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What Would Langdell Have Thought? UC Irvine's New Law School and the Question of History

Christopher Tomlins*

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In 1895, on the occasion of his retirement as Harvard Law School's first dean,¹ Christopher Columbus Langdell might have claimed—had he been an adept sloganeer—that he had overseen the creation of the first modern American law school, a law school for the twentieth century. The claim would have been eminently justified, but the prototypically reticent Langdell declined to make it.² Our days, however, are different: we live in a branded world in which we all perforce wear labels. Required to define its difference, the country's 200th law

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1. BRUCE A. KIMBALL, *THE INCEPTION OF MODERN PROFESSIONAL EDUCATION: C.C. LANGDELL, 1826–1906*, at 8 (2009).

2. *Id.* at 310.

school³ has declared that its goal is to be the ideal law school for the twenty-first century, and has named public service and interdisciplinarity the core elements of its vision.⁴ In part as earnest on the second of those commitments, it has identified history as a sufficiently important component of the ideal law school's intellectual equipment to include the hiring of a historian among its earliest faculty priorities. And one without a law degree.⁵ At times during my first year in Southern California I have found myself wondering, "What would Langdell have thought?"

In the world of legal education, we tend to remember Langdell as the progenitor of all that is regrettable. We trace law schools' obsession with hierocratic credentialing to Langdell's original installation at Harvard of a high standard, high cost regime of professional education in place of the low standard, low cost "commercial" regime that had prevailed thereto.⁶ Methods of instruction devoted to the inculcation of disciplinary technique rather than passionate commitments to republican virtue or social justice supposedly have their origins in Langdellian case method.⁷ Above all, Langdell is excoriated for dressing up doctrinaire legal formalism as a novel theory of law—a self-sufficient "science" of legal principles.⁸ Although it embraced Langdell's model, the legal academy has always preferred to idolize rebel intellects who spurned the inheritance: Langdell's near contemporary, Oliver Wendell Holmes, Jr., who famously derided the second edition of *Cases on Contracts* as the work of "the greatest living legal theologian";⁹

3. As of the end of 2008, the ABA lists 199 accredited law schools in the United States. ABA Approved Law Schools, ABA, <http://www.abanet.org/legaled/approvedlawschools/alpha.html> (last visited Nov. 7, 2010). Of law schools in the process of formation, both the UC Irvine School of Law and the Duncan School of Law of Lincoln Memorial University, Knoxville, Tennessee admitted their first class of students in August 2009. LMU School of Law Seats Inaugural Class, Lincoln Memorial University, http://lmu1.lmunet.edu/cgi-bin/MySQLdb?VIEW=/news/view_one.txt&newsid=654 (last visited Nov. 2, 2010); UC Irvine Law School Opens Doors to Inaugural Class, University of California, <http://www.universityofcalifornia.edu/advocacy/youru0909/story4.html> (last visited Nov. 2, 2010).

4. First-Year Curriculum Overview, U.C. Irvine Sch. Law, <http://www.law.uci.edu/registrar/curriculum.html> (last visited Sept. 17, 2010) (presenting first-year course listings, which include coverage of criminal law, civil procedure, contracts, torts and constitutional law, in addition to offering innovative course offerings such as a rigorous, year-long lawyering skills course, a year-long course on the legal profession, and international law).

5. As far as I am aware, very few non-J.D. history professors have had full-time appointments at U.S. law schools. They include Stanley N. Katz at the University of Chicago Law School (1971–78), Harry N. Scheiber at the University of California, Berkeley (1980–), Paul Finkelman (University of Tulsa College of Law, 1999–2006, and currently Albany Law School, 2006–) and William J. Novak (University of Michigan Law School (2009–)).

6. See, e.g., Paul D. Carrington, *Hail! Langdell!*, 20 LAW & SOC. INQUIRY 691, 693 (1995); KIMBALL, *supra* note 1, at 223–25.

7. Carrington, *supra* note 6, at 693–95.

8. *Id.* at 692.

9. Oliver Wendell Holmes, Jr., *Book Notices*, 14 AM. L. REV. 233 (1880) (reviewing C.C. LANGDELL, A SELECTION OF CASES ON THE LAW OF CONTRACTS, WITH A SUMMARY OF THE TOPICS COVERED BY THE CASES (Boston, Little, Brown 1879) and WILLIAM R. ANSON, PRINCIPLES

Roscoe Pound, who distinguished the formal unreality of law “in books” from the social vitality of law “in action”;¹⁰ Realists such as Felix Cohen, for whom legal science “as traditionally conceived” was nothing other than “transcendental nonsense”;¹¹ Realism’s progeny, all the way from Grant Gilmore¹² to Duncan Kennedy.¹³

Clearly the cartoon Langdell of law school lore would not find much to admire in the new UC Irvine School of Law, or its vision of legal education for the current century. What of the man himself?

