

# Foreword

## “Law As . . .”: Theory and Method in Legal History

Catherine L. Fisk\* and Robert W. Gordon\*\*

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In convening the “Law As . . .: Theory and Method in Legal History” symposium, Christopher Tomlins and Catherine Fisk invited new work on the theory of legal history and on the method by which legal historians do their work. A number of scholars from a variety of disciplines, not all of them historians or lawyers, were invited to offer their thoughts about reorienting legal history generally, and sociolegal history in particular, away from the long-dominant framework of “law and society” and toward a new framework that does not depend on a binary, or a conjunction of two distinct fields imagined as outside of each other. The conveners posed the idea of legal history as being the study of “law as . . .” about which we shall say more below. As is customary, papers were written and circulated. Over two days in Irvine in April 2010, we gathered to discuss sixteen papers divided into four panels. The exchange of ideas was facilitated by four discussants—John Comaroff, Robert Gordon, Morton Horwitz, and Christopher Tomlins—and four moderators—Catherine Fisk, Risa Goluboff, Ariela Gross, and Hendrik Hartog. Faculty, graduate students, and law students from UC Irvine and other universities also participated in the conversation. Thus, the symposium as it appears to you in text comprises not only the paper authors’ ideas, but also, through this Foreword and in the Afterword by Comaroff and

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\* Chancellor’s Professor of Law, University of California, Irvine.

\*\*Chancellor Kent Professor of Law and Legal History, Yale Law School. Professor Gordon feels obliged to mention that this introduction is predominantly the work of Catherine Fisk and that his contribution has been in the form of a few editorial suggestions. Professor Fisk demurs.

Tomlins, some of the ideas suggested by moderators and discussants, including many people in the audience.<sup>1</sup> The division of labor between article authors, on the one hand, and moderators and discussants, on the other, reflects an effort to draw together some of the most renowned legal history scholars in the United States over the last thirty years with those who are newer to the field, are less well known to legal historians, or produce work that suggests particularly interesting departures from the familiar terrain of legal history in matters of either theory or method.

In what follows, we explain the “law as . . .” concept of the symposium and introduce the papers by suggesting various ways in which they answered the call to contemplate legal history from the perspective of “law as . . . .” We identify the theoretical and methodological commonalities among the papers and suggest five distinct themes present in their answers to the symposium’s call.

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Legal historians, as well as scholars of anthropology, sociology, politics, philosophy, and other fields who study law and the past, have long taken their intellectual cues from the problematic of the “law and” or “law &” theory. “Law and” was first grounded on Roscoe Pound’s turn-of-the-twentieth-century distinction between law “on the books” and law “in action” as well as Oliver Wendell Holmes Jr.’s statement (following the famous aphorism: “[t]he life of the law has not been logic: it has been experience”) that “[t]he law embodies the story of a nation’s development through many centuries . . . .”<sup>2</sup> The “law and” idea was enlivened and extended by Legal Realism in the 1920s and 1930s, and given depth by the research of the law and society movement that began in the 1960s and continues today. From its start, the “law and” theory has explained law through its relations to cognate but distinct domains of action—society, culture, politics, and economy. “Law and” scholarship has generally described, parsed, and theorized the relations among these domains of action. Legal historians use “and” as a reminder that one should study law not as distinct from all else, as entirely self-contained and self-generating, or as a “brooding omnipresence in the sky.”<sup>3</sup> Thus, what may be a matter of rhetorical convenience becomes a crucial but largely unexamined ontological statement and cognitive habit. “Law and” scholarship perpetuates the idea that, even though law is situated in society, law is distinct from society and can, or must, be studied in relation to it.

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1. Only those whose names appear as authors should be faulted for their shortcomings; the ideas expressed here came from many sources.

2. O.W. HOLMES, JR. *THE COMMON LAW* 1 (1923).

3. *S. Pac. Co. v. Jensen*, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting) (“The common law is not a brooding omnipresence in the sky but the articulate voice of some sovereign or quasi sovereign that can be identified . . .”).

The “law and” theory identifies society as law’s most important determinative context, and makes both law and society subject to empirical study.<sup>4</sup> There are many methods by which empirical claims may be made in “law and” scholarship. In that way, “law and” has been far more ecumenical and eclectic than many social science and humanities disciplines in deciding how one should conduct social research and interpret its results. This methodological catholicism may help account for its enduring appeal. In introducing the live symposium, Dirk Hartog confessed an inclination, or experience, that may have been shared by many: the desire to be a sociologist/historian/lawyer at one point, an anthropologist/historian/lawyer at another. The law and society framework allows for this kind of methodological wandering over the course of a career.

The core theory underlying “law and” is the predominance of causally functional and empirical accounts of law. The scholar’s job is to examine how law arises out of activity in the social sphere and how, in turn, law reacts back upon and causes changes in that sphere. The scholar must also discover patterns and regularities in those interactions that would ideally allow causal generalizations. The theory is that law is a purposive or functional activity; people create law, or make use of law in a particular way for a reason, and the result of these activities, whether intended or not, is that law becomes what it becomes and society becomes what it becomes.

The “law and” framework has been a highly productive one for nearly a century, spurring humanities, social science, and law scholars to produce insightful, provocative, and canonical works on topics covering nearly the entire field of human endeavor. Under many different names and methodologies—including sociological jurisprudence, law and society, law and economics, and empirical legal studies—“law and” scholarship pervaded a wide range of academic disciplines, as well as the professional education and training of lawyers and the work of judges. The impact of “law and” can hardly be overstated.

The “law and” framework was as productive in legal history as in the rest of the academy, both in terms of its institutional impact and intellectual influence. As Steven Wilf<sup>5</sup> observes, legal historians became important members of faculties in many law schools and history departments and their work spilled over into sociology, anthropology, economics, critical theory, literature, and other fields. Methodological crises in many social science and humanities disciplines in the 1990s led many scholars to embrace history as a kind of salvation. The work of legal historians enriched jurisprudential scholarship as well, forcing theorists and philosophers of law to consider social context as a far more significant feature of law than the jurisprudence—even the historical jurisprudence—of the nineteenth

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4. Some of the ideas expressed in these paragraphs have also been explored in recent years by Christopher Tomlins. See Christopher Tomlins & John Comaroff, “*Law As . . .*”: *Theory and Practice in Legal History*, 1 U.C. IRVINE L. REV. 1039 (2011).

5. See, e.g., Steven Wilf, *Law/Text/Past*, 1 U.C. IRVINE L. REV. 543 (2011).

century had allowed.

Beginning in the late 1970s, however, critical theory produced a trenchant critique of the functional and empirical account of law/society relations on which the “law and” framework rests. Theories of causal regularities in law/society relations were elusive and unstable; they tended to break down under critique into indeterminacy marked by complexity and contingency.

