Howard Rock describes some of the ways that the keeping of pigs in the streets became the focus of class conflict. [FN10] I shall have more to say on this theme further on, but for the moment it is important to note that the identification of swine with the lower classes was not an innovation of the early republic. Cronon suggests in *Changes in the Land* that 17th century disputes over the keeping of pigs often expressed a disguised class hostility. [FN11] And in New York City too there had been a long history of attempts by *903 more elite city leaders to restrain and limit (even if they could not eliminate) the claims of less elite residents to keep their pigs. [FN12]

Early nineteenth century governmental debate first focused on draft ordinances that proposed to require all unpenned pigs to wear rings in their noses. Unringed hogs rooted with their snouts for scraps and excrement between the blanks of footwalks. The land developers and elite homeowners who were working to improve the streets in front of their properties no doubt saw the destruction the pigs produced as undercutting their efforts and investments. In late 1809, therefore, the city passed a law fining the owner of any unringed pigs found in the streets, [FN13] a regulation which may have been seen as implicitly recognizing artisans' rights to keep (ringed) pigs on city streets. [FN14]

I am not certain what explains the more sustained effort to criminalize New York City's pig keepers that began around 1816. In part, the petitions and newspaper editorials that preceded and accompanied the campaign may have been motivated by a relatively new intolerance of urban nuisances. It may be that the coherence and the inclusiveness of the vision of pigs as a 'bad thing,' a public nuisance, was a new achievement of the city's developing governmental culture. We might

read the petitions as asking, 'Why should we expose ourselves and our properties to danger and harm, when we have city government which should be capable of securing the public safety for our benefit?' Or, to put the matter slightly differently, 'Why should the longstanding existence *904 of the urban custom of keeping pigs in the streets prevent government from abating this nuisance, given the fact that city government has changed so many urban customs and practices in the previous quarter century?' [FN15]

Still, as Rock notes in his article, the new campaign initially came to naught. A law forbidding swine to run at large was first proposed to the city council in 1816, justified primarily as a way of preventing injuries to street pavements. [FN16] As drafted, the ordinance declared that any hog running in the streets could be taken by any person to a public pound. If the pig's owner wanted it returned, he or she would have to pay ten dollars to the person who 'captured' the pig plus charges of twelve cents per day to the pound. After much delay, the law was finally called up for a vote in June 1817, at which time it was voted down. Then in October the same ordinance was passed into law. [FN17]

Petitions for repeal, protests, and remonstrances inevitably followed. Not only was the pig 'our best scavenger,' a street cleaner for parts of the city which badly needed cleaning but which were ignored by municipal employees, but it also provided cheap food for the poor in winter. All that the new law would produce would be increased street cleaning expenses and a 'swarm of informers' to prey 'on the defenceless poor.' [FN18] And in early 1818 the city repealed the ordinance. [FN19] In June the council's committee on laws used a petition for relief by two men injured when their carriage was overturned by hogs as an excuse to reintroduce a law against swine in the streets. But the whole council postponed consideration of their draft. And at the council's next meeting the law committee's motion to have its report considered was voted down. [FN20]

Then, in late 1818 Mayor Cadwallader Colden, sitting in his traditional role as judge of the quarter sessions court, impanelled a grand jury to hear evidence on the keeping of pigs in the city. [FN21] *905 Soon the jury returned an indictment charging

two individuals with the common law misdemeanor of 'keeping and permitting to run hogs at large in the city of New York.' [FN22] One of the two accused, Louis Lashine, came to trial on December 11. After proof was introduced that his place on Duane was 'a receptacle for about forty hogs,' he offered no defense, and a jury convicted him and imposed a nominal fine. [FN23] The other defendant, a butcher named Christian Harriot or Harriet who lived in the northern part of the city on Spring Street, apparently did not concede that charge so willingly. He hired attorneys to defend him, and thus on January 5, 1819 a full trial was held in the sessions court on the question whether he could be convicted of maintaining a public nuisance because he owned pigs that were sometimes found on city streets. [FN24]

Van Wyck, the district attorney, began the case by examining a Mr. Ames, Harriet's neighbor and evidently another pig keeper, who reluctantly admitted that Harriet's hogs had been seen in the streets. [FN25] The district attorney then moved on to show 'that hogs running in the streets are a nuisance, that they attack children even, and do various other forms of mischief.' [FN26] A series of horror stories was produced to show the evil of pigs in the streets, for example: (1) hogs attacked children, (2) boys got into trouble by *906 riding hogs, (3) ladies had been compelled to view swine copulating in open view, and (4) hogs defecated on people. [FN27] The defense called no witnesses.

III. *PEOPLE V. HARRIET AS A LEGAL TEXT*

A. Who Decides Who Decides?

With the factual preliminaries out of the way the lawyers in the case next turned to the foundations of the legal case against Mr. Harriet. Granted that Harriet owned pigs which might have been found on city streets, [FN28] and granted that pigs had been known to engage in conduct of the kind detailed by the prosecutor, but that meant that Harriet could be convicted of maintaining a public nuisance?

Both prosecutor and mayor-judge answered that question in the affirmative. Evidently the jury agreed, since Harriet would be convicted. But, needless to say, the defendant's lawyers answered the question in the negative. They challenged the

indictment on two grounds. The first was that a common law misdemeanor action was the wrong means to abate this nuisance, if nuisance it were. The second was that in any event keeping pigs in the streets of the city did not constitute a public nuisance.

Implicit in the first ground of Harriet's defense was a Jeffersonian distrust of common law or judge-made nuisance law. [FN29] What institutions should make laws that took away the right to keep pigs in the city? Not this sessions court surely, which enforced statutory misdemeanors as defined by common council and state legislature, but which should not arrogate to itself power that properly belonged to popular institutions. Indeed, the lawyers insisted that the sessions court was explicitly denied the power to act on this indictment by the state legislature, which in authorizing pounds for the confinement of hogs in particular specified circumstances, had recognized the right of citizens to keep hogs and allow them to run at large in all others. [FN30]

*907 Further, English law declaring that hogs were not permitted to run in the streets of London could not serve as precedent for judicial action in this case because there never had been a right to run pigs in London. The problem here was whether a mayor's sessions court had the power to use nuisance law to change an existing right, not its power to restate rules already known. [FN31]

Finally, Harriet's lawyers pointed to the repeal of the 1817 ordinance which made it illegal to keep pigs in city streets. Repeal demonstrated that citizens had a right to keep pigs, 'by the existing state of our corporation laws.'

If our corporation have seen fit to repeal the law which they themselves once passed of that description; and if they have not independence and stability enough to renew the act and free our citizens from doubt; is it to be endured, that severe and antiquated doctrines should be brought up from the English books to inflict a stigma and a penalty upon an honest and industrious fellow citizen . . . And if this practice really was 'a nuisance of the intolerable description alleged,' then let the city government go about removing it in the right

way. Let it draft a statute which could be sent to Albany for passage. [FN32]

The prosecutor's response rested, as did the mayor's charge to the jury, on his sense of the great need for immediate legal action and, correspondingly, on a lesser regard for the proprieties of institutional choice. [FN33] Who should decide was less important than that someone should. The 'long indulgence this practice has received from successive grand juries; and even from the corporation,' rather than legitimating pig keeping as a vested right, revealed instead the need to correct the evil now. [FN34]

At the same time, both prosecutor and mayor-judge insisted that the sessions court was the right institution to make this decision. Even 'if the corporation had in fact expressly authorized swine to run at large in the streets,' it would not, said the prosecutor, limit the authority of the grand jury to issue this indictment, *908 for 'the corporation cannot abrogate the common law.' To which the mayor added that the corporation (meaning the common council) had no right to pass any law contrary either to state statute or to 'the common, or unwritten law of the land.' [FN35] The only question was whether the acts charged and proved constituted a nuisance as defined by legal authority and precedent. Where a remedy existed at common law, even a statute which gave a further or different remedy could not take away the common law remedy, unless the statute explicitly stated its intent to do so.

B. The Dream of a Pig-free City

Were the pigs Harriet kept in the streets a nuisance? His lawyers rested their defense on the claim that labeling pigs in the streets a nuisance was nothing less than a direct attack by elites on the way of life of the poor. '[A] great convenience, and almost an essential source on the score of provisions would be taken from the poor or less opulent of the citizens by a conviction.' If this practice were indictable as a nuisance:

the dandies, who are too delicate to endure the sight, or even the idea of so odious a creature, might exult; but many poor families might experience far different sensations, and be driven to beggary or the

Alms House for a portion of that subsistence of which a conviction in this case would deprive them. [FN36] Harriet's lawyers conceded that keeping pigs in the city might produce some 'few and slight inconveniences.' Yet, they insisted, those inconveniences were hardly sufficient to constitute an indictable nuisance. Whatever problems pigs caused could not be distinguished from the problems caused by urban dogs, cats, and horses, none of which were seen as indictable nuisances. In any event, a social practice could become a public nuisance only if it violated standards held in common by the entire population of a community. [FN37]

To the prosecutor, the fact that hogs 'would attack children in the streets, and mangle them and commit all sorts of indecencies,' was all that needed to be proved to reveal them as public *909 nuisances. [FN38] The mayor, on the other hand, used his charge to the jury to develop a short essay on the law of nuisance and the significance of labeling pigs in the streets as a nuisance, an essay he probably thought responsive to the charges of defendant's lawyers.

What is a public nuisance? It is, said the mayor, 'an offence against the public order and economical regimen of the state, and an annoyance to the public, such as produces disturbance in the reasonable enjoyment of life, property, or common comforts of life, and that, though no man's health be affected.' [FN39] As such, the standard against which to judge the presence of pigs in the streets was made objective and distanced from the wishes of particular communities. The public which might be annoyed by the condition was not the populace directly involved, but rather the partially abstracted 'public' characteristic of American federalism. [FN40]

Local conditions, of course, could not be entirely ignored. To use the apposite language of Mr. Justice Sutherland 110 years after *People v. Harriet* (explaining why it is constitutionally legitimate to keep apartments out of areas zoned for single family residences only), 'A nuisance may be merely a right thing in the wrong place,-like a pig in the parlor instead of the barnyard.' [FN41] The pig that is a nuisance on Broadway, in the built up part

of Manhattan Island, might not be one on the northern outskirts of the city.

The mayor, however, refused to concede to the residents of particular neighborhoods any power to determine the presence of a public nuisance. The tolerance of particular communities, their acceptance of a particular social practice, could not control the legal issue. 'A nuisance at Corlaer's Hook may not, of necessity, be a nuisance to the people at the Battery; but it must be such as that people at large would be offended if they happen to come to the place.' [FN42] Using the inverted egalitarianism characteristic of American federalism, [FN43] the mayor made the equal citizenship of all in the city a justification for an attack by wealthier citizens on practices identified with poorer ones. The streets, we might paraphrase the *910 mayor as saying, belonged to the people, not the pigs, and, as a corollary, neighborhood sensibilities had no particular right to consideration against the wishes of the sovereign 'people' in control of the institutions of government.