Langdell was not, admittedly, a known devotee of public service. During the early 1870s, for example, Langdell served as secretary of a “committee on jurisprudence”¹⁴ created by the American Social Science Association (ASSA), a reformist organization dedicated to inquiry into pressing social issues in the realms of education, public health, and social economy.¹⁵ To the ASSA (as we shall see), law was an instrument of social reform, and “jurisprudence” was law’s proper expression as such. To that end the ASSA created a “Department of Jurisprudence” charged with translating the Association’s deliberations into concrete legal action.¹⁶ The particular responsibility of Langdell’s committee was to inquire into the present state of “the science of jurisprudence” in the country’s universities and determine whether “jurisprudence” could actually fulfill the role the ASSA had assigned it.¹⁷ Langdell was profoundly skeptical. The ASSA’s attempt to use jurisprudence to link law to reform would not work because jurisprudence did not “specially concern lawyers” at all. It was for “those aiming at public life” (or, he added, archly, “a high order of journalism”). A lawyer’s concern was “the law *as it is*” not the law as it “*ought to be*.” The one was likely to generate “distaste” for the other.¹⁸

Nor, if we went looking, would we discover in Langdell’s era any prescient buds of interdisciplinarity. Rather the reverse. In the professionalizing academic world of the later-nineteenth century, emphasis lay on the production of disciplinarity, not overcoming it. In establishing the terms of law’s professional

OF THE ENGLISH LAW OF CONTRACT (Oxford, Clarendon Press 1879)).

10. Roscoe Pound, *Law in Books and Law in Action*, 44 AM. L. REV. 12 (1910).

11. Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935).

12. GRANT GILMORE, *THE AGES OF AMERICAN LAW* 42 (1977).

13. Duncan Kennedy, *Legal Education as Training for Hierarchy*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 40–61 (David Kairys ed., 1982).

14. WILLIAM P. LAPIANA, *LOGIC AND EXPERIENCE: THE ORIGIN OF AMERICAN LEGAL EDUCATION* 77 (1994).

15. THOMAS HASKELL, *THE EMERGENCE OF PROFESSIONAL SOCIAL SCIENCE: THE AMERICAN SOCIAL SCIENCE ASSOCIATION AND THE NINETEENTH-CENTURY CRISIS OF AUTHORITY* 221 (1977).

16. *Id.* at 105.

17. *Id.* at 221.

18. LAPIANA, *supra* note 14, at 77 (1994) (quoting C.C. Langdell).

and methodological differentiation from other subject areas and modes of inquiry, in creating a distinctively credentialed expertise, the Langdellian law school was on precisely the same track as every other sector of the modern university. Indeed, it was in the vanguard—so much so that Langdell has recently won recognition as one of the founders of modern professional (not just legal) education. He had begun his reform of Harvard Law School, after all, a good six years in advance of the appearance of the country's first German-model graduate school at Johns Hopkins, the mother-church of Arts and Sciences disciplinarity.¹⁹

All that granted, still the obloquy thrust upon Langdell is undeserved. As Bruce Kimball's recent biography cogently observes, the Langdell who pioneered the case book and made original contributions to contract jurisprudence and equity jurisdiction did so in furtherance of a substantially more refined method of legal analysis than his critics have ever acknowledged, "a comprehensive yet contradictory integration of induction from authority, deduction from principle, and analysis of acceptability, which includes justice and policy."²⁰ Langell's method actually led him to a subtle appreciation of the manner of common law reasoning that Holmes would later famously enunciate as the "paradox of form and substance"—accounting, perhaps, for Holmes' constant struggle to create greater intellectual separation between them than actually existed.²¹ As classroom teacher, meanwhile, Langdell developed modes of instruction that rejected the prevailing tradition of recitation (memorization and regurgitation) and encouraged students to engage in active intellectual exchange.²² As educator, finally, Langdell's innovations—from curriculum to hiring to academic administration—grounded legal professionalism on an abiding commitment to meritocracy.²³ That commitment came accompanied by its own hypocrisies and blind spots: Langdell's meritocratic sensibility did not extend to the admission of women to Harvard Law School or the graduates of Catholic colleges.²⁴ Still, his model was sufficiently novel—both in expression and implications—that twenty-five years of struggle were required before it became fully sedimented as the standard for twentieth-century legal education.²⁵

To comprehend fully the significance of Langdell's model law school, one must assess it on its own decidedly innovative terms—just as the significance of Irvine's attempt at a distinct model, and the mode of its implementation, must be assessed on its own terms. C.C. Langdell created modern American legal education's disciplinary consciousness and point of institutional departure, but

19. KIMBALL, *supra* note 1, at 2–3.

20. *Id.* at 124.

21. *Id.* at 124–28, 325–29.

22. *See generally id.* at 140–60.

23. *See generally id.* at 167–232.

24. *See generally id.* at 271–308.

25. *Id.* at 264.

professional legal education has journeyed far from its originary moment. Its development cannot be explained (or regretted) as the unfolding of some immanent logic inscribed upon it by a now-mythic founder. What then do Langdell's Harvard and Chemerinsky's Irvine share, other than the appellation "law school"? How should we understand the development of American legal education and of the legal scholarship it produces?