For the critics of law/society relations, it was fun to destabilize the widely accepted verities about the origins and function of law. It was fun to skewer the just-so stories that tended to dominate legal scholarship and still persist in so much law and economics work. Yet, scholars took the critique seriously and were forced to question both the theory underlying our work and the nitty-gritty of what we do on a daily basis. Can we make causal claims? What kind? Should we try? More broadly: What should we study? How much and what kind of study of the “social” is desirable or necessary? What is the “social” and how can we distinguish it from “law”? When legal historians go into the archive, what should we read and how should we interpret the papers we find there? Should we even be in the archive at all? At the most extreme, what is “history” and what is “law”? Or, as Norman Spaulding asks, musing on Hayden White’s suggestion that Hegel posited that there could be no history without law, “why put history in relation to law at all?”<sup>6</sup> Does history—that is, the ability to represent reality as history—depend on the existence of a subject constituted in relation to or, more specifically, as resistance to a system of law? Or, as Ritu Birla says, perhaps legal history as critical practice must “confront the problem of the autonomous subject exercising intentioned agency.”<sup>7</sup> Graduate students and junior scholars may be forgiven for wondering, if the existence of subjects exercising intentional agency is up for grabs, whether it is worth staying in graduate school or studying history at all. Regrettably, critical theory produced no replacement for the problematic “law and” theory it had undermined.

The “law and” theory survives, in part by default, and in part because of the capaciousness of the conjunctive metaphor. It has long allowed all manner of claims about the natures of law and history, and about the insights one might gain from studying law as part of other domains of human activity. The pragmatic usefulness of the conjunction papers over abiding doubts about the continuing intellectual coherence of the framework that encompasses so much sociolegal historical work. Careful writers know that the word “and” can hide all manner of sins of argumentation, vagueness, or ambiguity. Usually, an assumed shared cultural context gives meaning to the linking of two words by “and.” For instance,

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6. Norman W. Spaulding, *The Historical Consciousness of the Resistant Subject*, 1 U.C. IRVINE L. REV. 677, 685 (2011); see HAYDEN WHITE, *THE CONTENT OF THE FORM: NARRATIVE DISCOURSE AND HISTORICAL REPRESENTATION* 12–14 (1987).

7. Ritu Birla, *Law as Economy: Convention, Corporation, Currency*, 1 U.C. IRVINE L. REV. 1015, 1036 (2011).

one familiar with Anglo-American culture knows what is meant when “toast” and “marmalade” are linked by “and” in the same sentence; others may not see the necessary connection between them. Thus, the linking of two words by “and” can seem implausible (“law and plastics”) or controversial (“law and papal infallibility”), depending on the cultural context.

Aware of the difficulty of making claims about the relationship between law and society in the past or in the present, we still work away, trying to avoid making, or carefully hedging, claims about the relationship between law and whatever follows the ampersand. We say that the economy/society “shapes” law, or law “influences” the economy/society, or that law and the economy/society are “mutually constitutive.” Legal historians have shown that all three propositions are surely true in some sense, but that precision and certainty about the exact nature of, reasons for, or processes by which the one “has an impact on” the other are elusive. Indeed, the propositions are sometimes so elusive as to make one wonder whether anything can, or should, be said about the causal relationship between “law” (whatever that means) and “society” (whatever that means). If one is to abjure making any kind of causal claims at all, and to forswear the use of certain words and phrases (“caused,” “influenced,” “had an impact on,” “led to,” “resulted in,” etc.), one needs a new perspective on the enterprise. To the extent that history generally, and legal history in particular, invites or demands clear and verifiable claims about causal relationships between this and that (for example, that the creation of a right of landowners to divert water from a stream was motivated by a particular vision of the benefits of economic development,<sup>8</sup> and led to a particular set of outcomes) a prodigious amount of work by a generation of scholars has made us aware that this approach to legal history, termed “evolutionary functionalism,”<sup>9</sup> has serious conceptual limitations. These limitations were pointed out many times over the last twenty-five years, and yet legal historians still work away at writing about the past, even in the absence of a grand theory about why or how one should go about it. Of course, it is perfectly possible, and indeed very common, to write first-rate history uninformed by a grand theory. But if we want to pause now and again to think about our practice, we can spare time for a little theorizing about relationships between law and whatever follows the ampersand.

The papers in this volume responded to an invitation to consider legal history through a lens other than that provided by the “law and society” or “law and social history” frameworks. Authors were invited to try dispensing with theory built from the conjunctive metaphors of “law and,” and instead reach for different metaphors. Instead of parsing relations between distinct domains of activity,

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8. See MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780–1860* 34–53 (1977).

9. See Robert W. Gordon, *Critical Legal Histories*, 36 *STAN. L. REV.* 57, 59 (1984).

between law and what lies “outside” of it, the objective of historical research about law might be to imagine them as the same domain: “*law as . . .*.” The conveners deliberately extended the invitation not only to scholars of law and history, but also to those whose primary intellectual or disciplinary home lies in politics, theory, rhetoric, and anthropology. Each of these fields has experienced its own historical turn in the last generation, and each has had a lively and penetrating discourse about law that produced ideas and works that are influential to historians and to lawyers.

The invitation was answered in many richly imaginative ways. The articles in this symposium conceptualize law variously as text, peace, politics, silence, claims, justice, consciousness, resistance and that which is resisted, drama, tragedy, enchantment, sacred ritual, spectacle, allegory, war, empire, the Crown, money, economy, and more. Law is imagined *as* these things, and, importantly, as antithesis. The wealth of possibilities and the subtleties in the way that law is imagined in these pages and, we suspect, can be imagined by others, were among the greatest surprises at the symposium and remain among the greatest joys of reading the papers in this collection. That wealth of ideas, with its promise of generating more ideas in the future, explains the conveners’ insistence on the ellipses in the symposium title: “Law As . . . .” The ellipses began as a hopeful invitation to consider what law is if it is not half of a conjunction. The conveners had no idea what might follow “law as . . . .” Now that we know what these symposium participants imagined law as on this occasion, we insist on the ellipses as a statement of principle: law can and should be imagined as many things, including but by no means limited to those suggested here. The invitation continues to you, the reader, to imagine “law as . . . .”

Inevitably, for most of us, whether we see ourselves as scholars of both history and law, scholars of history who happen to study law, scholars of law who happen to study history, scholars in some other discipline entirely who happen to study history and law, or scholars who are resistant to disciplinary categorization altogether, these disciplines will always be something of a binary. The cognitive map inscribed in the brain of those teaching or trained in most contemporary universities invites thinking about law and history separately and as needing a conjunction. We use many conjunctions besides the ubiquitous ampersand; the most common linguistic feature to link the concepts may be “inter-” (interdisciplinary, intertwining, interaction, intersection, interpretation). Whatever the terminology, perhaps the most common and most significant methodological and theoretical insight of these works, and the enduring insight of the “law and” framework, is the importance of *context* in the study of law. Without knowing about context we can know little about law, but we should be careful in how we think about the relationship between context and law. We should remember to think about context as law and law as context. Most broadly, “as . . . .” reminds and invites creative consciousness about our work.