But what made pigs a legally proscribable nuisance? The mayor restated the evidence the prosecutor had earlier raised about the dangers and harms produced by pigs. He could have left it there, but he did not, perhaps because in the last analysis it is difficult to see how these urban dangers and harms were distinguishable from many others left unproscribed. Instead, his charge to the jury shifted attention to the 'great and proud city' he was charged with governing and the significance for its future of removing the pigs.

What was the pigless city he imagined? His jury charge suggested three features: First, city whose cleanliness and health-the public good-would be produced by a paid bureaucracy, rather than through the more or less compulsory involvement of a citizenry in corporate governance. Traditionally, public services and goods had been a by-product of the commercial life of the community. Public docks and streets, for example, were often produced as conditions for grants of wharf space. [FN44] In poorer wards, streetcleaning resulted from the presence of pigs, which offered artisans some protection from total dependence on a market economy. Now, however, public goods-the products of instrumental state action-would be created, if at all, by specialized public means using public

employees paid for by public tax dollars. 'So, it is . . . said,' the major noted, 'that they swine are a useful sort of scavengers; but I think our corporation will not employ brutal agency for that object when men can be got to do it.' [FN45]

Second, a city whose workers will be entirely dependent on a cash economy for their subsistence. 'It is said, that if we restrain swine from running in the street, we shall injure the poor. Why, gentlemen! must we feed the poor at the expense of human flesh?' [FN46] Putting aside the hyperbole, one might still ask: how did he expect to feed the poor if they were denied their pigs? What did he expect them to live on? The obvious answer is that he expected a growing economy to provide jobs and a rising standard of living for the working classes, so that all could purchase food sufficient for a healthy diet. But one could as easily pose his vision in more Machiavellian terms: a working class without its pigs would be that much more dependent on the market and employers, that much *911 more controllable in situations of labor conflict. [FN47] Most likely, he had not thought about the question at all, seeing the city as his, to be molded to suit his vision of urbanity.

Third, a city radically separated from the countryside. Maitland once wrote that those who wished to study the legal history of urban government would necessarily have fields and farms on their hands. [FN48] Throughout most of human history that has been sound advice. To the mayor, though, that history was one from which he wanted escape. A pig in the city, like Sutherland's pig in the parlor, was matter out of place. [FN49] And implicit in his dream of piglessness was a vision of a place where 'our wives and daughters' can 'walk abroad through the streets of the city without encountering the most disgusting spectacles of those animals indulging the propensities of nature.' [FN50] That kind of nature had no place in urban life. [FN51]

What may be most striking about all this is the mayor's prescience. Just as the modern exclusionary suburb can be derived imaginatively from Justice Sutherland's 1926 language in *Euclid v. *912 Ambler*, so the modern—that is to say, 19th century-city springs from the text of Mayor Colden's charge to the jury in *People v. Harriet*. The creation of a modern bureaucracy, the

transformation of relatively self-sufficient artisans and mechanics into a working class, and the growth of a commercial rural agriculture dedicated to feeding urban residents are all commonly viewed as central features of urban modernity.

In what ways, we might wonder, did Colden's language help make that vision come to life?

C. *The Silence of Custom*

There is nothing surprising about the fact that neither the mayor nor the prosecutor ever suggested that pig keepers possessed any customary rights to run their pigs in the streets. Indeed, a corollary of the legal instrumentalism and social engineering that characterized their arguments would certainly be a general rejection of claims that an 'investerate practice' [FN52] might by its very existence constrain public policy and implementation.

Still, a generation of distinguished works of social history have demonstrated the extent to which claims of custom formed both the property and the political practice of poor and laboring classes in early modern England and America. Custom was 'one of the normative weapons of the weak against the strong, one of the ways in which power was disciplined and concessions enjoyed.' [FN53] We might therefore expect that Harriet's lawyers would have construed the practice of keeping pigs in the streets as a custom held by its practitioners as a legal right.

Did Harriet's attorneys ever raise such a claim? They began their summation stating that the practice of allowing pigs to run in the streets was of 'immemorial duration,' [FN54] thereby invoking the standard common law vocabulary for claims to customary rights. But from then on their defense was shaped by an implicit concession that the pig keeper held no right that the state was obliged to recognize. In part their argument for governmental restraint was prudential: that the social evils produced by pigs running in the *913 streets were (over)matched by social goods, thereby making the practice an inappropriate object of regulation and delegalization. In part it was framed by what my colleague Neil Komisar calls the problem of 'comparative institutional choice:' not whether government per se could make the decision to forbid the running of pigs in the streets, but whether

the sessions court was the right institution to make such a decision. [FN55] Harriet's lawyers never suggested that pig keepers should be thought of as owning a customary right (or easement) in the streets of the city or, alternatively, that the city was bound by its past conduct in accepting as legal the pigs in its streets to continue accepting that practice.

I elsewhere have argued that a custom-restrained way of conceptualizing municipal governance had become impossible by the end of the second decade of the 19th century. [FN56] Lawyers like those who argued Harriet's case could no longer think in terms of customary rights, at least not in making a formal legal argument for their client, certainly not if their adversary was the corporation of the city of New York. I am today, for reasons which will become apparent, far less certain than I was then that the silence of Harriet's lawyers can stand as strong evidence for my earlier claim, but I remain convinced of the significance of that silence.

Why not raise the claim of a customary right held by artisans and other relatively poor residents of the city? We can imagine that at the most basic level such a claim would conflict with the republican political commitments of American artisans. In the common law, customary rights always have been intimately bound up with status ascriptions. One reason that English 'peasants' could plausibly claim particular manorial rights—such as grazing animals or gathering firewood—was precisely because they were publicly identified as peasants. Would American artisans have allowed their lawyers to label them similarly? Republican-egalitarianism might in this case have posed a direct challenge to the defense of traditional rights and usages which Sean Wilentz and Howard Rock have demonstrated also lay at the heart of so much of artisans' political practice. [FN57]

*914 But let us lay aside the contradictions of American political identity and political theory. Hypothetically, could Harriet's lawyers have found in 18th century English common law principles a basis for arguing that their client had a customary right to run pigs in the streets? [FN58] I think the answer is no, but answering the question requires a short detour through the bramble bush of English customary law.

From Coke through Blackstone and beyond, custom was a (perhaps the) central category in English jurisprudence. It was a protean term, irreducible to clear or coherent categories. At times the whole of the common law was seen as an expression of the customs of the English people. At times the common law was itself characterized as a custom. [FN59] Analytic categories were easily *915 overwhelmed by the descriptive uses to which the term 'custom' might be put in legal practice. [FN60] Still, eighteenth century jurisprudence devoted much energy to the project of rationalizing and ordering the varieties of customs, and typically, legal theorists distinguished custom as a source of law from custom as a particular type of law. [FN61] It is the latter category which concerns us here.

As a particular type of law within the larger regime of the common law, custom was identified with 'local' bodies of rules or rights which could be differentiated from those of the nation as a whole. [FN62] For some purposes these local or 'particular' normative orders would be seen as exemptions from general law. For other purposes they would be regarded as property rights (usually) held by particular communities in their group or corporate capacity. Particular customs included distinctive forms of land tenure or distinctive use-rights: rights to gather twigs from royal or aristocratic forests, rights to collect tolls, rights to play cricket on specified lands, distinctive inheritance practices. They also included jurisdictional privileges: rights to have particular forms of disputes judged by distinctive decision-making bodies, rights to collect dues, to hold banquets, to be exempted from general rules, obligations, or procedures. The varieties of particular customs existant in early modern England beggars the imagination and seems at times to swamp any notion of the common law as a coherent body of positive legal doctrine.

Using the examples above, it would seem a relatively easy task to characterize the long-standing social practice of letting pigs run on New York City's streets as a particular custom which the sessions court should have recognized. By 'immemorial usage,' it might have been said, residents of the city and/or artisans and/or the city's poor held the right to depasture their beasts in the corporation's close (the streets) or, alternatively, in the municipal commons (the streets). [FN63]

*916 Characterization, however, is not everything, and before concluding that the silence of Harriet's counsel was an error, it is necessary to consider the ways eighteenth century courts and treatise writers treated claims to particular customs. [FN64] Many scholars have used the universe of particular legal customs as a symbol of the limited authority and reach of the state in the early modern world. [FN65] But the history of English customs is also a part of the history of the growth of state power, one important exercise of which was the 'legalization' of customs by the courts. [FN66] At the same time that particular customs constrained and limited the exercise of national legal authority, legal authority set out a series of standards by which to recognize and control the existence and value of a legally enforceable custom. Blackstone summarized those standards as requisites that a custom be ancient, continuous, peaceable, certain, compulsive, and reasonable. In almost all cases the existence of the social practice had to be specifically proved. And insofar as the practice of the custom was in derogation of common law rules, it would be interpreted strictly. [FN67]

*917 Applying two of these standards, certainty and reasonableness, to the claimed right to keep pigs in New York City's streets could only have been disastrous to Harriet's case. Keeping pigs may look like a custom not unlike (for example) the right to play cricket on specific lands. But the actual local practice of keeping pigs in the streets was unmistakably 'uncertain,' and therefore unenforceable as a custom, for there was no way of specifying in advance who owned the right. 'Certainty' usually flowed from tenure: from a landed estate or some secure foundation in property. Manorial tenants could hold a customary right to let their pigs run on manor property. The residents of a village or town could not use their residency as a way of making similar claims on municipal property. [FN68] A particular custom might become the property of a particular trade, but again, that was so because a traditional apprenticeship process provided a structure of inheritance and of vested property rights which made certain who was entitled to the custom. By 1819 such a conceptualization of apprenticeship would have been almost inconceivable in New York City, and in any event nothing in the history of the social practice identified it unambiguously with a particular trade. It may well be that the greater number of pigs found

in the streets belonged to butchers fattening imported pigs before slaughter. But Harriet, as a butcher, could not lay claim to a right distinctively held by the members of his trade (and, of course, his lawyers never tried). [FN69]

*918 Similarly, the legal requirement that a practice be 'reasonable' meant that its legitimacy could always be challenged. No practice, no matter now settled, could be maintained if a court determined that its exercise was unreasonable. And one might read both the prosecution's case and the mayor's charge as demonstrations of the unreasonableness of the practice of keeping pigs in the streets.