Based on work that I have undertaken at various points during the last ten years, and which I am using as the evidentiary and argumentative basis for much of this article, I shall argue here that legal education is best understood as one of the most important processes contributing to the development of the modern American juridical field, which I define as the infrastructural ensemble of personnel and institutions (lawyers, judges, and legal academics; courts, state agencies, professional associations, and law schools) individually and collectively engaged in the systematic and continuous reinvention of "law" as a process of rule production controlled by professionalized juridical institutions and practices. In this field, juridical institutions and professional and academic disciplines (principally law and the social sciences), together with a variety of outside actors, collude and compete to influence the substance of the rules (the legal technology) produced to govern state, economic, and social practices.²⁶

The process of rule production is not static because its environment is continuously changing. As its environment changes, the process must continuously produce itself and its rules anew. The dynamic of continuous reproduction is also influenced by extrinsic rule regimes. For example, processes of knowledge production—the creation and evolution of the various forms of expertise that compete to inform the substance of the law—have their own rules of formation, also undergoing continuous change, dating to the professional and organizational revolution that brought about the advent of "the disciplines" in the late nineteenth century.²⁷ Processes of influence production involving outside actors—for example, investment in personal relations (cronyism), investment in politics (lobbying), and investment in legal/social scientific research—have their own rules of formation too, generally responsive to the social, political, and economic context within which outsiders, such as capitalists, labor unions, NGOs, and other organized social groups compete for influence in rule formation processes. Rule production, in short, has an extrastructure as well as an

26. See Christopher Tomlins, *Framing the Field of Law's Disciplinary Encounters: A Historical Narrative*, 34 LAW & SOC'Y REV. 911 (2000); Christopher Tomlins, *History in the American Juridical Field: Narrative, Justification, and Explanation*, 16 YALE J. L. & HUMAN. 323 (2004); Christopher Tomlins, *How Autonomous is Law?* 3 ANN. REV. L. SOC. SCI. 45 (2007); Christopher Tomlins, *The Strait Gate: The Past, History, and Legal Scholarship*, 5 L. CULTURE & HUMAN. 11 (2008). For the concept of a "juridical field," see Pierre Bourdieu, *The Force of Law: Toward a Sociology of the Juridical Field* (Richard Terdiman trans.), 38 HASTINGS L. J. 805 (1987).

27. THOMAS BENDER, INTELLECT AND PUBLIC LIFE: ESSAYS ON THE SOCIAL HISTORY OF ACADEMIC INTELLECTUALS IN THE UNITED STATES at 34, 39–46 (1993).

intrastructure.²⁸

The production of legal rules, however, is most particularly determined in the complex of juridical-legal ideologies, behaviors, discourses, and institutions that collectively comprise “the world of the law” (the juridical field). As a rule of law regime, the nineteenth- and twentieth-century United States privileges law rule. That is, the U.S. identifies “law” as its preferred structural and discursive modality of rule.²⁹ Hence law and its institutions occupy a position of advantage that sets the terms and limits of discussion—“the key terms of legitimacy”—in interactions with other modalities and ideologies of action over the substance of the rules.³⁰ The production of rules, in short, takes place within an established structure of legal practices—discursive, institutional, organizational—that continuously and actively reinforce the U.S.’s inertial political-cultural tendency toward the privileging of law in rule production. Although periodically contested by competing disciplinary complexes, rule production has never been captured or transformed by them.³¹

As a historian, I am interested in understanding the history of the process of rule production and of the distinctive legal practices that structure it in the U.S. case. But I also have a particular interest in delineating the role—and fate—of “history” itself as an activity, both professional and ideational, relevant to the determination of the contours of the modern American juridical field, and to the legitimation of its rule production processes.³²

In the case of law, history has been more than a source of “perspective,” an observational standpoint. In the nineteenth century, first in Germany and subsequently in the Anglophone common law tradition, history—in the form of “historical legal science” (*geschichtliche Rechtswissenschaft*)—furnished the first grand *theory* of legal development.³³ By the last years of the century, however, the organic-evolutionary premises of this so-called “historical school” of law had been seriously eroded by the era’s sudden, massive, and transformational political, social, and economic shifts. Simultaneously, the historical school’s claims to have developed a “science” of law were challenged by, on the one hand, the emerging social sciences, with their self-announced superior grasp on theorized social

28. See generally Yves Dezalay and Bryant G. Garth, *Legitimizing the New Legal Orthodoxy*, in GLOBAL PRESCRIPTIONS: THE PRODUCTION, EXPORTATION AND IMPORTATION OF A NEW LEGAL ORTHODOXY (Yves Dezalay and Bryant G. Garth eds., 2002) (discussing rule production processes).

29. For the concept of law as a “modality of rule,” see CHRISTOPHER L. TOMLINS, LAW, LABOR, AND IDEOLOGY IN THE EARLY AMERICAN REPUBLIC 19–34 (1993).

30. Dezalay and Garth, *supra* note 28, at 307.

31. See Tomlins, *History*, *supra* note 26, 325–27, and generally Tomlins, *Framing*, *supra* note 26 (discussing disciplinary competition between law and social science disciplines).

32. See generally Tomlins, *History*, *supra* note 26 (discussing the history of “history in the American juridical field”).

33. *Id.* at 348–59.

knowledge; and, on the other, by law's parallel disciplinary turn toward reinvention and redefinition as a distinct and self-contained scientific expertise of its own. Like all other disciplines, law turned inward, claiming to be able to explain itself, exhibiting only occasional interest in theories of itself grounded in other domains of knowledge. The remnants of the historical school that remained within this increasingly autonomous legal sphere turned into "legal history"—a desiccated intellectual activity that had shriveled from a once expansive theory of legal evolution to a merely descriptive account of how law had always been the autonomous discipline it had only recently become. This legal history had little in common with the formerly related but now diverging disciplinary practices of professional history and political science. It had no particular reason for being, other than as an antiquarian hobby that validated what the field had turned into.³⁴

Legal history did not manifest a clear sense of purpose again until the 1960s, largely as a result of the influential "new" socio-legal perspective pioneered by James Willard Hurst.³⁵ In the half century since then, growing numbers of legal historians located both within and outside the juridical field have developed a variety of modes of analysis and explanatory archetypes (functionalism, instrumentalism, social construction, different varieties of the "constitutive" trope) but no overarching conceptual-organizational narrative for their field. Rather the reverse. Like historical (and social scientific) practice at large, legal history has become deeply enmeshed in the conflicts over generalization and causation that pit truth-claims about substance against theories of meaning and interpretation that emphasize the contingency of all relational phenomena and identify "complication" of received understandings as the task of scholarship.

