

Law and Magic

A Collection of Essays

Edited by

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Editor's Foreword

This collection began as an idea for a symposium in the summer of 2004. Although we still haven't had the symposium, my good friend Bob Jarvis of Nova Southeastern Law Center (whose essay you will read in the Section "Procedurally Speaking") suggested putting together a collection of essays, and sending out a call for papers to see who might be interested in participating. Keith Sipe of Carolina Academic Press was kind enough to see some merit in the proposal, and agreed to publish the results. You now hold in your hands the work of the people listed in the Table of Contents, but also of research assistants, administrative staff, librarians, and others whose contributions also led to the production of this book. Those of us involved in *Law and Magic: A Collection of Essays* thank them for their patience and dedication. In particular, I would like to thank the following persons for assistance: Benjamin Janke (LSU Law '08), Suzanna Johnson (LSU Law '10), and Mackenzie Smith (LSU Law '09), Cynthia (Cyndi) Virgillio, LSU Law Center, rendered impeccable editing and psychological aid often throughout the course of this adventure. Laura Dewey prepared the invaluable index.

What is "law and magic?" When I first started thinking about this area of law, while I was doing research for another book, I looked around to see if anyone else had written on the subject, and more importantly, to see if anyone had defined it, and could find very little in print. Few people I spoke to (besides Bob Jarvis and Keith Sipe) thought "law and magic" meant anything at all. I thought that certainly law and magic interacted in the area of magicians' intellectual property rights, and in the hiring and firing of crews—beautiful magicians' assistants, for example. Certainly magicians had as much interest in the law as any other entertainers. But did they have specific, definable interests different from those? I thought so. Eventually I came across George Gurvitch's *La magie et le droit* and rediscovered Edward Peters' *The Magician, the Witch, and the Law*. I began to discern an interaction between the law and religion—regulation of belief, in reaction to that demands for freedom of worship, witchcraft trials. In particular, mainstream, majority religions often took the position that those who did not believe as they did engaged in the practice of magic, often pointing to passages in revered texts to justify their positions.

From there one could examine minority religions, belief in ghosts, superstitions, fortune telling, the list seemed endless. That seemed to me to be an entire area in which law and magic operated. What constitutes "magic" and the definition of "magic" in any society are other interesting questions. Is "magic" what people understand and believe in, or as Arthur C. Clarke has famously stated in another context, what they do not?¹ And if so, is that why governments try so hard to prohibit or regulate it, either in the religious or secular context, prohibiting fortune telling, astrology, types of gambling, and other manifestations that suggest that people place their trust in the irrational?

1. "Any sufficiently advanced technology is indistinguishable from magic." PROFILES OF THE FUTURE (1961).

Historical, literary, sociological and comparative approaches further illuminate them. How do different societies regulate the practice of magic? Over the centuries why have some prohibited it? How have and why have such prohibitions disappeared or continued?

But law and religion is just one area in which “law and magic” interacts. As many governments became secular and some crimes lost their religious nature, those who committed certain acts still faced prosecution. Fortune telling, for example, which is a type of magic, is still criminalized in certain jurisdictions. Certain minority religions, whose magical beliefs are not those of mainstream society, have gained respectability but still face discrimination.

Once the practice of magic became secularized, as an accepted form of entertainment, and its practitioners recognized professionals, could magicians use the legal system to protect their work as other artists did? If not, why not? Intellectual property law and the use of freedom of speech protections to disseminate or discuss magic tricks are fascinating areas to explore. Labor laws and other laws that have an impact on the profession of secular magic also provide an area to examine.

Magicians themselves have roles to play in the legal system. As expert witnesses they can show lawyers and fact finders how “impossible” things might be accomplished, just as scientists might do. In addition, lawyers and magicians have a lot in common. Both lawyers and magicians are in the business of telling stories, and of doing a certain amount of misdirection (although lawyers must never lie to the court, and magicians announce from the beginning that lying is what they do best). Both lawyers and magicians must be good psychologists, excellent at reading people, and at discerning when someone is lying, when someone is bored, when someone is convinced or not convinced of the story being told.