What made the practice unreasonable? Was it enough for the mayor to declare that unpenned hogs were a nuisance under New York common law? Eighteenth century English legal lore would have said, by contrast, that the inconsistency of the practice with central policy could not determine its unreasonableness. There was no necessity that a custom be justified by public policy or general legal reasoning. It was sufficient 'if no good legal reason [could] be assigned against it.' [FN70]

Did that mean that a committed application of legal precedent should have led to a determination that pig keeping was not an unreasonable practice? Probably not. In spite of the seeming clarity of the black letter rule, English legal practice during the 18th and 19th centuries was deeply divided on the proper relationship between central policy and inconsistent local practice. English courts often held void a usage or custom opposing an established rule of law. [FN71] A custom which benefitted the individual to the detriment of the commonwealth was per se bad. [FN72]

What little American doctrine there was on the question was less ambivalent and posed a republican critique of any attempt to insist on the legitimacy of customs in the face of contrary legal rules. [FN73] The author of the only American legal treatise on customs concluded his unhappy examination of the case law language with the following restatement of the meaning of unreasonableness: [FN74]

A usage or custom, as we have already shown, is not invalid simply because it is

different in its effect from the general principles of law applicable to the particular circumstances in its absence. But if it conflicts with an established *919 rule of public policy which it is not to the general interest to disturb; if its effect is injurious to the parties themselves in their relations to each other; if, in short, it is an unjust, oppressive, or impolitic usage, then it will not be recognized in courts of justice, for it will lack one of the requisites of a valid custom, viz., reasonableness. [FN75] In the face of the burden raised by such a standard of reasonableness, not to mention the monumental difficulty of making the practice of urban pig keeping appear a certain custom, we can imagine that the swine's legal defenders reasonably concluded that they had nothing to gain by framing their claims in the form of customary right. And thus no one ever raised the kinds of arguments sketched out in the last few pages.

D. The Law of Pigs

Both prosecutor and mayor took pains to assure the jury that 'this prosecution was not instituted from vindictive motives.' Indeed, the mayor went on to admit that the defendant had been given an implicit license to keep pigs in the streets, 'and that exonerates him from any immoral intent.' Punishment would thus be nominal. (In fact, after the jury arrived at a guilty verdict, Harriet was fined only one dollar and costs.) [FN76]

The point was to establish a legal principle: that there was no legal right to keep swine in the streets of the city or, alternatively, that doing so constituted a public nuisance which left the perpetrator subject to criminal prosecution. From the mayor's perspective—indeed, from the perspective of what most of us think of as law—it may well be that the case succeeded in establishing that principle. No appeal was taken. [FN77] I can find no published cases anywhere in America after 1819 in which the issue was reargued. [FN78] *920 While many cases discussed the power of cities to impound pigs and other animals found in city streets, all of them presume that a city may regulate to abate what is by definition a public nuisance. [FN79]

A distinctively bourgeois vision of a pig-free

city had thus become a legal reality in New York City. A traditional social practice of municipal artisans had been publicly and formally declared unsafe, immoral, and, therefore, illegal. [FN80] To keep pigs on municipal streets was to commit a crime. The rights Mr. Harriet and his fellow pig keepers once thought they had in the streets of their city no longer were theirs to claim.

IV. *PEOPLE V. HARRIET AS EPISODE*

A. The Persistence of Pigs

I cannot refrain from saying a few kind words on behalf of the favored pet of the Americans, the swine. I have not yet found any city, county, or town where I have not seen these lovable animals wandering about peacefully in huge herds. Everywhere their domestic tendencies are much in evidence; no respectable sow appears in public unless she is surrounded by a countless number of beloved offspring. These family groups are a pleasing sight to the Americans, not only because they mean increasing prosperity but also because a young porker is a particularly delicious morsel. Besides, the swine have shown certain good traits which are of real practical value; in the country they greedily devour all kinds of snakes and the like, and in the towns they are very helpful in keeping the streets 'cleaner than man can do' by eating up all kinds of refuse. And then, when these walking sewers are properly filled up they are butchered and provide a real treat for the dinner-table. [FN81] *921 This passage, taken from the travel descriptions of Norwegian lawyer Ole Raeder, was written in 1847, nearly thirty years after *People v. Harriet*. It will, of course, surprise no one that the delegalization of keeping pigs in the streets did not eliminate pigs immediately from American city streets. But thirty years?

Throughout that time, pigs remained important as 'local color' for foreign travellers. In *Martin Chuzzlewit*, based on Charles Dickens' 1842 trip to America, Dickens has Martin arrive in New York and go to a house distinguished by 'jalousie blinds to every window, a flight of steps before the green street-door, a shining white ornament on the rails on either side like a petrified pineapple, polished, a

little oblong plate of the same material over the knocker, . . . and four accidental pigs looking down the area.' And while Martin waits to be let in, 'the pigs were joined by two or three friends from the next street, in company with whom they lay down sociably in the gutter.' [FN82]

Foreign travellers ascribed the pigs' continuing presence on the urban scene to two familiar intertwined causes, both of which can be drawn from Raeder's account. First, they presumed the centrality of pork in the American diet. [FN83] Second, they regarded urban swine as an odd solution to the problem of urban sanitation. Hogs fattening on wastes found on city streets were monuments to the inability or unwillingness of city government to provide effective street cleaning. They were, as Charles Rosenberg has written in his study of cholera in New York City, 'the city's shame, but, nevertheless, its only efficient scavengers.' [FN84] And the result was that the whole city could be characterized as a 'pigstye.' [FN85]

That New York City (like other American cities) semi-officially tolerated swine is suggested by an 1848 case involving a father's attempt to collect damages from the city after his son was killed by a pig loose on Chatham Street. The father based his suit on an 1839 ordinance imposing penalties on owners for any swine at large on *922 city streets. [FN86] The result of the enactment of that ordinance was, according to the father, a municipal assumption of liability.

The New York Superior Court, on the other hand, characterized the injury as one 'which no legislation can prevent, and which no system of laws can adequately redress.' No government, wrote Judge Sandford for the court, 'ever assumed, or was subjected to a general liability of this description.' And the court refused to recognize any municipal duty to keep swine off the streets. [FN87]

The court had good reason not to hold the city liable for the death of the child. If the city were liable here, why not every time a vehicle injured some passerby while breaking the municipal ordinance 'against racing and furious driving in the public streets?' [FN88] But note the analogy's implicit tolerance of pigs in the streets. Keeping

them in the streets was a wrong, just as a speeding cart was a wrong, but also something close to an inevitable fact of municipal life. [FN89]

There were campaigns at various times over the thirty year period that followed *People v. Harriet* to rid New York City of its pigs. For example, Raeder told his Norwegian readers that the city had recently declared 'war . . . against these animals; it was decreed that any pig found walking the streets of New York after the first of July of this year [1847] should be outlawed and become the property of anyone who could catch it.' But in this case, as in others, the campaign failed. Raeder was uncertain 'if the law was dropped or if a common feeling of sympathy prevented its execution, but at any rate I have seen pigs wandering about just as freely as ever, even after that ominous day, on Broadway itself, and evidently with perfect peace of mind, just as though no one had ever thought of depriving them of life, liberty, and the pursuit of happiness.' [FN90] And as far as I can tell, pigs were kept openly and unashamedly in many parts of New York City throughout the first half of the 19th century.

Rosenberg suggests that the end of New York street pig keeping came during the infamous cholera epidemic of 1849. [FN91] Public *924 health officials had learned the intimate connection between filth and the spread of disease, and though swine had a traditional status as filth removers, a new campaign was initiated under color of municipal emergency which identified them as filth producers. City officials vowed to obliterate pigs from the face of the city. Owners resisted, sometimes violently, and many hid their pigs in basements and cellars, but by June, 1849 the police had taken five to six thousand pigs into custody. Thereafter, if numbers of pigs remained in the city, their presence in the streets had become surreptitious and unambiguously 'criminal.' [FN92]

B. The Persistence of Custom

How to explain the public presence of a criminalized pig through the 1840s? Since the 1930s, American socio-legal writing has provided a standard explanation for such situations in terms of the gap between 'law-in-the-books' (*People v. Harriet*) and 'law-in-action' (or here, 'in-the-streets'). Gap analysis takes a variety of

competing forms. Some focus on the intentions of the makers of the law, asking whether they really cared about enforcement. Some focus on the structure of implementation and enforcement. Some ask questions about the role(s) of legal norms in the social structure and wonder whether the gap is not a systemic feature of the social order. All of these analytic forms assume a separation between the legal norm as articulated-in this case that pigs are not permitted in the streets of New York City-and the social fact of human (and animal) behavior-in this case the persistence of pigs in the streets.

There are many problems with gap analysis, and I do not intend here to rehearse a theoretical critique which has been made many times before. [FN93] My dissatisfaction with this form of explanation is less subtle. Gap analysis rests on the presumed existence of a norm which in one way or another could have been enforced. Up to now I have proceeded by showing the ways that *People v. Harriet* *925 revealed such a norm. And I am quite sure that for some New Yorkers-notably for the mayor, the prosecutor, perhaps even the defense attorneys in the case, and for other middle and upper class residents of the city-*Harriet* embodied the law. But it is equally clear from even the most cursory look at the records of the common council, that for many, and perhaps even the majority, of the active citizens of the city, *Harriet* meant little, if anything. The idea of a gap only makes sense where there is some shared consciousness (some accepted structure of legitimation, a hegemonic order) that the law was the law, and therefore 'ought' to be obeyed (since in gap analysis, law is a sphere of 'oughts'). [FN94] But as we shall see, there was no such shared consciousness on the question of the legitimacy of labeling pigs as nuisances throughout the first half of the 19th century.

Consider the following narrative of municipal law-making and law enforcement during the fourteen years following *People v. Harriet*. In November, 1819, ten months after the case, the common council asked its counsel to prepare an ordinance to make it implicitly assuming that in the absence of such a law pigs in the implicitly assuming that in the absence of such a law pigs in the street were legal. A new law, similar to the one approved and rejected in 1818, was quickly drafted, and was quickly voted down. [FN95] Six months later the council passed a resolution 'directing' that

hogs not be allowed to run at large in the southern wards, which was referred to the police committee to consider how best to proceed. [FN96]

In November, 1820 the police committee made its report. The only way a law could be passed, wrote the committee, would be if animals found at large in the settled portions of the city were given *926 directly to the almshouse for the use of the poor. Why was that the only way? We can assume one reason was that an explicit charitable intent would blunt the arguments of those who regularly marshalled support to defeat anti-pig legislation. The claims of the 'poor' pig keeper would be trumped by the needs of the stillpoorer resident of the almshouse. But the committee also argued that traditional forms of regulation, which rewarded 'pignappers' and which put found animals into a pound where they remained until the owner paid a fine, 'have proved entirely inadequate for the correction of the evil.' Neighborhood solidarity almost certainly made the risks of pignapping far higher than the rewards provided by any municipal legislation. It was, moreover, usually impossible to identify the owners of pigs found in the streets, so that a pig keeper who chose to abandon his or her captured swine could avoid all punishment. [FN97] Conversely, if an owner chose to come forward and pay the fine, the pig would in short order be back on the street, defeating the purpose of the ordinance.

While the proposal to make pigs found in the streets the property of the almshouse could not solve the problem of the anonymity of pig keepers, it would, on the other hand, transfer responsibility for capturing pigs from private enterprise to the public hands of the almshouse commissioners. [FN98] Most important of all, it meant that a captured pig was permanently removed from city streets.