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One of the advantages of legal history as compared to, say, jurisprudence, is the flexibility it offers scholars to see the many faces of law rather than having to characterize the nature of law as being all one thing or all another. While the discussion that follows highlights five distinct themes that unite some papers and distinguish others, there are at least as many theoretical and methodological themes that unite them all. For the sake of brevity, we identify three. First, the big and, by now, tedious theoretical problem (Is law ideological superstructure or is it foundational? Is it something mostly determined by external social change or itself a cause?) that vexed so much of legal history for a generation has been dismissed, just as one might dismiss the debate over whether the chicken preceded the egg. Law constitutes society and society constitutes law; as Birla says, legal historians see law as *embedded* in all else about human existence<sup>10</sup> and, as many have noted, a great deal of human existence is embedded in law. Second, grand, unidirectional theories of causation or efforts to explain causation are absent. Legal history is not trying to be an empirical social science aiming to identify a series of variables and use the past as an experiment to prove that one or two variables produced particular effects. Teleological theories are out, but so are theories that insist all is irreducibly particular, contingent, and complex. Narrative arc matters and, thus, it is important to explain that somebody did something to, with, or for someone else, for identifiable reasons and with identifiable consequences. Contingency and complexity remain—one would have to be arrogant, deluded, or ignorant of a quarter century's critical theory to believe that any historical event worth writing about was indisputably the product of only one or two prior events or phenomena; however, the contingency and complexity have to be pushed aside enough to tell a story that a reasonably literate reader can follow. Third, all the papers bear the imprint of the critical theory and critical histories of the last generation. It seems fair to say that a critical stance, with occasional aspirations to the redemptive possibilities of critical history, seems to be the unanimous theoretical commitment of these scholars, even as their methodologies vary widely.

Ironically, given the universal embrace of the idea that history should be critical in any of the many ways in which legal histories can be critical, there was somewhat less critical engagement with the theories that underlie the canonical works than one might have expected from an invitation to rethink the theory and method of legal history. No one wanted to storm the citadel of Hurstian, Friedmanian, Horwitzian, Hartogian, or Tomlinsian history even as they have, by

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10. Birla, *supra* note 7, at 1020.

their methods, chosen other paths for their work.<sup>11</sup> This is no surprise, given the respectfulness and modesty with which all the papers staked their theoretical and methodological claims. For good or ill, we have no manifesto for the next wave of sociolegal history. It is not that the conference conveners tried to suppress revolution; indeed, they almost tried to provoke it. While some of the most eminent and influential scholars were present, the conveners selected papers that gave precedence to some of those whom they thought might be characterized as “up-and-comers” or newer voices. With both the old guard and new wave present, some might have imagined a lively debate as the new generation tried to stake its intellectual claim by differentiating itself from the canonical works. When some of the presentations referred to old frameworks and intellectual exhaustion in the field, the conveners invited the hurling of a few bricks by suggesting, as noted above, that perhaps it was time for radical reorientation of the field of sociolegal history. Yet, what we have in the pages that follow are ruminations and invitations to future work, not a sharp break with the past or a call to arms for future scholars. During the conference someone even remarked, with a tinge of disappointment, that no one had tossed a grenade or tried to incite an uprising. For those, including the conveners, who may have arrived at the conference with the hopes of seeing an ancien régime toppled, the Revolution will have to wait.

The legal-historical methods reflected in these papers are ones that make a virtue of pluralism, bricolage, multiple perspectives, and diverse sources. The conventional sources of legal history—judicial opinions, statutes, treatises, lawyer’s pleadings and other writings, and court records of trials and testimony—appear here alongside conventional sources of intellectual and social history—theorists’ and historians’ books and articles, news accounts, advertisements for rayon,<sup>12</sup> and John Reed’s account of Pancho Villa in Mexico.<sup>13</sup> One need not choose between top-down and bottom-up approaches, or between (as one of us once put it and Kunal Parker echoes<sup>14</sup>) internal and external legal histories. The mix of theory and narrative differs from one paper to the next, as it should, but everyone is still reading texts and examining images from the past and trying to construct a story out of them.

What we do have, however, is a commitment to conscious and careful

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11. See, e.g., LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* (1973); HENDRIK HARTOG, *MAN AND WIFE IN AMERICA* (2000); HORWITZ, *supra* note 8; JAMES WILLARD HURST, *LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH-CENTURY UNITED STATES* (1956); CHRISTOPHER L. TOMLINS, *LAW, LABOR AND IDEOLOGY IN THE EARLY AMERICAN REPUBLIC* (1993).

12. Barbara Young Welke, *Omning Hazard, A Tragedy*, 1 U.C. IRVINE L. REV. 693, 696–97 (2011).

13. John Fabian Witt, *The Dismal History of the Laws of War*, 1 U.C. IRVINE L. REV. 895 (2011) (citing JOHN REED, *INSURGENT MEXICO* 142 (1914)).

14. Kunal M. Parker, *Law “In” and “As” History: The Common Law in the American Polity, 1790–1900*, 1 U.C. IRVINE L. REV. 587 (2011).



scrutiny of the past. We have the joys of our practice. Archives are often fun, yet when we emerge from them, as Hartog said at the conference, we find ourselves living in historiographic time in which we struggle against past interpretations or against the absence of interpretations, and we feel the anxiety of influence and the fear of too little influence. In each of these papers we have an author bringing awareness to the why and how of studying the law's past.

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In the remaining pages of this Foreword, we weave together the symposium articles by identifying five different conceptions of the nature of law. The articles appear in an order that is intended to highlight the claims they make about what the authors see “law as . . . .”

*“Law as . . . .” the Language of Social Relations*

Several of the papers advocate the importance of a quality of law that emphasizes its communicative aspect. Communication, of course, presupposes social relations and law is the medium through which people communicate with each other about social order. We have texts (Wilf), speech acts (Constable), local social relations conceptualized as “the peace” (Edwards), jurisprudential theories of positive law that “transform law into a product of science” in the sense of reason (Berkowitz), and law as irreducibly both and neither politics in history (Parker). All of these treat law as a particular and particularly indefinable form of human engagement with the others.

Wilf's article appears first in the symposium because it most squarely addresses the crucial and obvious question of theory and method: legal history is, in the most basic sense, the records we study (most of which are texts) and what we write about them (since most legal history scholarship is delivered in the form of a text). Except for relatively recent history, which can be studied through oral exchange or through watching films or listening to recordings, and except for those circumstances in which legal history requires study of objects (on this Goodrich's paper has interesting things to say), the method of legal history is to read texts. Wilf reminds us that legal historians tend to fetishize texts and, riffing on Derrida,<sup>15</sup> suggests that a variant of archive fever, which Wilf calls *mal de texte*, may be an occupational hazard.<sup>16</sup> What distinguishes sociolegal history from the (oft-derided) form of legal history that consists of reading *only* cases and statutes, is its eclecticism about what kinds of texts should be read and, more importantly,

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15. JACQUES DERRIDA, ARCHIVE FEVER: A FREUDIAN IMPRESSION 91 (Eric Prenowitz trans., 1996).