In the remainder of this article, Part I offers an abbreviated account of the development of the juridical field in the U.S. case. Part II offers an appraisal of the role played by legal history inside and outside the juridical field, focusing in particular on its successes and failures in constructing a coherent theory of history of and for that field through the early 1970s. Part III concentrates on the particular significance of "Critical Legal History" and "Critical Historicism," the development of which between the 1970s and the turn of the twenty-first century coincided with the rapid growth of legal history as a field of practice.

In unpacking first the development of the juridical field and then the varieties of American legal history, my goal is to establish grounds for a

34. Robert W. Gordon, *Recent Trends in Legal Historiography*, 69 *LAW LIBR. J.* 462, 462–63 (1976); *but see* David M. Rabban, *The Historiography of The Common Law*, 28 *LAW & SOC. INQUIRY* 1161 (2003) (emphasizing the vitality of late nineteenth-century legal historical scholarship); *see generally* Robert W. Gordon, *Historicism in Legal Scholarship*, 90 *YALE L.J.* 1017 (1981) (describing multiple modes of relationship between historical and legal scholarship during the nineteenth and twentieth centuries).

35. *See generally* Robert W. Gordon, *Introduction: J. Willard Hurst and the Common Law Tradition in American Legal Historiography*, 10 *LAW & SOC'Y REV.* 9 (1975–76) (providing a broad overview of the field of legal history since the 1880s and an assessment of Hurst's impact).

conceptualization of legal history as a “structural history of the creation and production of national legal practices.”³⁶ This is described in Part 4. By this I mean a form of history that approaches law neither as an organic or evolutionary phenomenon, nor as one to be understood functionally or instrumentally, nor as one that is socially constructed or mutually constituted, but rather identifies law as the product of the juridical field’s processes of rule production and as the source of the rules by which the process of rule production itself is governed. In Part 5, I will conclude by returning to where I began—the interdisciplinary/public service turn that UC Irvine’s School of Law has embraced—to offer a series of speculations on the reasons for UCI’s choices informed by the article’s account of the American juridical field and of the place of history in the field’s research agenda.

I. LAW: THE AMERICAN JURIDICAL FIELD

Law in the contemporary United States has achieved a largely unchallenged ascendancy as the principal arena and discourse of decision making in social and political affairs. Law’s ascendancy is rooted generally in a historically supportive political (“rule-of-law”) culture, and particularly in continuous processes of institutional and ideological self-renewal, the purpose of which is to maintain law’s ascendancy in rulemaking processes through innovations in legal education and professional structure, while simultaneously generating popular confidence in the legitimacy and efficacy of the rules that are produced. Legitimacy at large is grounded upon repeated invocation over time of foundational values embodied in national legal-cultural practices associated with the juridical form—that the law is objective in application (no one is above the law), universal in implementation (one law for all), neutral in outcome (the law does not take sides) and supremely authoritative (a government of law, not men). Together, these values compose law’s aesthetic meta-character—the normative idealization of the workings of law in the social world—that in turn sets the discursive conditions for processes of rulemaking. The actual process of rulemaking thus occurs within the frame of national legal practices, institutional and ideological, that constitute the world of the law itself. Generally true since the creation of the original republic in 1787, this has been particularly the case since the crystallization of those practices in their modern form in the half century after 1870.

As resort to law has proliferated over the last 150 years, however, actual “legalities”—the prevailing legal conditions of social life—have been produced not through the polite elaboration of holistic juridical narratives but far more often in another set of practices: collusive or competitive struggles, adversarial or bureaucratic, to achieve specific outcomes that serve the interests of specific clienteles. Individuals, agencies, interest groups, corporations and social

36. Dezalay and Garth, *supra* note 28, at 311.

movements (including, of course, legal professionals themselves) make *particular* self-serving investments in law, and mobilize a vast range of resources—material, ideological, disciplinary—to that end. The availability of law for such widespread use furnishes practical quotidian arguments for law’s social efficacy, but by its very nature resort to law is necessarily subjective, selective, and partial. Resort to law is generally indifferent to, and may even contradict, law’s meta-character.

Law’s aesthetic meta-character—and thus its overall social authority—is endangered when daily piecemeal legality is produced in competitive, self-serving processes. How does law avoid undermining itself, or being undermined, by its own practices?