According to the police committee, the sole problem with passing such an ordinance was that it violated the city's charter, which only authorized the use of fines. Enabling legislation from the state would be needed, and so an application to the legislature and a draft statute were sent to Albany, which quickly did as the common council desired. And in late April, 1821 an ordinance reflecting the police committee's plan was read and passed. [FN99]

This law remained the model for municipal regulation of swine for the next decade. [FN100] The minutes of the common council provide conflicting evidence on how well this new law was enforced. In July the almshouse commissioners reported that their first attempt to carry it into effect 'had been resisted and opposed . . . by a collection *927 of Persons who exercised great violence towards them.' [FN101] There is little in the records to indicate that many pigs were ever captured by the commissioners' agents. Yet the council minutes do suggest that the traditional practice of keeping pigs in the streets was threatened by the new regime. A petition from inhabitants of Greenwich Village, which was not included in the area affected by the ordinance, indicated that some pig keepers were moving to that northern clime. [FN102] And by July, 1821 the council began to receive a steady stream of petitions by pig keepers—a suspiciously large number of whom were 'poor widows'—for the return of their hogs or for a monetary equivalent. [FN103]

In June, 1822, the council heard a petition to exclude the seventh and tenth wards from the operation of the new law. The request was referred to the aldermen from those wards, who soon reported:

[I]nhabitants in those two wards are nearly unanimous in the opinion that the law should be so amended as to admit swine running at large in those wards, and as the Laws are passed for the benefit of the Citizens their opinions Should be consulted[.] [T]hey also would state that the Bell carts [the carts of municipal garbage and refuse collectors] do not often come into those wards which makes it more necessary that the swine Should run at large to eat the garbage thrown into the Streets[.] [T]hey would also state that a considerable part of those two wards are but thinly inhabited. [FN104] By July a law to exempt the area east of Market and Forsythe Streets had been presented to the full board and passed. [FN105]

Similar exemptions were considered (and often approved) by the council over the next decade. One of the responsibilities of the council over municipal life was to determine the applicability of *928

seemingly general municipal regulations to different parts of the city. Some parts properly were subject to the municipal law which turned pigs found in the streets into food for the almshouse. Some were not. [FN106] Only in some wards would a pig in the street be considered a nuisance equivalent to a pig in the parlor.

Defenders of the pigs were, needless to say, not the only ones who petitioned the common council for relief. In March, 1825, for example, taxpayers from the Lamp and Watch District, which evidently had been exempted from the ordinance, successfully petitioned to amend the law to keep hogs from running at large in their ward. Four months later Moses Jaques complained that a butcher in his neighborhood kept 'a large drove' of swine in the streets, 'who being fed on the blood and offiles becom extremely ferocious and dangerous to children.' In March, 1826, a petition asking that hogs be prohibited from running at large in the eleventh ward was referred to the police committee, which agreed and drafted an amendment to the existing law. [FN107]

The council minutes suggest that a more sustained campaign to eradicate the swine began towards the end of 1829. A petition for relief from hogs by inhabitants of the twelfth ward was followed by a report of the police committee recommending that the council extend the ordinance to the whole city, including the area north of Fourteenth Street. In February, 1830, a petition was read urging the council to ensure that the law was being carried into effect. Then, in June, the council itself resolved that the almshouse commissioners be directed to enforce the law. [FN108]

But then, evidently, the pig keepers regrouped, and the campaign came to a halt. In July, the superintendent of the almshouse reported that after he had taken several swine from the streets as directed by law, one of the owners of the pigs had brought an action in trover, and a jury had just returned a verdict in favor of the plaintiff? What should he do? And who would pay the damages awarded by the court? [FN109]

The council referred those questions to the police committee. But before it could report an answer, New York City's swine eradication program suffered a still more serious blow. In February,

1831, the superior court decided that the municipal law taking pigs off the streets and donating them to the poor house was unconstitutional, presumably because it took property without compensation. [FN110] *929 And so, in 1832 the council reinstated the public pound system of regulation which it earlier had declared to be an ineffectual response to the problem. [FN111]

How should this narrative be understood? A persistent gap analyst might insist that all that has been revealed is a failure by city government to implement the legal norm articulated in *People v. Harriet*. Yet it would be hard to overemphasize the wrongheadedness of that insistence. Whatever the common council was, it certainly was not an implementer-successful or not-of the 'law' of *Harriet*. The minutes of the council reveal a studied ignorance not just of that case but of the significance of nuisance law as applied to urban pigs. [FN112] The behavior of all participants seems premised on the assumption that in the absence of explicit municipal regulation pig keeping was legal. The ongoing debate in the council was fundamentally about lawmaking, not problems of enforcement. [FN113]

In this context, *Harriet* itself may best be understood as an attempted usurpation of the ordinary lawmaking authority of the common council. As of 1819 the mayor of New York was still appointed by a state council and thus was not beholden to the artisans who worked to prevent municipal legislation and who helped elect the common council. The grand jury and the prosecutor indicted Harriet immediately after the defeat in the council of an attempt to outlaw the keeping of pigs. And at the heart of the mayor's arguments and those of the prosecutor was the claim that the council had no right to authorize a practice which was (or rather, which the mayor declared to be) illegal. The mayor may have thought that his charge to the jury satisfactorily resolved the questions of comparative institutional choice and jurisdictional authority raised by the case. There is no reason to think that members of the common council, let alone citizen pig keepers, shared in that opinion. While the case has all the markings of an authoritative text, and may be read as such (as I have in the first half of this Article), it likely struck some contemporary readers as about as authoritative as the council's implicit legalization of pig keeping no *930 doubt

struck Mayor Colden.

What then was the law of keeping pigs in the streets in the years after *People v. Harriet*? As should be apparent, the question does not admit a neutral, objective, singular answer, once we begin to think of pig keeping law as an arena of conflict, rather than as an unfolding text. How one characterized the law was an act of aggression, a way of claiming rights or of asserting authority. And any attempt by us to answer the question retrospectively inevitably will end with numbers of competing answers.

The point is not that participants could make the law into anything they chose. Of course that was not the case. Parts of the law belonged to one's antagonist. Parts (perhaps the most important parts) were constituted out of the conflict between competing groups, and belonged to no group in particular. We can, for example, imagine that nobody particularly liked the revised ordinance of 1832, which recreated a public pound system of regulation. To those who wanted no pigs at all, it was a recipe for disaster. It gave the ideological high ground to those who would allow the poor pig keeper to keep food on his or her table, since captured pigs no longer went to the almshouse. It seemed to authorize a structure of implicit, and implicitly corrupt, toleration of the pigs in the streets (much like the modern 'revolving door' of prostitute regulation). Pig keepers, we might hypothesize, preferred this new law to its immediate predecessor. But for them, likewise, the law was far from ideal, and it certainly was not 'their' kind of law. It gave new incentives to 'pignappers.' It meant that the city council had again labeled pigs as a 'bad' to be regulated, and if possible, eliminated.

Still, what the law was depended on who was asking. Within the terms of the situation sketched out, there were three significant perspectives on the question. One, the mayor's, we know well enough already. A second, that of some model pig keeper, I will come to shortly. But first I should briefly turn to the perspective of the pig keeper's lawyers, or, what is the same thing, that of the pig keeper seen as a rational maximizer, as a 'bad man' (or bad woman) of the law. [FN114]

Let us imagine a pig keeper sitting in her lawyer's office in, say, 1831. She is, to use Holmes'

language, someone who fears 'the command of the public force' and who wants 'to know under what circumstances and how far' she 'will run the risk of coming against what is so much stronger than' she is. She has no ideological commitment to keeping pigs. It is simply what she does *931 right now. It matters not a whit to her 'whether the act [of keeping pigs in the streets] . . . is described [in the law] in terms of praise or in terms of blame, or whether the law purports to prohibit it or to allow it.' All she cares about are the 'material consequences' that the law may subject her to if she continues in her occupation. From her lawyer she needs information about what the courts and other public decision-makers 'will do in fact' if they discover her pigs in the streets. That is what she means by 'the law.' [FN115]

What will she learn from her lawyer? On the one hand, he will tell her that her occupation may subject her to a criminal prosecution for maintaining a public nuisance, although he would certainly mention that in the only published prosecution the defendant was fined just one dollar and costs. There remains, as of 1831, a municipal ordinance which gives the almshouse commissioners authority to grab her pigs off the streets. But the common council has on several occasions reimbursed pig keepers for the loss of their property under the ordinance. And, the lawyer would note, a pig keeper whose pigs were snatched has recently successfully sued and been awarded damages for the loss of the swine. Whether or not that damage award could be sustained, the risk of governmental action would be highly dependent on where she lives. Some areas of the city are formally or informally exempted from enforcement. Finally, he might advise (although here he would come close to the boundaries of legal ethics) that her risk of being caught for keeping pigs in city streets is low in any event, because so many of her fellow New Yorkers are doing likewise, and because the resources of government are simply inadequate to the task of eradicating the pigs.

Such a perspective on the law of pig keeping in New York City's streets highlights the complexity of the situation. Just to solve what seemed to be an archaic and extraordinarily narrow and sharply defined legal problem, the lawyer would need information of a variety and detail not unlike that used by the modern food and drug or securities

lawyer. The law did not embody one coherent policy. It constituted a number of conflicting policies, and the information he could give his client was necessarily uncertain and incomplete. It thus carries us far from the integrated vision of the mayor in *People v. Harriet*.

But does it encompass the point of view of the pig keepers themselves? In part, of course. But in the most important ways, not at all. I do not want to suggest that the common council minutes give me a window into the legal consciousness of the pig *932 keepers, although they do assuredly tell the attentive reader some things. One thing those records clearly announce is the involvement of pig keepers in lawmaking. The Holmesian vision of lawyer and client starts from a premise that law is an external, objective social fact—a complex, perhaps incoherent social fact—but still one outside of the control of the lawyer and client. The law to Holmes was a maze through which the lawyer guided the client in order to help her achieve given ends (like getting to the other side). To the pig keepers, however, the law was a domain of conflict in whose construction they participated. At the heart of the Holmesian lawyer's vision is a kind of passivity towards public power. It is the client who inevitably will have to accommodate herself to 'that which is so much stronger than [s]he is.' To the pig keepers, however, the law was both an external force imposing itself on them and also, and at the same time, a structure within which they resisted and worked to control their traditional social practices.

All this becomes increasingly speculative, but I remain convinced that when pig keepers thought about the law of pig keeping they thought of themselves as owning a customary right to keep pigs in New York City streets. Assuredly, lawyers and judges could not have formally recognized the existence of such a right. But even they knew the right survived. And the pig keepers themselves knew it survived because they, the pig keepers, worked to make it so.