16. Wilf, *supra* note 5, at 549.

what aspects of human activity we hope to understand by reading the texts and what kind of narrative about the past we hope to write based on our reading. Sociolegal history derives conclusions from not just “law” texts, whatever those are, and not just formal law, but from material that describes more than just judges’ and lawyers’ opinions. Wilf points out that we easily substitute the conjunction “text and context” to escape from the problems of the old “law and society” framework, and yet we bring along the old conjunction and all its possibilities and limitations.<sup>17</sup> He reminds us that the conjunction is deeply embedded in the way in which many of us imagine the very essence of sociolegal history.

Several of the contributions to this symposium examine and theorize the relationship between texts and social life, showing that the relationship is foundational to the legal historical project. Constable notes that even the most formal legal texts or statements of law are speech acts that are, necessarily, social. One cannot separate, in her account, text from context or law from society because the text *is* a social artifact and either making or reading it is a social act.<sup>18</sup> Edwards highlights that the social order (the “peace”) *was* law, and the law was the social order.<sup>19</sup> The positive law discussed in Berkowitz’s essay similarly figures primarily as written law, or at least stated law. He excavates Leibniz and scientific rationalism as a form of discourse about legitimating social relations in the absence of consensus on morality.<sup>20</sup> And Parker argues that, until the turn of the twentieth century, when Holmes and others insisted that law was simply a way of talking about politics that used both arguments of logical syllogism and of historical continuity to legitimate claims, law was a way of arguing about claims of right.<sup>21</sup>

Constable points out that sociolegal scholars, in their determination to reject the narrow doctrinal study of law in books that even most law schools no longer monolithically teach, may have overemphasized whatever comes after the ampersand—society, economy, polity, etc. Laws in books are, she reminds us, “utterances or written productions [that] are themselves acts, produced and circulated by different sorts of agents over time.”<sup>22</sup> Studies of the history of law, like studies of the rhetoric of law, have the advantage of forcing attention on “the claims—explicit and implicit, past and present—to justice in legal speech [acts],” an emphasis on justice that she finds absent in sociolegal studies that focus solely

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17. *Id.* at 544–48.

18. Marianne Constable, *Law as Claim to Justice: Legal History and Legal Speech Acts*, 1 U.C. IRVINE L. REV. 631, 633–34 (2011).

19. Laura F. Edwards, *The Peace: The Meaning and Production of Law in the Post-Revolutionary United States*, 1 U.C. IRVINE L. REV. 565, 565 (2001).

20. Roger Berkowitz, *From Justice to Justification: An Alternative Genealogy of Positive Law*, 1 U.C. IRVINE L. REV. 611, 615–19 (2011).

21. Parker, *supra* note 14, at 587–88.

22. Constable, *supra* note 18, at 633.

on actions, in legal scholarship that focuses solely on rules, and in legal philosophy that “exiles justice from its bailiwick.”<sup>23</sup> Wilf, Constable, and Parker share an emphasis on law as written or spoken words. It is not just that historians (as opposed to archeologists) study the past by studying the written words of the past—though we do read and read and read; it is that the word-ness of law is one of its defining and most interesting features.

Edwards, by contrast, finds significance in a highly localized, yet ubiquitous, concept of social relations, an inextricable intermingling of law and social order known as “the peace.” This was a form of law least likely to be written, codified, and formally systematized. It existed in contrast to the law formally promulgated at the state or national level. Thus, Edwards challenges the longstanding paradigm that law is the set of rules written in books, originating either in state or federal legislatures, constitutional conventions and courts, or the written or spoken work of lawyers and judges in treatises and formal writings. Law in the paradigmatic account is somewhat top-down and centralized. It originates in governmental bodies and is disseminated via books and written work of lawyers out to the people. In that account, a state/people or law/society dichotomy is easy to see. Law is made in the buildings holding legislatures and courts and it is recorded in books stored in libraries in these buildings. Society is the mass of people outside these buildings in homes and streets, factories and fields. Law filters out from the big government buildings to the smaller buildings and to the fields via the efforts of lawyers, police, and those who invoke law for one reason or another. Edwards turns the flow around depicting law as existing and, importantly, *originating* in a localized, decentralized fashion throughout the space of communal life.

Edwards’s account of law as “the peace”—as a sense of order to life that is deeply situated and felt—makes a methodological and theoretical claim about the nature of law that is widespread and intellectually influential in the family of works which includes the important work of Ariela Gross on trials of racial determination<sup>24</sup> and of Hendrik Hartog on marriage.<sup>25</sup> In courts, and in every other forum where people make claims on or demand protection against others, we find law not only in what the judge says, but in what people say and, if our sources allow a window into it, in what they say and do outside the court as well.

Kunal Parker and Roger Berkowitz both offer histories of law as histories of the philosophy of law. Their focus facilitates the redemptive project of legal history. Berkowitz concludes his essay by invoking “a path of redemption” offered by contemplation that law was once transformed into “a product of science.” Remembering that (and what is the historian’s job but to remember?) may facilitate the creation of “an art of legislation that would summon the just, the

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23. *Id.* at 640.

24. ARIELA J. GROSS, WHAT BLOOD WON’T TELL: A HISTORY OF RACE ON TRIAL IN AMERICA (2008).

25. HARTOG, *supra* note 11, at 10.

true, and the beautiful,” which is “the question for our age.”<sup>26</sup> Parker, too, cannot resist the lure of ending on what he terms a positive note. Even after carefully chronicling an origin to the modern view that law and politics cannot be disentangled, and that foundational and teleological faiths are hard to find in modern law and history, he invokes the story of constitutional history as one of “ever-expanding circles of rights, freedoms, and equalities,” leading up to the possibility that legal recognition of same-sex marriage is “something mandated by the logic of history itself.”<sup>27</sup>

Like canonical works of legal history, such as Hurst’s story of Wisconsin lumber businesses<sup>28</sup> or Hartog’s account of the practices of pig keeping in antebellum New York,<sup>29</sup> all of these papers locate law by identifying the ways in which people make claims about what they can or cannot do, or what is just or justifiable. Law is not only a delegation of state power to make rules that govern the lives of others or rights allowing the holder to call upon state power to resist, it is also the *claiming* of such powers and rights by means usually or always done with words. Law is the talking about social relations, either in the context of resolving particular disputes (Edwards and Constable), or in the effort to justify a system of rules in the abstract (Parker, Berkowitz), or in accounts of how those claims were made in the past (Wilf). Law when it is figured as a particular form of communication can be either intensely and necessarily local (Edwards, Gross, and Hartog) or it can transcend the particularity of time and place (Wilf, Berkowitz). Sometimes it is portrayed as being both local and transcendent at once. Law can be radically situated in time and place yet timeless and universal. “The peace” is both situated in communities in the antebellum South and, as it was articulated by those who lived there, it made claims to universality and abstraction: civilization, as they imagined it, necessarily required a certain order and certain resolution of disputes over behavior and control of land, things, and people. The scientific justification of positive law is necessary because moral pluralism undermines all other justifications. All of these works explore the richness of law as a form of communication within a social context.