Maintenance of law’s overall social authority in this environment is the principal concern of the complex of institutions, actors, and ideologies that collectively comprise “the world of the law,” or in Pierre Bourdieu’s terms “the juridical field.”³⁷ The major actors in the field are organized in the juridical professions—bench, bar, and academy. Here lies the greatest interest in sustaining both the practical authority of law’s place in rulemaking in the face of the particularism and fragmentation bred by fissiparous social and state usage *and* the ideological legitimacy of law’s claim to a unique discursive authority to set the terms on which rules are made. That is, the field works at two levels. First, within the actuality and effects of instrumental usages that their members’ dedication to particular clients, or outcomes, or ideas produces, the juridical professions perform a crucial managerial role in the American rule-of-law state formation by taking responsibility for the maintenance of a representation of law that can sustain its claims to ascendancy in rulemaking. Second, above the level of instrumental usage, the juridical professions act to validate law’s proclamations of objectivity, neutrality, and universality by discursively working law pure, whether by endorsement, reform, or critique.

I use the term “juridical field” to encapsulate what might otherwise be termed “the world of the law” because talk of “law,” or “the law,” or “the rule of law” or “the world of the law” always evinces a certain vagueness. Precisely what do these terms encompass? “Juridical field” answers that question by concentrating our attention on the intersection of discourse, behavior, and institutions. “Field” means an area of “structured, socially patterned activity or ‘practice’” that is defined “disciplinarily, and professionally.”³⁸ Organizationally and conceptually, a field is centered on “a body of internal protocols and assumptions, characteristic behaviors and self-sustaining values” that unite materiality with ideation, ceremonial with outcome, action with ideology.³⁹ In law’s case, the juridical field is responsible both for the production and

37. Bourdieu, *supra* note 26.

38. *Id.* at 805.

39. *Id.* at 806.

reproduction of national legal practices, particular and general, and for their overall effectivity.

Specifically how has this task been performed? What resources have been used? Here I explore these questions schematically, concentrating in particular on the period from 1870 onward. I present the component elements of the juridical field in their early unorganized configurations during the first century of U.S. history; the social, intellectual, and institutional conditions that prompted the crystallization of the field in its modern configuration in the late nineteenth century; the reasons for its formation; the legal aesthetic and practices that crystallized with it; and its later manifestations. The exploration as a whole is organized in three chronological phases—the phase of *revelation*, the years prior to 1870; the phase of *production* (1870–1940); and the phase (since 1940) of serial attempts at innovation in light of production’s increasingly obvious *insufficiency*.

A. Revelation

Revelation is the key to the world of law’s antebellum intellectual and organizational configuration, persisting through the 1870s. Prior to the professionalization of legal education, lawyers acquired specifically legal knowledge by rote learning and by observation and repetition of legal practice, overwhelmingly through apprenticeship.⁴⁰ Both proprietary and university law schools attempted systematic training in legal principles by mounting courses of lectures and by promoting directed study of key texts, but there too absorption and regurgitation of detail was emphasized.⁴¹ At the level of general intellectual inquiry, however, law and lawyers shared in the organization of knowledge through the contemporary conjunction of naïve Baconian empiricism (“science”) with evangelical Protestantism. What emerged was a mode of discourse in which law knowledge could harmonize institutionally with other modes of “scientific” inquiry in undifferentiated and localized organizations, such as lyceums.⁴² Culturally, law was an integral component of local and regional networks of respectability and gentility—“communities of the competent.”⁴³

The formation of the American Social Science Association (ASSA) in 1865 signified both the climax and endpoint of this mode of intellectual organization.

40. Hugh C. Macgill & R. Kent Newmyer, *Legal Education and Legal Thought, 1790–1920*, in THE CAMBRIDGE HISTORY OF LAW IN AMERICA 37–40 (Michael Grossberg and Christopher Tomlins eds., 2008).

41. *Id.* at 45–48; Alfred S. Konefsky, *The Legal Profession: From the Revolution to the Civil War*, in THE CAMBRIDGE HISTORY OF LAW IN AMERICA, *supra* note 40, at 78–83; KIMBALL, *supra* note 1, at 34.

42. LAPIANA, *supra* note 14, at 29–32; Howard Schweber, *The “Science” of Legal Science: The Model of the Natural Sciences in Nineteenth-Century American Legal Education*, 17 LAW & HIST. REV. 421, 421–26, 431–55 (1999).

43. HASKELL, *supra* note 15, at 65–68; *See generally* DANIEL WALKER HOWE, WHAT HATH GOD WROUGHT: THE TRANSFORMATION OF AMERICA, 1815–1848, at 446–82, 613–57 (2007).

Informed by the example of the U.S. Sanitary Commission, which had been created during the Civil War by northeastern philanthropic elites,⁴⁴ the ASSA was established to address the mounting crises of U.S. urban-industrial development by providing a translocal forum for the production and dissemination of socially-useful knowledge that could inform national state practice across a wide range of reformist activity, specifically “the Sanitary Condition of the People, the Relief, Employment, and Education of the Poor, the Prevention of Crime, the Amelioration of the Criminal Law, the Discipline of Prisons, [and] the Remedial Treatment of the Insane.”⁴⁵ Responsibility for investigation was divided substantively among three departments—Education, Public Health, and Social Economy. The ASSA’s departmental organization did not embody particularist commitments to distinct investigative or analytic methods; its founders and members were gentleman amateurs whose curiosity touched upon the “numerous matters of statistical and philanthropic interest which are included under the general head of ‘Social Science’,” and whose authority lay in their elite status and their demonstrations of “sound opinion.”⁴⁶ Straightforward fact gathering and topical discussion would enable each department to transcend the incapacities of traditional state structures in responding to social problems.