What were the terms of that right? Presumably, the prolonged conflict between pig keepers and their adversaries should have taught the pig keepers by the 1820's that whatever they held was fragile and easily destroyed. Illegality and expropriation were always just around the corner. Yet those who would bestroy the right to keep pigs in the streets

also faced uncertainties and conflicts. And the pig keepers knew enough to play on the ambiguous political impulses of their enemies. Recall the 1822 report of the aldermen of the seventh and tenth wards, recommending that those wards be exempted from the operation of the law against swine in the streets. [FN116] The inhabitants of those wards, according to the aldermen, were nearly unanimously opposed to the present law, 'and as the Laws are passed for the benefit of the Citizens their opinions Should be consulted.' One what basis could republican political leaders ignore such a claim? The aldermen went on to imply that the residents of those wards were already being treated unequally. Unlike other wards, 'the Bell carts do not often come into those wards.' Thus, the pigs were serving their customary municipal purpose because of the corporation's failure to provide *933 the preferred alternative. [FN117]

My point is not that pig keepers could or did insist that their right was absolute and beyond external control. Most rights, even the most conventional of property rights, are held with an awareness of partiality and of our subjection to other claims in particular circumstances. How we hold what we regard as ours changes with time and context. Indeed, it may be that consciousness of the right to keep pigs was ultimately overwhelmed and delegitimated by the 1849 cholera epidemic and the unambiguous identification of street pigs with harm to the public health.

Pig keeping was not a legal right because it met the formal requisites of a legal custom. (It didn't.) Nor was it a legal right because it met the objective functional 'needs' of the artisanal community of pig keepers. As suggested earlier, it may be that most street pigs were not held as a cheap and uncommercialized food source by the working poor. [FN118] Harriet's lawyers and other defenders of pig keepers may have largely fantasized their vision of poor families dependent on hogs. It may well be, if only we could do a census, that we would find that most of the pigs were owned by butchers who imported them from Long Island and New Jersey and then fattened them for a period of time before slaughter. Pig keeping was a practice connected with a particular way of life, but I would be hard put to make it crucial, or to link the end of the practice to the end of the community.

What made the keeping of pigs in the streets of New York City a right had nothing to do with its objective characteristics or functions. It was, rather, the fact that a politically active and insistent community of New Yorkers believed pig keeping to be their right and, also, that those who opposed the social practice were (for a significant period of time) unwilling and unable to do what was necessary to stop it. The legal right to keep pigs in New York City's streets was constituted both by the activities of the right's defenders and by the relative passivity and ineffectuality of its opponents.

If I am right that for thirty years after *People v. Harriet* New Yorkers would have recognized a right to keep pigs in the city, does that mean that throughout that period pig keepers would not have recognized that what they were doing was illegal? The question demands more knowledge than I can have about the consciousness of the pig keepers. But even if one assumes that they knew that what they were doing was in some way illegal, what difference does that assumption necessarily make? We all have engaged *934 in practices-say walking a dog without a leash-which we know to violate some law yet which are also legal within our own better understanding of the legal order. Knowing that what they did subjected them theoretically to prosecution did not transform pig keepers into a criminal subculture (whatever that is), skulking in alleyways. Likewise, the knowledge that they were engaged in criminal conduct certainly did not limit their political participation. [FN119]

The problem is that our conventional legal theory makes it impossible to account for the legal consciousness of a group like the pig keepers of New York City. In defining law as the command of the sovereign we ordinarily deny the legitimacy of interpretive stances other than those-like the mayor's-which have the benefit of formal authoritativeness. Although the sovereign in American political ideology incorporates the pig keepers, out implicit Federalism restricts their participatory role and empowers others to determine the content of the law, which is expected to become their 'civic religion.' [FN120]

That way of thinking allows us to maintain our valued vision of law as a (single) text. But in doing so it represses the existence and the relative autonomy of competing and conflicting socially

constituted visions of legal order. It is, as a result, clearly false to our own experience of political life and can only distort our understanding of the conflict over the legal right to keep pigs in the streets. [FN121]

My point is not, as I hope is obvious, that there are not winners and losers in the law, that repressive laws never are imposed from above, that effective participation in this society never has been restricted and debased, that consciousnesses are never shaped by the content of the law. Those may all be empirical realities of our legal history. They are not, however, a priori deductions from the nature of law. If a legal historian has to define or assume a nature of law, and I am not at all certain that it is necessary to do so, [FN122] he or she might as well start with a definition of law as an arena of conflict within which alternative social visions contended, *935 bargained, and survived.

Having made such a move, a case like *Harriet* comes to be seen as less about the continued existence of a social practice than it is about the terms under which the practice is going to continue. Assume that it made a difference to all concerned that pigs in the streets were labelled a public nuisance. Once so labelled, an important symbol of power had been transferred to those who opposed pigs in the streets. But, however important that victory was, however important control of that element of public discourse might be, *People v. Harriet* did not affect the continued existence of the practice; or its legality, within the worldview we are here exploring. The case was one episode in an ongoing story of bargaining and conflict between contending normative orders.

Such a perspective depends on a recognition of the implicit pluralism of American law—its implicit acceptance of customs founded on multiple sources of legal authority. [FN123] A custom, as I am using the term here, is not necessarily a practice confirmed by judicial doctrine or statute. Legal authority may emerge from numbers of governmental and quasi-governmental institutions and practices. Prosecutorial discretion, bureaucratic inertia, fiscal incapacity may all play parts as sources and justifications for the practice, as may the realization that action against the custom might undermine the legitimacy or the effectiveness of the political order. But in the end, the legality of the

practice of keeping pigs in the streets rested on its actual possession by a group with some political significance, a group capable of imposing its practices, within limits, on the larger community, a group capable of resisting invasions of its relative autonomy. Until the late 1840's, the artisan pig keepers of New York evidently were such a group. An adequate account of our legal history should be capable of incorporating their values as well as those of the mayor of the city of New York.

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[FN1]. The model of competing interpretive strategies emerged out of discussions with Martha Fineman. An early and incomplete attempt to pose the methodological issues can be found in Fineman and Hartog, *Family Law as Text and as Arena of Conflict*, presented to the 1984 Legal History Program seminar at the University of Wisconsin.

[FN2]. It does seem to me, however, that legal history's attachment to the first strategy has left it relatively blind to the social meanings of legal rules.

[FN3]. I have been much influenced in this project by recent work in English legal history. See, in particular, E.P. THOMPSON, *WHIGS AND HUNTERS: THE ORIGIN OF THE BLACK ACT* (1977); E.P. THOMPSON, *THE POVERTY OF THEORY & OTHER ESSAYS* (1978); Thompson, *The Grid of Inheritance: a Comment*, in J. GOODY, J. THIRSK, & E.P. THOMPSON, *FAMILY AND INHERITANCE: RURAL SOCIETY IN WESTERN EUROPE* 328 (1976);

Ignatieff, *State, Civil Society and Total Institution: a Critique of Recent Social Histories of Punishment*, in LEGALITY, IDEOLOGY AND THE STATE 183 (D. Sugarman ed. 1983); Sugarman, *Law, Economy and the State in England, 1750-1914: Some Major Issues*, in LEGALITY, IDEOLOGY AND THE STATE 213 (D. Sugarman ed. 1983); Sugarman & Rubin, *Introduction: Towards a New History of Law and Material Society in England, 1750-1914*, in LAW, ECONOMY AND SOCIETY 1750-1914: ESSAYS IN THE HISTORY OF ENGLISH LAW I (G.R. Rubin & D. Sugarman eds. 1984).

[FN4]. Enemies of the pigs tended to describe them as epidemic in the city. I imagine they exaggerated, if only because the amount of food available to the pigs in the streets must have been limited. See *infra* note 7. It also seems likely that a large number of the pigs found in the streets in the 19th century were owned by butchers who fattened them there for a limited period of time before slaughter. See *infra* notes 25 & 51. Even in those wards of the city where pig keeping was most prevalent, I am uncertain how many individuals owned them as personal property.

[FN5]. Much of what we know of the urban American hog is, in fact, largely derived from the descriptions of Europeans, who found our acceptance of his presence curious and a little exotic. See, e.g., *The Journal of Mederic Louis Elie Moreau de Saint-Mery*, excerpted in THIS WAS AMERICA: TRUE ACCOUNTS OF PEOPLE AND PLACES, MANNERS AND CUSTOMS, AS RECORDED BY EUROPEAN TRAVELERS TO THE WESTERN SHORE IN THE EIGHTEENTH, NINETEENTH, AND TWENTIETH CENTURIES 92 (O. Handlin ed. 1949) and *The Watercolor of the Baroness Hyde de Neuville*, reproduced in J.A. KOUWENHOVEN, THE COLUMBIA HISTORICAL PORTRAIT OF NEW YORK 111-12 (1953), which is the source for the description in the previous paragraph. See also *infra* text accompanying notes 81-92.

[FN6]. The notion that a city is a place where most animals are not is, of course, a recent invention, and one still occasionally controversial. In Madison just recently, a couple were given some chickens with a modern easy-to-clean chicken coop. When the zoning board objected, the couple went to court on

the theory that keeping chickens was part of the customary expectations of single-family home ownership. The Wisconsin Court of Appeals ruled in their favor. See *Capital Times*, February 26, 1985. See also M. GOLD, JEWS WITHOUT MONEY 53-54 (1930), for a description of goats in New York City in the early 20th century. I am indebted to Rick Abel for the latter reference.

[FN7]. We can imagine such an ecological cycle, and contemporary observers insisted on its existence. I have, however, been informed by reliable sources at the experimental farm of the University of Wisconsin-Madison, confirmed by Professor G. Thomas Johnson, of the University of Western Ontario Law School, that pigs today do not eat excrement. My research assistant, Janis Tabor, formerly a reproductive physiologist and agriculturalist, disagrees, pointing to a modern method of feeding swine by having them follow cattle. She argues that pigs to eat excrement so long as it contains grain. I could play historian and suggest that, whatever pigs do today, pigs then might have been different, but this is as good a place as any for me to reveal my abysmal ignorance of things swinish, even though my grandfather once owned a ham factory.

[FN8]. Rock, *A Delicate Balance: the Mechanics and the City in the Age of Jefferson*, 63 N.Y. HIST. SOC'Y Q. 93 (1979). The Webbs mention the laconic presentment before a Welsh court leet of a town in 1804 in which 'all [was] well but the pigs.' B. WEBB & S. WEBB, THE MANOR AND THE BOROUGH 122 (1906).

[FN9]. W. CRONON, CHANGES IN THE LAND (1983) describes some of the ways rural pigs became nuisances in colonial New England; see especially *id.* at 135-37. The standard description of the lean and nasty early American pig, which in rural environs was expected to survive through most of the year in the woods, can be found in P. BIDWELL & J. FALCONER, HISTORY OF AGRICULTURE IN THE NORTHERN UNITED STATES, 1620-1820 31-2 (1941). Bidwell and Falconer describe the swine of New Netherlands as relatively larger and heavier than their New England equivalent, although they too were not penned. I have no idea who were the genetic forebears of the urban pigs of early 19th century New York City.

[FN10]. See Rock, *supra* note 8 at 93, 101-04; R. MOHL, POVERTY IN NEW YORK, 1783-1825 11 (1971). On artisanal politics, see generally H. ROCK, ARTISANS OF THE NEW REPUBLIC (1979) and S. WILENTZ, CHANTS DEMOCRATIC: NEW YORK & THE RISE OF THE AMERICAN WORKING CLASS, 1788-1850 (1984).