### *Law as Consciousness*

In contrast to the various conceptions of law as communication or, as we will see in later papers, a domain of existence or activity, there are histories in which law figures as a form of consciousness, or as a lens through which people perceive the world. In this way, law is like a particularly self-aware religion or state

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26. Berkowitz, *supra* note 20, at 630.

27. Parker, *supra* note 14, at 609.

28. HURST, *supra* note 11, at 10.

29. Hendrik Hartog, *Pigs and Positivism*, 1985 WIS. L. REV. 899 (1985).

of mind. As consciousness, law can be imagined in many different ways. The articles in this symposium emphasize law as the consciousness of resistance or rebellion: law as the opposition or antithesis, law as that which people resist, or law as the source of its own resistance. Edwards's account of "the peace" shows how a form of local order in the antebellum South was ultimately replaced by a law that initially was cast as the Other, or an outsider in the rural areas and small communities of the South. In the sit-ins of the civil rights movement, activists saw themselves, in Christopher Schmidt's telling, as opposing or resisting law.<sup>30</sup> Law was what they were avoiding, resisting, subverting, and *not* using or doing. What they were doing was trying mightily to change the law while believing that they were deliberately trying not to rely on lawyers and the apparatus of law to do so. Their conviction that to change society they had to change the law by not resorting to law was—if one may hazard a simplistic causal claim—the product of the centuries of social practice of racism as part of the social order and racial subordination as part of "the peace." Jim Crow was not just culture or superstructure or epiphenomenal, and its dismantling was, and remains, a project of radical legal and social change. The student protesters in Schmidt's telling knew a lot more about law than the mandarins who wrote from the confines of elite universities in the Northeast.

The sit-ins were animated at least in part by the sense that attitudes of whites and blacks had to change. Later, that same spirit of attitudinal change became organized consciousness-raising sessions. Legal change was consciousness change, which means that law is an aspect of consciousness. Implicit in the idea of consciousness may also be consciousness in resistance to something or someone else. The sit-ins were an expression of a determination to resist. Norman Spaulding goes farther, exploring law not only as consciousness, but particularly as inevitably the consciousness of the subject who resists. The subject, in this case, is variously the subject of power and the subject of the crown, the subject as opposed to the object. But always the subject of the account is one who resists—resists power, resists law, resists analysis—and thus law figures as both consciousness and consciousness of resistance and as one of the things that the subject resists. Spaulding begins with the French Revolution, which was for a long time, and remains for many, the paradigmatic moment of resistance and the beginning of modern Western legal history. But he, exhibiting the habit of any good historian who wants to dig deeper, cannot resist going back further in time to J.G.A. Pocock's account<sup>31</sup> of the sixteenth-century dispute over the concepts of law being custom from "time out of mind"; law as ancient custom figures here as simultaneously a resistance to monarchical authority and resistance to the idea of

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30. Christopher W. Schmidt, *Conceptions of Law in the Civil Rights Movement*, 1 U.C. IRVINE L. REV. 641, 652–58 (2011).

31. Spaulding, *supra* note 6, at 687 (quoting J.G.A. POCOCK, THE ANCIENT CONSTITUTION AND THE FEUDAL LAW 33 (1987)).

history as change.

Spaulding's article is, on the surface, an inquiry into the ways in which psychoanalytic and Hegelian theory suggest that law and history are inextricably intertwined. "Only in a State cognizant of laws,' [Hegel] argued, 'can distinct transactions take place, accompanied by such a clear consciousness of them as supplies the ability and suggests the necessity of an enduring record.'"<sup>32</sup> If the whole project of sociolegal history is to insist that we must ask more than just what the law *was* in the past, or to make a chronological list of events and speculate about the path from one point to another on the timeline, then we need to think about *how* we know what we say about *why* people did things, what they thought, and *what difference it made to the people who experienced it*. To do that, legal historians must grapple with the problem of consciousness and not merely what people knew and thought about law. Law *was* what they knew and thought and, most frustratingly for those in the legal history trade, our own consciousness.

### *Law as Enchanted Ritual and as Spectacle*

Law is a somewhat organized form of behavior that derives its significance from being observed. While it must be observed, unlike other practices that derive most or all of their meaning from being observed (religious rituals, theater, performance art), it must be believed to *be* even when it is not observed. A spectacle is a spectacle because it has spectators. The first sentence of Spaulding's essay is explicitly cinematic: "The first scene always includes a shot of the corpus delicti," and he immediately invites the reader to imagine beheaded corpses, guillotines, and the ghost in Hamlet.<sup>33</sup> Peter Goodrich's first sentence is also visual: "It all begins with the apparition of a specter," but he then leads the reader to envision books.<sup>34</sup> In an account of law as "a theater that denies its theatricality, an order of images that claims invisibility, a series of performances that desire to be taken as the dead letter of prose and so the dead hand of the law,"<sup>35</sup> Goodrich also locates the origin of the absence of the visual in the Protestant Reformers' "critique of images in favor of writing," and their critique of Catholicism's emphasis on ceremony and spectacle at the expense of reason, unmediated reading of scripture, and belief.<sup>36</sup> Wilf, Constable, and Goodrich all insist on the importance of words to law. A huge amount of U.S. constitutional law

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32. Spaulding, *supra* note 6, at 684 (quoting GEORG WILHELM FRIEDRICH HEGEL, THE PHILOSOPHY OF HISTORY 61 (J. Sibree trans., Dover Publ'n 1956)(1837) and citing HAYDEN WHITE, THE CONTENT OF THE FORM: NARRATIVE DISCOURSE AND HISTORICAL REPRESENTATION 12 (1987)).

33. Spaulding, *supra* note 6, at 677.

34. Peter Goodrich, *Specters of Law: Why the History of the Legal Spectacle Has Not Been Written*, 1 U.C. IRVINE L. REV. 773, 773 (2011).

35. *Id.* at 811.