Singular in this structure was the role accorded the ASSA’s fourth department, the Department of Jurisprudence. Its mission was to consider both “the absolute science of Right,” and “the Amendment of laws.”⁴⁷ The former embraced a general meta-character for law entirely in harmony with the normative scientism of the ASSA’s general project; the latter identified law’s specific role as the point of final resort for implementation of the solutions envisaged by the ASSA’s other departments. That is, once specific departmental investigations had fully ascertained “the laws of Education, of Public Health, and Social Economy,” the task of the Department of Jurisprudence was to oversee the translation of these social and human laws into “the law of the land.”⁴⁸ Governments were expected to yield to the sound opinion of the most competent in the definition and resolution of social problems as a matter of course; the Department of Jurisprudence would register the results of their deliberations in national law, creating social harmony as an instantiation of the “absolute science of Right.”

B. Production

If *revelation* stands for the conception of law as a naïvely empiricist science of social laws that emerged from the genteel intellectual tradition of the antebellum

44. GEORGE M. FREDERICKSON, *THE INNER CIVIL WAR: NORTHERN INTELLECTUALS AND THE CRISIS OF THE UNION* 98–112 (1965).

45. HASKELL, *supra* note 15, at 98 (quoting Franklin B. Sanborn).

46. *Id.* at vi, 87.

47. *Id.* at 105.

48. *Id.* at 105–06.

nineteenth century, *production* stands for what succeeded it, the phase of formation of the juridical field in its first, recognizably modern, configuration. By the end of the century, the organization of intellectual discourse was driven by disciplines, modes of specialized academic inquiry and professional self-identification defined in universities rather than in the public pronouncements and commonsense beliefs of gentlemanly elites. The social sciences became “university-based, research-oriented” enterprises, each with its own community of full-time practitioners developing new methods of inquiry and conceptions of causation, each seeking equal stature for their particular domains of expertise.⁴⁹ Beginning in the 1880s, the creation of disciplinary associations—the Modern Language Association (1883), the American Historical Association (1884), the American Economic Association (1885), the American Political Science Association (1903), the American Sociological Association (1905)—signified serial acceptance of this differentiated model of expertise.⁵⁰ Law’s classical antebellum claims to ascendancy—the “characteristic references to legal knowledge as the product of a gradual, incremental process of discovering and perfecting natural laws” embedded in the ASSA’s conception of “jurisprudence”—were increasingly at odds with modes of inquiry that “understood theory as provisional, relative to the current economic and technological order,” and that “defined rights, law and state forms as cultural creations, shaped by the conditions and needs of a particular historical context and subject to experimentation, growth and change.”⁵¹ In place of an “absolute science of right,” the disciplines reimagined law as the instrumental output of legislatures. Legislatures were themselves reimagined as sites for the inculcation and application of disciplinary knowledge.⁵²

This elevation of non-judicial state structures and accompanying re-theorization of law as the product of legislative mechanics informed by expertise in social knowledges was a major challenge to law.⁵³ Hence the phase of *production*, succeeding *revelation*, describing law’s encounter with and adoption of specialized ideologies of investigation and training that would hold sway for most of the next century, the century of American modernism and industrialism. *Production* stands for the breakdown of a generalized and naïve ideology of science; the reconstitution and reorganization of professional social expertise as related but distinct discourses—“law” and “the disciplines”—with separated self-defined

49. *Id.* at 166, 234.

50. BENDER, *supra* note 27, at 43.

51. Mary O. Furner, *The Republican Tradition and the New Liberalism: Social Investigation, State Building, and Social Learning in the Gilded Age*, in *THE STATE AND SOCIAL INVESTIGATION IN BRITAIN AND THE UNITED STATES* 174 (Michael J. Lacey and Mary O. Furner eds., 1993).

52. See, e.g., LESTER FRANK WARD, *DYNAMIC SOCIOLOGY OR APPLIED SOCIAL SCIENCE*, vol. I, 37–40, vol. II, 501–02 (Greenwood Press 1968) (1883).

53. *Id.* at vol. II, 501, 502; Michael J. Lacey, *The World of the Bureaus: Government and the Positivist Project in the Late Nineteenth-Century*, in *THE STATE AND SOCIAL INVESTIGATION IN BRITAIN AND THE UNITED STATES*, *supra* note 51, at 142–43, 152.

purposes; the beginnings of the critical encounter between them; the revolution in practices that resulted; and the spaces—institutional and ideological, educational and governmental—in which that encounter occurred.

Langdell's Harvard stands as the first attempt at, and lasting influence on, the reconstitution of the juridical field in modern form during this period. Though it required twenty-five years of hard academic labor, Langdell professionalized legal education by reworking it as the elaboration of a specific case- and court-centered knowledge, attained through explicit and defined methods of inquiry, defended by exacting institutional standards, and applicable in any locale.⁵⁴ He was to the reconstitution of legal education and the production of law what his younger contemporary, Frederick Winslow Taylor, was to the reconstitution of industrial work and the production of manufactured goods. Each in his distinct sphere was a transformational influence on the half century after 1870, each a pioneer innovator who attempted to reinvent the institutional and the conceptual apparatus of a field of endeavor by creating new protocols and behaviors at its center. At the heart of his innovations, each located "an attitude of questioning, of research, of careful investigation . . . of seeking for exact knowledge and then shaping action on discovered facts."⁵⁵ Each experimented with methods of systematic "case" study to gain purchase on his core subject, using discrete instances to pick apart and examine accepted practices, strip them to their constituent details, and reconstitute them in new ways that suggested reorganized institutions and reorganized people. Each identified education and training as such as a central avenue of response to contemporary industrial society's transforming demands. Each saw education and training as deliberately conceived and deliberately managed processes that inculcated appropriate and useful "skills."⁵⁶

The Langdellian revolution in legal education and training, and the reimagining of law as a technical expertise that the revolution championed, established the groundwork for widespread transformation in U.S. national legal practices. It created new "rules for the production of the rules."⁵⁷ In elite eastern law schools, countermovements—notably sociological jurisprudence and legal realism—signified discontent with Langdell's legal "formalism" but not with the underlying logic of the new juridical field's hermetic structure. Neither would furnish a clear intellectual basis for an alternative structural regime. Instead each ended up furthering the process of innovation that had created the new field.