[FN11]. See W. CRONON, *supra* note 9, at 201. For a somewhat similar analysis of the post Civil War South, see S. HAHN, THE ROOTS OF SOUTHERN POPULISM: YEOMEN FARMERS AND THE TRANSFORMATION OF THE GEORGIA UP-COUNTRY, 1850-1890 (1983).

[FN12]. See 6 Minutes of the Common Council of the City of New York, 1758, at 152 [hereinafter cited as C.C. Min.] 7 C.C. Min. 1770, at 246; 1 C.C. Min. 1788, at 369, 379, 385, 417. In colonial New York there had also been a fair amount of provincial legislation dealing with problems of swine. In 1683, for example, a statute was passed giving any one finding a pig loose off of its owner's property the right to kill or capture it. This statute was premised on the 'daily Experience that Swine are Creatures that occasion trouble and difference among Neighbours and rather prejudiciall than beneficiall to the Province while they have liberty to run att randome in the woods or Townes . . .' 1 Colonial Laws 134. Two years later, however, the legislature came to the opposite conclusion that the earlier statute was itself 'prejudiciall and of ill consequence to the Inhabitants of this province.' And so it was replaced by a local option statute. 1 Colonial Laws 177. Similar pieces of legislation were passed and repealed over the remainder of the colonial period, always applying only to specified counties. 1 Colonial Laws 616, 811; 2 Colonial Laws 301, 992; 3 Colonial Laws 881; 4 Colonial Laws 40, 393, 844, 872, 1069; 5 Colonial Laws 679, 866. It should be noted that none of these statutes, except possibly the early 1683 statute, applied to the pigs of New York City residents. See *infra* note 63.

[FN13]. 5 C.C. Min. 692; see also *id.*, at 199, 252, 465, 508.

[FN14]. See also *infra* text accompanying note 31. I can find no petitions or complaints in the public records protesting the law requiring rings. On the

other hand, the evidence on enforcement is mixed. See, e.g., the successful petition to the common council of Peter Witt, a butcher, who asked it to remit his fine. He had not intended, he said, to let his hogs run at large, and had therefore never put rings in their noses. They had, however, 'escaped' from his yard into the street. 8 C.C. Min. 1816, at 710. See also the 'complaint' of some citizens against hogs in their neighborhood running in the street without rings. 9 C.C. Min. 1818, at 653-64.

[FN15]. On change and city government, see H. HARTOG, PUBLIC PROPERTY AND PRIVATE POWER: THE CORPORATION OF THE CITY OF NEW YORK IN AMERICAN LAW, 1730-1870 69-175 (1983). It is worth noting how little attention was ever devoted to public health in debates over swine prior to the 1840's.

[FN16]. 8 C.C. Min. 595, 607, 666, 670.

[FN17]. 9 C.C. Min. 129-30, 143, 155, 215, 310.

[FN18]. *Id.* at 393, 462. See Rock, *supra* note 8 at 102-04.

[FN19]. 9 C.C. Min. 462.

[FN20]. *Id.* at 668, 703.

[FN21]. Under the Montgomerie Charter of 1730, which remained in 1818 the fundamental law of the corporation of the city of New York, the mayor of the city was an officer appointed by the state Council of Appointments, rather than one elected by municipal residents. Under the charter also, the mayor retained authority to sit and hear cases both in the Mayor's Court (equivalent to a court of common pleas) and in the quarter sessions court. As far as I can tell, 19th century mayors rarely exercised their right to do so. See generally, J. KENT, THE CHARTER OF THE CITY OF NEW YORK (1836).

Cadwallader Colden (1769-1834), born into a leading Tory family, was a Federalist appointed by a Federalist-dominated Council of Appointments at a time when the city council was controlled by Jeffersonians. He was one of New York City's leading lawyers of the first quarter of the 19th century. See D. FISCHER, THE REVOLUTION OF AMERICAN CONSERVATISM 312-313 (1965) and H. TAFT, A CENTURY AND A HALF

AT THE NEW YORK BAR BEING THE ANNALS OF A LAW FIRM AND SKETCHES OF ITS MEMBERS 23, 29, 39 (1938).

[FN22]. Louis Lashine and Christian Harriot's Cases, 4 New York City Hall Recorder 26 (1819).

[FN23]. *Id.*

[FN24]. *Id.* The best record of the case can be found in the New York Judicial Repository 258-72 (1819). (References will be to the latter source.) Commentators at the New-York Historical Society Conference suggested that this case might have been a collusive law suit, constructed to test and settle the issue. I see no evidence that it was, and it seems unlikely to me since the pig keepers had nothing to gain from a suit. They were, after all, in control of the city council.

[FN25]. On cross-examination Ames insisted that Harriet's pigs were not a nuisance, since the neighborhood was one inhabited primarily by other butchers. The butchers, Ames explained, kept the pigs for up to two weeks after taking them from the sloops before slaughtering them. Was it necessary, asked the district attorney, to let those pigs run at large during that time? No, answered a very cagy witness, 'but it is very well if they find plenty of feed in the street to get fatter.' *Id.* at 258-61.

It is worth noting that a large, but undisclosed, number of the city's pig keepers were butchers, undercutting claims that the pigs were necessary to provide minimal protein for the urban poor. *See supra* note 4. As we shall see, though, the right to keep pigs in the city had a symbolic significance that seems to have gone well beyond its dietary and economic significance.

[FN26]. Defense attorneys attempted to make the prosecution prove that it was Harriet's hogs specifically that were the nuisance, but the mayor ruled that 'the question is, whether the people, the citizens, generally suffer, or are liable to suffer, from hogs running at large.' Risk of harm was all that needed to be demonstrated. New York Judicial Repository 261 (1819).

[FN27]. *Id.* at 261-64.

[FN28]. Harriet's lawyers conceded that he kept pigs. Implicitly, they also conceded that he kept

pigs on the street in front of his place, although they argued the insufficiency of the evidence presented by the prosecutor. *Id.* at 264-67.

[FN29]. *See* M. HORWITZ, TRANSFORMATION OF AMERICAN LAW 9-16 (1977). *See also* R. ELLIS, THE JEFFERSONIAN CRISIS: COURTS AND POLITICS IN THE YOUNG REPUBLIC 176-77 (1971); W. Sampson, 'Motion to Quash Indictment,' *People v. Melvin* (The Trial of the Journeymen Cordwainers of the City of New York), *Yates Select Cases* 611 (1810).

[FN30]. *People v. Harriet*, New York Judicial Repository 265-66 (1819).

[FN31]. *Id.* at 266.

[FN32]. *Id.* at 267. On the dependence of New York City government on state legislation, see Hartog, *supra* note 15, at 126-42. *See, generally*, Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1059 (1980).

[FN33]. On comparative institutional choice, see Komesar, *In Search of a General Approach to Legal Analysis: a Comparative Institutional Alternative*, 79 MICH. L. REV. 1350 (1981); Komesar, *Taking Institutions Seriously: Introduction to a Strategy for Constitutional Analysis*, 51 U. CHI. L. REV. 366 (1984).

[FN34]. *People v. Harriet*, New York Judicial Repository 267-70 (1819).

[FN35]. *Id.*

[FN36]. *Id.* at 266.

[FN37]. *Id.*

[FN38]. *Id.* at 268-69.

[FN39]. *Id.* at 270. There is a flourishing literature on private nuisance law during the 19th century. *See*, in particular, the superb recent essay by John McLaren, *Nuisance Law and the Industrial Revolution—Some Lessons from Social History*, 3 OX. J. LEG. STUD. 155 (1983). *See also* Brenner, *Nuisance Law and the Industrial Revolution*, 3 J. LEG. STUD. 403 (1973); Nedelsky, *Judicial Conservatism in an Age of Innovation:*

Comparative Perspectives on Canadian Nuisance Law 1880-1930 in I ESSAYS IN THE HISTORY OF CANADIAN LAW 281 (D. Flaherty ed. 1981) M. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860 74-78 (1977). We know much less about public nuisance doctrine. Horwitz suggests that its main purpose was to divert and block private plaintiffs who might otherwise have forced polluters and other nuisance producers to internalize their costs. *Id.* at 76-77. I am unconvinced.

[FN40]. See G. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787 (1969).

[FN41]. Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 388 (1926).

[FN42]. People v. Harriet, New York Judicial Repository 271 (1819).

[FN43]. See G. WOOD, *supra* note 40.

[FN44]. See H. HARTOG, *supra* note 15, at 44-68.

[FN45]. People v. Harriet, New York Judicial Repository 272 (1819).

[FN46]. *Id.*

[FN47]. See generally, K. POLANYI, THE GREAT TRANSFORMATION (1944); A. SMITH, THE WEALTH OF NATIONS (1776). This sense of the dependency of labor on the market is often captured by the Marxist notion of 'the reserve army of the unemployed.'

[FN48]. F. MAITLAND, TOWNSHIP AND BOROUGH 9 (1899).

[FN49]. I had always thought it was Chesterfield who was responsible for the quip that dirt was 'matter in the wrong place.' The Oxford English Dictionary, however, simply labels it 'modern.' A similar sense of urgent need to separate discordant nature from constructed urban civilization is an important part of the rural cemetery movement of the early 19th century, which sought to remove death from urban life (and which also used nuisance law as a tool for effecting the separation). See H. HARTOG, *supra* note 15, at 71-81; Story, *Consecration Address at the Opening*

of Mount Auburn Cemetery, MISCELLANEOUS WRITINGS 572 (W.W. Story ed. 1852).

[FN50]. People v. Harriet, New York Judicial Repository 272 (1819).

[FN51]. David Sugarman reminds me that this urge to separate animal life from the city is surely connected in complicated ways to the general 19th century transformation and sentimentalization of relations with the 'natural' world, and in particular with domestic animals. See generally, K. THOMAS, MAN AND THE NATURAL WORLD: CHANGING ATTITUDES IN ENGLAND, 1500-1800 (1983); J. TURNER, RECKONING WITH THE BEAST: ANIMALS, PAIN AND HUMANITY IN THE VICTORIAN MIND (1980). At the same time it is also important to note that the mayor's dislike of pigs, a dislike which he presumably shared with most of his class, did not mean that there was no place for animals in elite visions of 19th century urban life. See, e.g., C. HASWELL, REMINISCENCES OF AN OCTOGENERIAN OF THE CITY OF NEW YORK (1987):

Before the introduction of shop butchers, when a butcher in any of the public markets became possessed of an exceptionally fine beef or a number of sheep, he would parade them through the principal streets, as Broadway, Bowery, Greenwich, and Grand streets, preceded by a band of music and followed by the fellow-butchers of his market, with their aprons and sleeves on, in their wagons . . . the cortege being arrested before the house of the customers of the butcher, when it was expected of the occupants to step out and give an order for such part of the animal paraded as they elected.

For more on butchers' retention of pre-industrial work patterns, see Wilentz, *supra* note 10, at 137-139.

[FN52]. See S. WILENTZ, *supra* note 10, at 267.