36. *Id.* at 775.

scholarship, including constitutional historical writing, focuses on the question of interpretation of texts and the relative authority of current readers, past readers, lay readers, and judicial readers (among others) to say “what the law is.”<sup>37</sup> For all the emphasis on the meaning of the text, there is relatively little emphasis on the text itself. Law in the United States and, Goodrich’s opening example suggests, in Britain too, “is subject to a pragmatic ethos that is distinctly adiaphoristic.”<sup>38</sup> That pragmatic ethos, and his interest in the relationship of the congregant to the officiant as the spectator to the authority, leads to his opening example: a message encrypted in the typeface of an English Court of Chancery judgment in a copyright infringement suit against the author and publisher of *The Da Vinci Code*, and Goodrich has great fun exploring angles on the Court of Appeals’ decision condemning the judgment as “not easy to read or to understand.”<sup>39</sup> Constable and Goodrich remind us that text itself is not just a portal to meaning, it is a social act. It deserves its own sociolegal history.

Barbara Welke makes the point more explicit by writing the history of products liability law as a drama in which the very form of legal history scholarship becomes the narrative form of a play: a tragedy in two acts. Assuring the reader that the project is no mere thought experiment, Welke’s foreword tells us that the prologue and the first scene of the play were performed for an audience at an academic conference in the autumn of 2010.<sup>40</sup> The incidents that gave rise to litigation—children wearing highly flammable costumes or pajamas were burned to death—become part of the drama and remind the reader that liability rules should not be abstracted from the suffering of the people whose resort to law produced the rules. The dramatic form reminds the reader of the horrible suffering of the children and their families. The ghost of Welke’s own daughter Frances, who died suddenly at the age of eighteen, just days after this symposium, hovers over the tragedy Welke writes, reminding us of the unbearable heartbreak of the sudden death of a child. Welke’s decision to write the history of products liability law as a play in which children die is, to some of us, the most powerful possible methodological choice one could make to remind us that the history of law is full of sorrows greater than many of us will ever know. And those of us who find insight in her work can be grateful for Welke’s courageous determination to persist in writing the play in the months after Frances died.

The rhetorical choices Welke makes in constructing her drama echo Bertolt Brecht. She writes of a modern tragedy and then, at the end, her character

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37. *Marbury v. Madison*, 1 Cranch 137, 177 (1803) (“It is emphatically the province and duty of the judicial department to say what the law is.”).

38. Goodrich, *supra* note 34, at 812. *Adiaphoristic* is defined in the Oxford English Dictionary as relating to “religious or theological indifference; indifferentism, latitudinarianism.” 1 OXFORD ENGLISH DICTIONARY 153 (2 ed. 1989).

39. Goodrich, *supra* note 34, at 773–74, (quoting *Baigent & Leigh v. Random House*, [2007] EWCA (Civ) 247, [3], (Eng.)).

40. Welke, *supra* note 12, at 693–95.

addresses the reader, perhaps in an effort to shock us out of the complacency of just being an observer. We are all part of the drama, and how the story ends is a choice that we all make. Bertolt Brecht ends *The Resistible Rise of Arturo Ui*, his play about the rise and fall of a murderous dictator, with the actor who plays the title character walking forward on the stage, removing his Hitler-esque moustache, and speaking directly to the audience:

If we could learn to look instead of gawking,  
 We'd see the horror in the heart of farce,  
 If only we could act instead of talking,  
 We wouldn't always end up on our arse.  
 This was the thing that nearly had us mastered;  
 Don't yet rejoice in his defeat, you men!  
 Although the world stood up and stopped the bastard,  
 The bitch that bore him is in heat again.<sup>41</sup>

By breaking down the barrier between actor and audience, Brecht insists that the fight against evil is never over and that justice in the future will depend on whether we look instead of gawking and act instead of talking. Similarly, Welke's narrator, knowing what she knows about the law of products liability, reminds us that the comforts of our contemporary life—comforts enabled by the mass consumption economy—are in many cases also hazards. Whether the processes of law succeed in protecting us against danger is ultimately up to each of us. The liability law may force a company to pay damages to those injured or to the estates of those killed by the hazardous product, but the heartbreak and pain of injury and death can never be shifted to the company. The cozy chenille bathrobe purchased or received as a gift may be a fire hazard. So what should I do? (implicitly, what would you do?), the narrator asks, after reading the label warning that the robe is flammable: "Should I wear it? . . . Should I send it back?" And then, the possible tragedy as the narrator succumbs to temptation: "Some day, when I just can't get warm, I imagine I'll put it on."<sup>42</sup> And the tragedy will repeat again.

Religious ritual is often meant to be observed, in the sense of ritually followed or adhered to in a prescribed method, and in the sense of being observed by a congregation who participate in the ritualized behavior. Shai Lavi offers an account of nineteenth-century German-Jewish legal history that disputes the tendency since Weber to contrast the pre-modern past, in which religion was pervasive, with the secular present, and to suggest that law was enchanted in the past and is rational, secular, and disenchanting now.<sup>43</sup> Rather, Lavi argues, the

41. BERTOLT BRECHT, *THE RESISTABLE RISE OF ARTURO UI* 128 (1972).

42. Welke, *supra* note 12, at 762.

43. Shai J. Lavi, *Enchanting a Disenchanted Law: On Jewish Ritual and Secular History in Nineteenth-Century Germany*, 1 U.C. IRVINE L. REV. 813, 816 (2011) (citing Max Weber, *Religious Rejections of the World and Their Directions*, in *FROM MAX WEBER: ESSAYS IN SOCIOLOGY* 323 (H.H. Gerth & C.



secular age invented the notion of the enchanted religious past even as it invented the idea of the secular present. Thus, enchantment and disenchantment exist side by side, and in the nineteenth century, Germans ritualized certain Jewish practices (including burial, animal slaughter, and circumcision), rendering Jewish law as exotic, alien, and supernatural. The ritualization of Jewish *halacha* ultimately transformed the way that observant Jews themselves described or experienced their practices, making what was once done for educational or ontological reasons into practices that had symbolic meaning.<sup>44</sup> Lavi contends not merely that Weber's modernization-secularization thesis is only half the story, and that German state law played a role in the secularization of segments of the Jewish community (the rise of the Reform movement), but also that German state law played a role in increasing the symbolism and enchantment that orthodox Jews attributed to longstanding practices. Lavi also makes the case for studying law just as law: not "law as . . ." or "law and" or law as rules, but simply the meditative quality of practice. Taking a cue from the value of observance for its own sake, he suggests "that a focus on the minute details of legal practice was a dominant alternative to a search for meaning, whether enchanted or disenchanting."<sup>45</sup>

The power of law to enchant is magical. Law can make the state, and the coercive power exercised by people in the name of the state, seem to disappear. The critical and social histories of the last three decades, and the wave of work on postcolonial studies, remind us that the history of American law, and of colonial law all over the world, is a history of mass killings, expropriation of land, suppression of populations, destruction of cultures, systematized subordination of entire classes of people, all done under the auspices of claimed government authority. The outrageousness of this violence disappears under various forms of delegated sovereignty and presumed consent that are legitimated by law. To make that much killing and expropriation seem to be the exercise of legitimate sovereign authority—to make it seem the process of state-building, as it has lately come to be called—takes quite a sleight of hand. Law is a very adept magician.