Roscoe Pound's sociological jurisprudence came closest to disrupting the

54. See generally KIMBALL, *supra* note 1.

55. Majority Report of the Sub-Committee on Administration of the American Society of Mechanical Engineers, *The Present State of the Art of Industrial Management* (1912), as quoted in DANIEL NELSON, *FREDERICK W. TAYLOR AND THE RISE OF SCIENTIFIC MANAGEMENT* 198 (1980).

56. TON KORVER, *THE FICTITIOUS COMMODITY: A STUDY OF THE U.S. LABOR MARKET, 1880–1940*, 59–72 (1990); ROBERT STEVENS, *LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S*, at 54–57 (1983); Carrington, *supra* note 6, at 704.

57. Dezalay and Garth, *supra* note 28, at 311.

shape of the new field. In advocating the “socialization” and “organization” of law—that is, attention to the social context and consequences of juridical decision making and administrative reform of juridical institutions in order to deliver systematic “social justice”—sociological jurisprudence stood as a *practice* precisely at the strategic nexus between Langdell’s insistence on the maintenance of judicial ascendancy in lawmaking and the discipline-based social knowledges that were competing with court-centered law to furnish the state’s policymaking discourse.⁵⁸ During his pre-Harvard career in Chicago, Pound had founded the American Institute of Criminal Law and Criminology at Northwestern University to explore that nexus. He used the Institute’s *Journal of Criminal Law and Criminology* to put lawyers and judges in mutually beneficial contact with “experts in the disciplines of social science, medicine, psychiatry, psychology, and social work.”⁵⁹ Chicago’s new Municipal Court system, established in 1906, provided a concrete example of Pound’s nexus in action—a centralized and bureaucratized administration of criminal law animated both by discipline-based therapeutic ideologies of social intervention and “treatment” of individuals, and by eugenic strategies of population management.⁶⁰

Chicago’s example suggests that, in the state, pressure on law from the new social knowledges resulted in accommodations of discipline-based social science in concrete juridical practice long before the late 1920s, when legal realists announced legal academia’s realization of the possibilities inherent in the encounter. Examined closely, however, these apparently novel state practices also demonstrate the institutional and ideological resilience of law when confronted by the progressives’ policy sciences. When “law” as a discourse of rule production came under pressure from social scientists’ proposals to create alternative venues for the application of specialized knowledges, law’s essential court-centeredness remained intact precisely because Langdellian technicality had affirmed the primacy of the law made by the judge, and of the court as the place where law was made. Embodied in the Chicago case, that is, one may see that the Progressive Era’s therapeutic ideal of “socialized law” was in fact as much a demonstration of the juridical field’s capacity to maintain law’s ascendancy over the disciplines in rule production as it was a recognition of the disciplines.

Nor, at least in Pound’s sociological jurisprudence, can one detect any desire to alter that ascendancy. Sociological jurisprudence recognized the divergence between textual law and law’s actual social expression. Law, crystallized in text, was forever left behind by the ceaseless wash of change that was social life. As Pound saw it, after lively innovation for most of the nineteenth century (the “formative era” as he would later dub it), American juridical thought by the end of

58. MICHAEL WILLRICH, *CITY OF COURTS: SOCIALIZING JUSTICE IN PROGRESSIVE ERA CHICAGO* 96–98 (2003).

59. *Id.* at 106.

60. *Id.* at 104–15.

the century was no longer attuned to “meeting new situations of vital importance to present day life.” While the new social sciences had successfully grounded themselves on “the economic and social interpretation” of life, law was adrift in a sea of formalist self-referentiality, committed to ideas and patterns of thought that had long “ceased to be vital,” no longer catching up to action.⁶¹

Sociological jurisprudence proposed to interrupt law’s self-referentiality by counterposing law to society rather than to itself. How was this new exterior social world to be apprehended? Pound proposed to look the facts of human conduct in the face, but his way of doing so was actually to look to expertises that would tell one what “the facts” were and what they meant: “Let us look to economics and sociology and philosophy, and cease to assume that jurisprudence is self-sufficient.” And once the facts of human conduct had been discovered by resort to the expertises that revealed them, the juridical sphere would take over, acting by resort to law, its own expertise, to regulate them. “It is the work of lawyers to make the law in action conform to the law in the books, not by . . . eloquent exhortations to obedience of the written law, but by making the law in the books such that the law in action can conform to it.”⁶² Making “the law in the books such that the law in action can conform to it” was work that only lawyers could do.⁶³ Indeed, Pound’s entire career was actually dedicated to maintaining and defending the autonomy of the juridical sphere in its relations with the social. Never was this clearer than in his deep antagonism during the 1930s to the emergence of the modern administrative state, or in his celebratory history of “the formative era” of American law, written in 1936 as a series of lectures, which stressed that American law possessed its own fountain of historical continuity, a “taught legal tradition” immune from generalized social influence that produced adaptive alteration under the wise direction of experienced jurists. Law was a function of a particular expertise wielding a closed discourse. Its considerable potency inhered precisely in its capacity to seize upon the best available social knowledge without diluting its own juristic authority.⁶⁴