[FN53]. R. MALCOLMSON, POPULAR RECREATIONS IN ENGLISH SOCIETY, 1700-1850 117 (1973) *quoted in* E. FONER, TOM PAINE AND REVOLUTIONARY AMERICA 157 (1976). See also Thompson, *The Moral Economy of the English Crowd in the Eighteenth Century*, 50 PAST AND PRESENT 23 (1971); Thompson, *Eighteenth Century English Society: Class Struggle Without Class?* 3 SOC. HIST. 133 (1978); Rock,

supra note 8; S. WILENTZ, *supra* note 10. See also *supra* note 3.

[FN54]. *People v. Harriet*, New York Judicial Repository 264 (1819).

[FN55]. See *supra* note 32.

[FN56]. See H. HARTOG, *supra* note 15, at 142 *passim*.

[FN57]. This conflict within artisans' political values is sensitively explored in E. FONER, TOM PAINE AND REVOLUTIONARY AMERICA 145-182 (1976).

Whether English rural inhabitants were at all like the standard sociological model of peasants has been a subject of vigorous debate, particularly since the publication of A. MACFARLANE, THE ORIGINS OF ENGLISH INDIVIDUALISM (1978). See generally, Sugarman & Rubin, *supra* note 3, at 23-42. What is important here is not whether 'plebian' Englishmen would have defined their rights as peasants would but, rather, that Americans of the early nineteenth century thought in terms of a sharp contrast between an imagined English society, in which rights were defined by status, and the freedom of their own society, where 'accidents' of birth and social origin could not determine legal rights. See, of course, A. DETOCQUEVILLE, DEMOCRACY IN AMERICA (1850); M. MEYERS, THE JACKSONIAN PERSUASION: POLITICS AND BELIEF (1956); W. HURST, LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH CENTURY (1956).

[FN58]. To answer that question we should also ignore the obvious and often voiced question whether any American social practice could ever technically constitute an immemorial usage.

One standard source states the conventional American legal answer:

Are there any particular customs in the United States? In the strict sense of the word, probably not. . . . We have in fact no *time out of mind* in which such local customs could originate, and no local divisions which could serve as basis for such particular customs. The subdivisions of our oldest states have very rarely any history which cannot be traced back to the formal action of the state or colonial legislature. If there were particular customs

originating in such action they would not comply with the requirements described here, and usages not so particularly located would, as has been shown above, be of entirely different character. It is doubtful also how the existence of local customs could be proved in an American state, even if they could be supposed to exist there. . . . Upon what grounds could any American court say, as a matter of law, that a usage thus proved prevailed within the boundary lines of any particular township, county, or other subdivision of the state, in opposition to the common law prevailing on the other side of that boundary.

Hammond, *Note*, in W. BLACKSTONE, 1 COMMENTARIES ON THE LAWS OF ENGLAND 135-36 (W. C. Jones ed. 1915). See also *Ackerman v. Shelp*, 3 Hals. (N.J. Law) 125 (1825); *Harris v. Carson*, 7 Leigh 632 (Va. 1836); *Ocean Beach Assoc. v. Brinley*, 34 N.J. Eq. 438 (1881).

Much recent colonial history, on the other hand, has detailed the pervasive reliance on local custom characteristic of 17th and 18th century American governmental and legal practice. See D. ALLEN, IN ENGLISH WAYS: THE MOVEMENT OF SOCIETIES AND THE TRANSFERRAL OF ENGLISH LOCAL LAW AND CUSTOM TO MASSACHUSETTS BAY (1974); Waters, *Family, Inheritance, and Migration in Colonial New England: the Evidence from Guilford, Connecticut*, 39 WM. & MARY Q. 64 (1982); Roeber, 'We Hold These Truths . . . ' German and Anglo-American Concepts of Property and Inheritance in the Eighteenth Century (Prepared for the New York Historical Society Conference on 'The Law in America, 1607-1861.'). It may also be, as Willard Hurst suggested in commenting on an early draft of this essay, that the reception clauses of the early state constitutions—which formally made English law our law—might have been regarded as importing at least some customs into American law.

[FN59]. See W. BLACKSTONE, *supra* note 58, at 74. 'And indeed it is one of the characteristic marks of English liberty, that our common law depends upon custom; which carries this internal evidence of freedom along with it, that it probably was introduced by the voluntary consent of the people.' *Id.* See also C. ALLEN, LAW IN THE MAKING (1927); M. HALE, THE HISTORY OF THE COMMON LAW OF ENGLAND (C. Gray ed. 1971); J. POCOCK, THE ANCIENT

CONSTITUTION AND THE FEUDAL LAW (1957); J. POCOCK, *THE MACHIAVELLIAN MOMENT* (1975); Thompson, *supra* note 3. For a clear statement of the anthropological usage of the term 'customary law,' and a comparison with common law usage, see I. HAMNETT, *CHIEFTAINSHIP AND LEGITIMACY* 9-23 (1975). Throughout this section I have been aided by the research assistance of Victoria List and her memorandum, 'Custom in England, 1600-1900.'

[FN60]. See E. P. THOMPSON, *supra* note 3, for a number of examples.

[FN61]. See W. FRIEDMANN, *LEGAL THEORY* 251-252 (5th ed. 1967). See W. BLACKSTONE, *supra* note 58 and M. HALE, *supra* note 61 for a similar analytic division. Blackstone also added a third analytic category; the custom of incorporating civil and ecclesiastical bodies of law into the common law.

[FN62]. Hamnett distinguishes this common law definition of custom from customary law, which to anthropologists refers to any popularly produced binding normative order. See I. HAMNETT, *supra* note 59, at 9-23.

[FN63]. Eben Moglen suggested at the New York Historical Society conference that the practice of keeping pigs on the streets could not have been characterized as a custom because technically a legal custom disappeared as soon as a practice was made the subject of legislation. As note 12 illustrates, there were a number of colonial statutes dealing with the problem of pigs running free. Thus, if Moglen is correct, Harriet's lawyers could not have argued the case for a customary right.

It strikes me as unlikely that anyone in 1819 regarded the issue as foreclosed by the existence of colonial statutes. In the first place, only the first provincial statute dealing with swine (1683) could conceivably be read as having applied to New York City, and I remain uncertain whether it was meant to be read in that way. Moreover, even though one might logically say that subsequent acts cannot recreate an immemorial usage destroyed by legislation, the municipal charter enacted by Governor Dongan in 1686, as well as the Montgomerie Charter of 1730, seemed to give the city an immunity from provincial regulation which might well have extended to past acts. More

importantly, nothing in the arguments made in Harriet, indeed nothing in what we know of legal practice in New York City in the second decade of the 19th century, suggests that the lawyers involved in the case had any knowledge of those earlier statutes. In some positivist conceptual heaven, the existence of a statute passed in 1683 might well cut off an otherwise plausible claim to a customary right to run pigs in the streets. In New York City in 1819, however, such a claim, if made, would not have been foreclosed by that earlier exercise of legislative authority.

[FN64]. Readers of the previous note may also wonder whether the lawyers in *People v. Harriet* would have had any knowledge of English common law doctrine and legal practice regarding particular customs. In fact, much in the case does demonstrate the lawyers' immersion in English legal doctrine—notably the ongoing debates over the relevance of the practices of the corporation of London and the applicability of English nuisance law. Although the legal historical writing of the last few years has gone far to demonstrate the significance of an 'Americanization' of legal practice, that body of scholarship should not be read as suggesting that American lawyers did not self-consciously work to identify themselves with an English common law tradition. To be a member of a 'learned' profession still meant to be learned in English law.

[FN65]. See *supra* note 3.

[FN66]. Carleton Kemp Allen follows Bentham in regarding the effect of Blackstone's standards for the recognition of customs by courts as being to 'reprobate' many customs on grounds of non-existence. Allen, *The Young Bentham*, in *LEGAL DUTIES AND OTHER ESSAYS IN JURISPRUDENCE* 132 (1931). See generally Diamond, *The Rule of Law versus the Order of Custom*, in *THE RULE OF LAW* 115 (R. Wolff ed. 1971).

[FN67]. See W. BLACKSTONE, *supra* note 58, at 75-79. See also C. K. ALLEN, *LAW IN THE MAKING* (7th ed. 1964); J. LAWSON, *THE LAW OF USAGES AND CUSTOMS, WITH ILLUSTRATIVE CASES* (1881). These standards make it easy to see why John Austin and other legal positivists saw no challenge to their position in the

existence of legalized customs:

The admirers of customary law love to trick out their idol with mysterious and imposing attributes. But to those who can see the difference between positive law and morality, there is nothing of mystery about it. Considered as rules of positive morality, customary laws arise from the consent of the governed, and not from the position or establishment of political superiors. But, considered as moral rules turned into positive laws, customary laws are established by the state: established by the state directly, when the customs are promulgated by its statutes; established by the state circuitously when the customs are adopted by its tribunals.

J. AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED 32 (H.L.A. Hart ed. 1954).

[FN68]. See *Anon.*, 2 Dyer 363a (1579) and *Gateward's Case*, 6 Co. Rep. 59b (1607). There were many English cases of customs identified with the inhabitants of a particular parish, but it is hard to see how the residents of New York City could be equated with the members of a parish, both because of the demographic uncertainty inherent in New York City's explosive growth and because of the emergence of an American conception of localities as administrative subdivisions of the state. Who 'belonged' to the community was both practically undeterminable and legally impossible to establish. In an English parish, by contrast, inhabitants held a property interest in their 'settlement' (including a right to poor relief if they became destitute).

[FN69]. Identifying the custom with 'the poor' would also have failed under English law. In a 1788 trespass case a custom giving 'poor householders' the right to cut and carry off rotten boughs and branches was declared too vague and uncertain to warrant recognition. *Selby v. Robinson*, 2 D. & E. 758 (1788).

[FN70]. See W. BLACKSTONE, *supra* note 58, at 140.

[FN71]. See cases collected in J. LAWSON, *supra* note 67, at 465.

[FN72]. S. CARTER, LEX COSTUMARIA, OR A TREATISE OF COPY-HOLD ESTATES 34 (1701).

[FN73]. 'Evidence of custom and usage is useful, in many cases, to explain the intent of parties to a contract. But the usage of no class of citizens can be sustained in opposition to principles of law.' *Homer v. Dorr*, 10 Mass. 29 (1813). On the identification of republicanism with a general public good antithetical to local customs, see O. HANDLIN & M. F. HANDLIN, COMMONWEALTH 94-96 (rev. ed. 1969); G. Wood, *supra* note 40, at 53-65, 344-89, 500.

[FN74]. Lawson desperately wanted to retain the notion that it was 'no objection to a common-law custom that it was contrary to the common law of the land,' since he realized that without such a notion the subject of his treatise would hardly have had much legal significance. See J. LAWSON, *supra* note 67, at 645.

[FN75]. *Id.* at 485-486. See C. K. ALLEN, *supra* note 67, at 614-32.

[FN76]. *People v. Harriet*, New York Judicial Repository 272 (1819).

[FN77]. An ambiguous result, as we shall see.