### *Law as Sovereignty*

The power of law as a form of enchanted spectacle is considerable precisely because it obscures the equally considerable power of law as sovereignty. Law, in this account, is a mechanism by which government authority is asserted over people, or some people claim in the name of government the power to control others. Law is not merely sovereignty, it is delegated sovereignty. Assaf Likhovski's paper offers a bridge between thinking of law as a particular form of

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Wright Mills, eds. & trans., 2001) (1946).

44. *Id.* at 826.

45. *Id.* at 842.

ritualized interaction and law as sovereignty. He begins with the image of law as a *dybbuk*—an enchantment, a wandering spirit possessing a living body—and then, like a wandering spirit himself, Likhovski flies us through time and space. First he takes us to a community of kabbalists and miracle workers in contemporary Israel who sell their paranormal insights on water, diamonds, and finance, and then to the complex colonial regime of Palestine during the British Mandate, and then further back in time to late eighteenth- and early nineteenth-century Britain where a debate over the income tax figures the tax as an “ominous, all-knowing spirit haunting every Englishman.”<sup>46</sup> By linking contemporary Israeli debates over tax policy with Mandate Palestine, Likhovski links the governance of an aspect of spirituality in the present with the long process of Israeli state-building in the past. The complex and multilayered tension between religious and secular claims to authority that pervade Israel today, as reflected in the dispute over tax policy for kabbalists (including his own implicit skepticism about the basis for the claim of the taxpayer that religious tradition should exempt his substantial earnings from taxation), are linked textually in his article with his account of the spiritual meaning of taxation in the context of political culture. Likhovski reminds us that sovereignty, as reflected in the power to govern, including the power to tax people and territory, is a deeply meaningful social construct.

Law as sovereignty or governance has often been expressed in terms of power to control land and its plant and animal inhabitants. More abstractly, at least in the New World, Europeans saw law as sovereignty over what they called territory, and they envisioned territory as sparsely populated land that offered possibilities for future riches. Paul Frymer, Mariana Valverde, and Ritu Birla all explore law not merely as a modality of colonial governance, though it is that. More interestingly and less obviously, they show that the way law defines and implements government power redefines the European conception of the European governors and the very nature of governmental or sovereign power in a nearly magical way. John Witt explores the law of war as a modality of governance with a particular focus on the rules for armed conflict, where warfare usually involves conflict over competing claims to governance.<sup>47</sup> All of them see law as the legitimation of exercises of power over land and people and, in particular, as the way in which conquering peoples used law to convince themselves of the justice of the subjugation of people.

Valverde finds in litigation over aboriginal land rights in Canada a process of “refurbishing the Crown for a multicultural age.”<sup>48</sup> The law’s role in this process of redefining the meaning of sovereignty is magical: judges, like shamans,

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46. Assaf Likhovski, *Chasing Ghosts: On Writing Cultural Histories of Tax Law*, 1 U.C. IRVINE L. REV. 843, 883–84 (2011).

47. Witt, *supra* note 13.

48. Mariana Valverde, “*The Honour of the Crown is at Stake: Aboriginal Land Claims Litigation and the Epistemology of Sovereignty*,” 1 U.C. IRVINE L. REV. 955, 965 (2011).

“conjur[e] sovereignty,” through a “wholly magical invocation of the Crown’s inherent virtues.”<sup>49</sup> In her analysis, we see that law’s magic, like the spiritual power of religion, works substantially through the power of words and the even greater power of words placed into text by judges. The ritually repeated incantation of a concept (“the honour of the Crown”<sup>50</sup>) by men in black robes ultimately gives an air of reality to a contestable proposition. Exploring a judge’s assertion that the purpose of a Canadian constitutional provision is to effect the “reconciliation of the prior occupation of North America by distinctive aboriginal societies with the assertion of Crown sovereignty,”<sup>51</sup> Valverde reveals that the assertion as fact of that which should be taken as a contested question is at the core of the law of aboriginal land rights in Canada. The symbolism of the term “honour of the Crown”—which is enhanced by using the antiquated term Crown rather than “government”—legitimizes a power grab that was, as she points out, never sanctified by Europeans defeating aboriginal people in war. Although she does not explore why defeat in war should be relevant to the legitimacy of the power grab, as we shall see, reading this passage of Valverde’s paper alongside Witt’s sheds light on how law defines some violent seizures of land and people to be legal and others not.

Whereas Valverde’s analysis of sovereignty focuses directly on the sovereign, for Frymer, law operates as an instrument of aggressive imperial expansion through various forms of mostly inconspicuous and delegated sovereignty. European, colonial, and later state governments engaged in empire building through exercising their power to legalize, ratify, and clothe with legitimate authority, thereby granting, delegating, or immunizing the actions of those who were not officially officers of the government. These actions were taken with respect to control of land, and the government and private empire-building project brutally forced the native inhabitants of the land into migration or death. As Morris Cohen—an earlier generation of law and society scholar—put it, property is sovereignty.<sup>52</sup> Law in the Cohen/Frymer formulation is the delegation of state power and government resources to nominally private parties, the landowners. The legitimization function of the delegated sovereignty that operated as the private law of property was the means by which a state with relatively little centralized administrative apparatus was able to extend its reach over vast territory. Letters of marque, land grants, licenses to collect user fees, the right to determine boundaries, and charters to business corporations were all forms of delegated sovereignty that not only enabled European domination of territory but also enabled horrifying acts of killing, expropriation, and brutality with no

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49. *Id.* at 957.

50. *Id.*

51. *Id.* at 972 (quoting *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, paras. 81, 141 (Can.)); see also *R. v. Van der Peet*, [1996] 2 S.C.R. 507, para. 31 (Can.).

52. Morris R. Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. 8 (1927).

accountability and no effective limits or controls.

Law is often imagined (especially in the self-congratulatory bombast of lawyers) as being the very antithesis of warfare. Law is civilized and peaceful dispute resolution; war is a brutal and violent hell. War happens when law fails. Yet, as John Witt's essay points out, law has been deeply entwined with the conduct of war for centuries and theorists of war have long delved in the fields of law for justification and guidance. Witt contrasts two contemporary accounts—what he calls the two master narratives—of the legal history of the laws of war: a declension thesis (holding that the United States once respected the international law of warfare and no longer does) and a novelty thesis (holding that law has never been more involved than now in shaping the American conduct of war).<sup>53</sup> He argues that both theses are “deeply wrong, and based in a set of assumptions that bespeak the scholarly poverty of the field.”<sup>54</sup> Arguing for the centrality of the cultural contestation that took place over the law of war in the Indian Wars of the colonial era, in the military academies, and over the militia in the antebellum period, between Alexander Hamilton and other statesmen of the founding era, and in the dispute over slavery, to name a few, Witt suggests that we reconceptualize the laws of war as a forum in which “legal discourse . . . animate[d] and shape[d] the ethical consideration of means and ends in warfare over . . . a long time period” covering “some of the gravest moments in American history.”<sup>55</sup> Witt is perhaps not striving to revolutionize the theoretical framework for historiography; his considerable ambition is to enrich the historiography of the law of war and to peek through the window of the law of war at the nature of the history of law.