Yet another area is that of magic within the law and the humanities. How do magic and magicians, no matter how it and they are defined, appear in literature, film, and other areas of popular culture?

The contributors to this volume take many of the topics above and address them in all sorts of original ways, bringing their expertise in law, history, and magic to the discussion.

The Honorable Loren A. Smith, Senior Judge, U.S. Court of Claims, and himself an accomplished magician, takes us on an entertaining journey through the use of magic as an interpretive tool, as well as a way of seeing the law, in his foreword to this collection.

In Section I of the book, *Speaking of Law and Magic*, several of our contributors examine the intersection of law and magic in the areas of speech and religion. Julie D. Cromer, professor of law at Thomas Jefferson School of Law, examines the current state of the law regarding tarot card reading in the United States. Craig Freeman, professor of journalism at Louisiana State University, and Stephen Banning, professor of communication at Bradley University, and a professional magician, look at the protections available under the First Amendment for fortune tellers. CUNY Law School Professor Pamela Edwards' piece on minority religious beliefs and the First Amendment allows us to consider to what extent our legal regime protects those groups that engage in non-traditional practices. My own essay on “Ghostwriters” discusses some spiritualists who have claimed to contact the dead, transcribe their work, and then take a copyright in the result. Expanding our investigation of speech and religious protections not just geographically but in terms of category, Indra Spiecker-Döhmman introduces us to the workings of freedom of information law under the current EU regime, demonstrating how it might apply to a practicing magician who wants to protect his secrets from competitors. In doing so, Ms. Spiecker-Döhmman's essay spans Sections I and II of the book.

In Section II of the book, *Protecting Magical Property*, we consider the protection of magic secrets, a controversial issue for magicians and lawyers alike. Jay Dougherty, professor of law at Loyola of Los Angeles Law School, explains how copyright law might be used to protect magic productions and performances. Jacob Loshin, considering the same issue, examines how magicians protect their work without recourse to traditional legal regimes. Finally, Florian Faust explains how dealers in magic tricks protect their business in the European Union.

Section III, *Procedurally Speaking*, takes up procedural matters: the “how” of legal magic. In “The Magic of Civil Procedure,” Frederick Brodie shows us how judges manage to keep supernatural cases out of courts using the civil procedure rules. Robert Jarvis has unearthed possibly the only admiralty case involving a magician’s assistant, and demonstrates how the workings of admiralty law intersect with prestidigitation.

Section IV, *Historical Considerations*, brings us to some historical magic. Jessie Allen introduces us to the legal realists and their “magical” use of language. Historian Wendy Turner offers us a fascinating piece on alchemy and its regulation in fourteenth-century England.

Several scholars introduce us to a number of intersections of law and magic in Section V, *Adverse Possessions*. Eric J. Gouvin’s “On Death and Magic: Law, Necromancy, and the Great Beyond” considers the rules and customs that we observe when we think about death. Susan D. Rozelle and Garrett Epps both consider the question of hypnotism, Professor Rozelle in the context of the criminal law and Professor Epps with regard to the First Amendment. Peter Edge, a British scholar known for his writing in the area of law and religion, gives us an introduction to the law governing trusts in the UK, and considers what additional status, if any, this law might give charitable foundations that promote magic and religion.

Section VI, *What’s a Law and Magic Book Without a Rabbit?*, is devoted to the use of animals in magic. Both Rebekah Hanley and Lisa Johnson review the history of animal law and argue eloquently for more protection of animals, from slightly different perspectives.

Two practitioners and two scholars discuss courtroom magic in Section VII, *Courtroom Magic*. Attorneys Noel Marcovecchio and Kenneth Trombly, the first a practicing magician, the second a magic collector and dealer, discuss analogies between law and magic. Law professor Sydney Beckman, also a practicing magician, discusses whether a magician can be an expert witness. Finally, the late Richard Ramsey, a distinguished scholar in the area of evidence as well as legal history, offers us one of his last essays on the uses of evidence in a very magical area.

Finally, in Section VIII, *Academic Interactions*, Marianne (Mimi) Wesson interprets the novel *Jonathan Strange & Mr. Norrell*, giving us the insights both of a legal scholar and a successful crime novelist.