[FN78]. I should confess that I find no published cases before 1818 which directly confront the issue either. *But see* *Shepherd v. Mees*, 12 Johns. 433 (N.Y. 1815), where a town by-law requiring that all hogs be kept penned up became the basis for an action of trespass for damages done by defendant's hogs. The trial verdict for the plaintiff was reversed on appeal. The New York Supreme Court held that the by-law could only be read as intending that no hogs should go at large upon the highways, not as interfering with the 'interior management' of every man's farm. The power of towns to make such a more expansive 'interior regulation' was considered doubtful. And thus, the by-law had no application, as the pigs entered the plaintiff's farm not through an outer fence, adjoining a highway or commons, but through the partition fence between the two neighbors.

[FN79]. Many of these cases turned on the interesting question of whether the city had the power to impound the animals of non-residents. See cases collected in *West Century Digest* under *Animals* (1888), particularly sec. XII: 'Animals Running at Large.'

[FN80]. In view of later emphases on health regulation and on the pig's causative role in cholera epidemics, it is surprising how little attention was paid to the unsanitary and unhealthy nature of the social practice.

[FN81]. See Raeder, in THIS WAS AMERICA: TRUE ACCOUNTS OF PEOPLE AND PLACES, MANNERS AND CUSTOMS, AS RECORDED BY EUROPEAN TRAVELERS TO THE WESTERN SHORE IN THE EIGHTEENTH, NINETEENTH, AND TWENTIETH CENTURIES, *supra* note 5, at 217.

[FN82]. C. DICKENS, MARTIN CHUZZLEWIT 290 (Signet ed. 1844). See likewise, C. DICKENS, AMERICAN NOTES 34-35 (1842); F. TROLLOPE, DOMESTIC MANNERS OF THE AMERICANS 88-89 (1949).

[FN83]. American contemporaries usually shared this presumption which historians today think entirely mistaken. See McMahon, *A Comfortable Subsistence: the Changing Composition of Diet in Rural New England, 1620-1840*, 42 WM. & MARY Q. 26 (1985); P. GATES, THE FARMER'S AGE: AGRICULTURE, 1815-1860 214-21 (1960).

[FN84]. C. ROSENBERG, THE CHOLERA YEARS 17 (1962).

[FN85]. 1 THE DIARY OF GEORGE TEMPLETON STRONG 110 (A. Nevins & M. H. Thomas, eds. 1952). See also W. DODGE, OLD NEW YORK. A LECTURE 20 (1880): 'There were then a special kind of street-cleaners, in the vast number of swine, owned by the poorer classes, that crowded some portions of the city, making travel dangerous. It was by many claimed that they ate up the garbage thrown into the streets in spite of law, and thus were to be tolerated.'

[FN86]. As we shall see below, such an ordinance was typical of several passed by the city council between 1820 and 1850.

[FN87]. *Levy v. The Mayor*, 1 Sandford 465 (N.Y. Sup. Ct. 1848).

[FN88]. *Id.* at 467.

[FN89]. It is important also to remember that the

second third of the 19th century was a time when New York courts were particularly insistent on imposing liability on the city, whenever the city could be characterized as having 'voluntarily' assumed particular duties or responsibilities (as in this case). See Hartog, *supra* note 15, at 224-39.

[FN90]. See Raeder, *supra* note 81 at 217-18.

[FN91]. See C. ROSENBERG, *supra* note 84, at 143-44. But see the illustration on the succeeding page entitled *The Police, under the direction of Inspector Downing, clearing the Piggeries of Bernard Riley, New York City*, Leslie's Illustrated Newspaper, Aug. 13, 1859. I am grateful to Susan Levine and the New-York Historical Society for finding this illustration and for permitting its reproduction here.

[FN92]. See C. ROSENBERG, *supra* note 84, at 113, 143-44. While I am confident that New York pig keeping did not end in 1849 (as the illustration surely indicates), it is clear that pig owners could no longer assume the tolerance of city officials. In other cities, swine remained an accepted part of public life for a longer period. See, e.g., C. GREEN, 1 WASHINGTON. A HISTORY OF THE CAPITAL, 1800-1950 211 (1962); D. MOLLENHOFF, MADISON, A HISTORY OF THE FORMATIVE YEARS 45, 62, 111, 158, 394, 396 (1982).

[FN93]. See Sarat, *Legal Effectiveness and Social Studies of Law: On the Unfortunate Persistence of a Research Tradition*, 9 LEGAL STUD. F. 23 (1985); Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57 (1984); Trubek, *Where the Action Is: Critical Legal Studies and Empiricism*, 36 STAN. L. REV. 575 (1984).

[FN94]. David Sugarman notes, in commenting on an early draft of this paper, that there may never be a shared consciousness around conceptions of the law as law. We do not really need to posit legitimation or hegemony as structures of belief in the state shared by all groups within a political regime. On the other hand, we do need to think seriously about shared notions of 'wrongs'-such as murder, rape, theft, and other forms of mistreatment-from which all might agree we need protection.

I find this an appealing formulation. But at the same

time, I still wonder about the seeming pervasiveness of an American commitment to 'rights discourse,' a discourse founded on a belief in the ability of many groups to confirm and legitimate their identities through public and legal means. Is that a distinctive feature of American political consciousness?

In any event, gap analysis builds from an unquestioning commitment to the positivist assumption that a law, by definition, is an act of state commanding the obedience of a constituency. Given that commitment, legal sociologists then proceed to show the 'failure' of the state to achieve actual obedience. As Sarat and others have argued, *see supra* note 93, this commitment makes the method one easily corrupted into advice by experts to lawmakers and enforcers how to make more effective commands which will be more enforceable-how, in other words, to lessen the gap.

[FN95]. 11 C.C. Min. 603, 611.

[FN96]. 12 C.C. Min. 158.

[FN97]. The accepted anonymity of pig keeping in the city does suggest that *People v. Harriet* may have been a test case. *See supra* note 24.

[FN98]. As such it was a reform at one with the deepest bureaucratic longings of municipal administrators and political leaders of the early 19th century. *See* H. HARTOG, *supra* note 15, at 143-57.

[FN99]. 12 C.C. Min. 383, 444-45, 600.

[FN100]. In June, 1826 the council resolved that the law ought to be rewritten to recreate a public pound system. The resolution was referred to the police committee which reported against the proposal on the grounds that maintaining a hog pound would cause more trouble and expense without correcting the nuisance. And the proposal was then rejected by the full council. 15 C.C. Min. 484, 515-16.

[FN101]. 11 C.C. Min. 722.

[FN102]. The petition complained of the pigs which 'since the late law restricting their being in the Street to the outer wards infest the Village and praying a law may be passed compelling the owners to put rings in their noses.' 12 C.C. Min. 293.

[FN103]. 11 C.C. Min. 731-732, 751, 766; 12 C.C.

Min. 17, 95-96, 114, 458, 471; 13 C.C. Min. 171; 14 C.C. Min. 694; 15 C.C. Min. 466, 468, 536, 570, 618. These petitions were at least sometimes granted. *See* the accounts listed for 25 September 1826, when three supplicants were each given ten dollars for the taking of their hogs. 15 C.C. Min. 615. Evidently, petitioners played on council members' uncertainties about a law which redistributed wealth from 'poor' citizens to poor inmates of the almshouse. Since it was often impossible to identify the true owner of the pig found in the street, one can well imagine that neighborhood widows and others likely to evoke middle-class sympathy would usually play the part of petitioner when the need arose.

[FN104]. 12 C.C. Min. 430, 447.

[FN105]. *Id.* at 460-61.

[FN106]. *See* 13 C.C. Min. 365, 410-11; 14 C.C. Min. 515; 18 C.C. Min. 489.

[FN107]. 13 C.C. Min. 365, 410-11; 14 C.C. Min. 674; 15 C.C. Min. 269-70.

[FN108]. 18 C.C. Min. 295, 489, 546; 19 C.C. Min. 115.

[FN109]. 19 C.C. Min. 168.

[FN110]. I am guessing here, since I have not been able to find a report of the case, aside from the record in the council minutes. *Id.* at 465.

[FN111]. Any persons finding swine at large in the city could take them to a pound. The pound master would pay such finders one dollar for each animal they brought. The owner of the swine could redeem them within five days by paying a fee of fifty cents a day per animal, plus whatever was paid to the person who brought the swine to the pound. LAWS AND ORDINANCES OF THE CORPORATION OF THE CITY OF NEW YORK tit. vii, at 133-35 (1833).

[FN112]. In other situations, particularly when enforcement was founded on ordinances it had drafted, the common council was perfectly willing to enforce nuisance laws. *See, e.g.,* the cemetery cases described in H. HARTOG, *supra* note 15, at 71-81.

[FN113]. There were, needless to say, problems of enforcement, but these cannot be distinguished from questions about the legal authority of the council and its agencies.

[FN114]. The phrase is of course that of Oliver Wendell Holmes, Jr., see O. W. HOLMES, *The Path of the Law*, in COLLECTED LEGAL PAPERS 167 (1921).

[FN115]. *Id.*

[FN116]. See *supra* text accompanying note 104.

[FN117]. 12 C.C. Min. 447.

[FN118]. See *supra* text accompanying notes 4 & 25.

[FN119]. I have been immensely helped here by a paper called OK Lawbreaking, prepared for my legal history class by Richard Claus in the fall of 1984. See also Rule, *Wrecking and Coastal Plunder*, in D. HAY, P. LINEBAUGH, J. RULE, E. THOMPSON, & E. WINSLOW, *ALBION'S FATAL TREE: CRIME AND SOCIETY IN EIGHTEENTH CENTURY ENGLAND* 167 (1975).

[FN120]. The classic statement of this legal theory can be found in Lincoln, *Address Before the Young Men's Lyceum of Springfield, Illinois*, in A. LINCOLN, *THE POLITICAL THOUGHT OF ABRAHAM LINCOLN* 11 (R. Current ed. 1967). See generally G. WOOD, *supra* note 40.

[FN121]. Paradoxically, it may also legitimate the emergence of law as the arena of conflict. But that is a subject for another day.

[FN122]. For one marvelous attempt to do so, see E.P. THOMPSON, *THE POVERTY OF THEORY & OTHER ESSAYS* 96 (1978).

[FN123]. Here I contradict an argument I made in *Distancing Oneself from the Eighteenth Century; a Commentary on Changing Pictures of American Legal History*, in *LAW IN THE AMERICAN REVOLUTION AND THE REVOLUTION IN THE LAW* 229 (Hartog ed. 1981). In that essay I argued for the relative truth of legal positivism as a description of the underlying legal theory of the

makers' of the 19th century legal order. In contrast to their 18th century predecessors, those men whom we conventionally label as the founders of our legal order thought of law as an analytically distinct sphere of human activity and as the command of a political sovereign (as opposed to the expression of consensual moral values). In general they would have derived the legitimacy and obligatory character of legal rules from the given institutional processes, rather than from the substantive rightness or morality of the rules themselves. I still believe that I fairly characterized their legal assumptions in that essay (although Robert Gordon and others have recently pointed to the complexities of elite legal thought). However, that essay wrongly transformed a limited and partial (yet influential) legal consciousness into the dominant feature of the legal order itself.

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