In Likhovski, Witt, Frymer, and Valverde we see the magical power of law at work. The magical power of law is to make the state and its exercises of power—sometimes coercive, sometimes liberatory—disappear. The violence of the law, as Robert Cover said,<sup>56</sup> disappears when law makes its operations seem to be the product of consent, custom, contract, or civilization. The law accomplishes its own vanishing when it makes the movement of money, land, or other resources seem to be the product of putatively autonomous institutions like the market, the employment contract, or the family.

### *Law as Economic/Cultural Activity*

One of law's amazing magical disappearing acts has been, over the last two centuries at least, to make it seem that the economy exists separately from law.

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53. Witt, *supra* note 13, at 898–901.

54. *Id.* at 898.

55. *Id.* at 911.

56. Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601 (1986).

While contemporary law and economics scholars, in company with political analysts and World Bank and International Monetary Fund officials, point out that the rule of law is necessary to, or at least helps support, efficient economies, the notions that law is distinct from economy, that the law may be necessary to a healthy economy but is not *the* economy, and that the law does things *to* the economy are so widespread as to seem indisputable. And, yet, the autonomy of the economy is a notion that has been disproved, debunked, and demolished so many times, using so many examples, and so effectively that one wonders why any educated person can still entertain it with a straight face. Of course, one of the core insights of legal history since Hurst and Horwitz has been that legal regimes facilitate particular economic arrangements and distributions of wealth and that people who are motivated largely by the desire to amass fortunes have been influential creators of the tapestry of law for centuries. The two final essays in this issue, along with parts of others, remind us that the relation of law to economy should not be seen just as a conjoining of two distinct social institutions (law and economy or laws and money) but that law is at the core of any activity or relationship of social life that might be characterized as being part of the economy—not just buyer/seller, borrower/lender, but also the fundamentals themselves: currency, capitalism, corporation, and commerce.

Roy Kreitner argues that law was “a central component” of the political and economic arguments over the gold standard in the United States in the 1890s. He identifies law both as a political argument over the power of government and as a debate among economists about money, trade, and technological change. Those advocating reliance on silver to value money considered that “the primacy of government in the money system was a relatively plain fact.” Gold advocates, by contrast, thought “international markets circumscribed the possibilities for wielding government power” and believed commerce, not law, was the “directing force for economic conditions.”<sup>57</sup> Kreitner finds in 1890s monetary policy the origins of the modern figuration of economics which “conceives law as the backdrop against which money is the facilitator of completely individualized action, as it were banishing the collective and its politics from the money equation.”<sup>58</sup> Kreitner’s argument not only illustrates the way law was imbricated in money, but also makes a number of historiographic points, including that progressive historians who looked back at populist debates about gold and silver tended to erroneously pass off their own views on monetary policy (that populists were well-intentioned but mistaken in supposing that a silver standard would help unemployed laborers or debt-ridden farmers) as economic verities.<sup>59</sup> The debate over monetary policy not only produced the gold standard, but, more importantly,

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57. Roy Kreitner, *Money in the 1980s: The Circulation of Politics, Economics and Law*, 1 U.C. IRVINE L. REV. 975, 989–91 (2011).

58. *Id.* at 1010.

59. *Id.* at 993.

it granted economics its position of structural objectivity and scientific expertise and its divorce from politics, and also established the idea that money is “an issue to be determined by economics and away from politics.”<sup>60</sup>

Where Kreitner allows us to see money, even gold, as a form of congealed law, Ritu Birla shows us economic man (market actors) and markets themselves as law. Reading Foucault<sup>61</sup> and colonial Indian experiences, she argues that the even the most foundational elements of a market economy—the “economic man” (the individual, intentional actor in the market), the family (as a business association), and even the market in India—were legal constructs, as were the more familiar constructs of economic life that later became normalized as social facts, including corporations as persons and contracts as natural social behavior. The Indian Companies Act of 1882 established the limited liability joint-stock company as the model for commercial organization in India under British colonial rule and insisted that indigenous business associations “be regulated by the Hindu or Muslim personal law governing families and religio-cultural practice” which, she says, governed vernacular capitalism “first and foremost as *cultural*, rather than as economic mechanism.”<sup>62</sup> This feature of colonial law “institutionalized a disjuncture between economy, a public and ethical project, and culture, a private one,” which was later embraced as “cultural formations, bound to age-old tradition.”<sup>63</sup> Reading Birla together with Likhovski, we see the complex ways in which British laws relating to money, taxation, and finance were used in different colonial regimes (India during the Raj and British Mandate Palestine) to create cultural constructs which, in later years, were reinvented as supposedly age-old traditions that were older than, and autonomous from, law rather than, as they show, a product of it.

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As Birla says, legal history plays an “important role as empirical mapping of the circuits of law’s agency and the legal agency of subjects.”<sup>64</sup> The articles in this issue map many such circuits by linking texts and communities, individual and group consciousness, sacred and secular rituals and spectacles, manifold sovereignties and conquests, and the circulation of money and ideas. This empirical mapping project of a diversity of people, places, things, and times would be a reward unto itself for a reader who simply wants to see ideas in play. The articles also invite the reader to join the authors in critical engagement with the

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60. *Id.* at 1012–13.

61. See MICHEL FOUCAULT, *THE BIRTH OF BIOPOLITICS: LECTURES AT THE COLLÈGE DE FRANCE, 1978–1979* (2010).

62. Birla, *supra* note 7, at 1031.

63. *Id.*

64. *Id.* at 1035.

nature of law and the nature of history. Asking questions about theory and method prods those of us who are practitioners of the craft of sociolegal historical writing to think about our craft. Thinking about the craft of a critical legal history can be pushed into “critical practice itself.” The latter would involve not *just* (Birla’s emphasis) “mapping law’s sites of regulation . . . but also addressing the historical production of the market as ethical and political model for self-regulation, that is auto-*nomos*, or autonomy, and its appearance and abstraction as an a priori *logos*.”<sup>65</sup>

The critical practice embraced by all of these scholars is to see law as cause and consequence, as deeply embedded in nearly every aspect of the social and intellectual life of people at diverse times and places. Law is not outside life but deep within it. Law is so deeply woven into our consciousness that a first step of critical practice is to find it at work and challenge the claims that law is external to suffering, privation, inequality, and oppression. That the study of legal history can have redemptive power seems an article of faith among this generally skeptical crowd. In matters of theory and method, the possibilities for sociolegal history are as many as can be imagined.

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65. *Id.* at 1036.