Even realists inspired by progressive state-building, though they would disdain Pound as conservative and timid, held on to the idea of law’s distinctiveness. As much as they migrated toward strategies endowing the state with distinct forms of regulatory capacity, they identified courts as crucial agencies “of social integration and social reform.”⁶⁵ Realism itself was split over the influence to accord social science. In the state, it is true, the era of

61. Pound, *supra* note 10, at 22, 25.

62. *Id.* at 35–36.

63. *Id.* at 36.

64. WILLRICH, *supra* note 58, at 315–17. *See generally* ROSCOE POUND, THE FORMATIVE ERA OF AMERICAN LAW (1938).

65. Daniel R. Ernst, *Law and American Political Development, 1877–1938*, 26 REVIEWS AM. HIST. 205, 213 (1998).

“Progressivism,” and particularly the later era of the New Deal, seemed ideal environments in which broadly conceived strategies of social inquiry, allied with legal-administrative regulatory processes, might provide a platform for fundamental departures in social organization. Robert S. Lynd, for example, wrote in 1935 of the opportunity “to open up wide, at this time of national re-appraisal, the question as to how modern democratic government may best function in relation to . . . a socially guided economy.”⁶⁶ But Lynd wrote as a hopeful sociologist, not a lawyer. The legal mandarin trained in elite schools who entered the federal government’s new administrative agencies proved quite capable of confining embodiments and modalities of state purpose that competed with the fundamental authority of law.

Some did try to blur the juridical field’s boundaries. The attempts were clearest in legal scholarship and education. Felix Cohen, for example, dedicated his “functional approach” to “cleansing legal rules, concepts, and institutions of the compulsive flavors of legal logic or metaphysics” by bathing them in positivist sciences of social events.⁶⁷ Indeed, Cohen’s goal was not simply to blur the distinction between law and social science but to transcend it by moving beyond positivism’s “clear, objective” descriptions to an independent appraisal of the law and legal institutions it revealed by reference to a distinct “critical” theory of social values. “It is through the union of objective legal science and a critical theory of social values that our understanding of the human significance of law will be enriched.”⁶⁸ But pedagogical innovation never succeeded in creating the conditions for Cohen’s ultimate move. At neither of realism’s twin bastions—Columbia in the 1920s, Yale in the 1930s—did reorganizations of law instruction and legal research according to “functional” criteria ever move beyond Cohen’s first step—the attempt to relate legal principles to factual situations parsed by resort to positivist social science. Nor, in either case, was even that first step sustained for very long. At Columbia the core group of realists abandoned the law school in 1928 in the face of mounting opposition to their attempts to bring social science to bear on law. At Yale, likewise, law and “empirical” research and instruction failed to mesh. By the end of the 1930s legal education at Yale had reverted to “entirely standard exercises in case law.”⁶⁹

Overall, the transforming conjunction of law and social science for which realism had appeared to stand did not take hold. In the vast majority of law schools the disciplines were simply too remote from the essential institutional imperatives of legal education and training. And realism itself, for all its liberal

66. Christopher L. Tomlins, *The New Deal, Collective Bargaining, and the Triumph of Industrial Pluralism*, 39 *INDUS. & LAB. REL. REV.* 19, 27 (1985) (quoting Robert S. Lynd).

67. Cohen, *supra* note 11, at 847.

68. *Id.* at 847, 849.

69. JOHN HENRY SCHLEGEL, *AMERICAN LEGAL REALISM AND EMPIRICAL SOCIAL SCIENCE* 147 (1995); LAURA KALMAN, *LEGAL REALISM AT YALE, 1927–1960*, at 117 (1986).

advocacy of social change, remained focused primarily on the possibilities for a peculiarly *legal* liberalism.⁷⁰

C. *Insufficiency*

If *revelation* stands for the genteel empiricism of law's antebellum epistemology, and *production* for the successful reconfiguration of law in the form of a deliberative and technocratic juridical field, *insufficiency* stands for the struggles, from the 1940s onward, to maintain the juridical field's configuration in the face of growing challenges.

Legal realism's efforts to reform legal education during the 1920s and 1930s were, in retrospect, its most significant achievement. They underline the capacity in American legal education and scholarship to recognize moments of "slippage" in law's status and influence and to respond, as had Langdell (and Pound), by innovating. But realism's particular curricular innovations lacked staying power. Nor did they have anything like the national impact of the Langdellian model so thoroughly disseminated only a generation previously. Once the law schools had completed their replacement of office apprenticeship as the effective point of production, early in the twentieth century, the goal in legal education became a general raising of standards of entrance, instruction, performance, and output. "[F]or most schools outside the narrow elite, these were years when changes or innovations in curriculum and teaching methods paled into insignificance when compared with the energy needed to cope with the national efforts to 'raise standards.'" By the 1940s "standardized" schools were becoming the norm in the law-teaching world at large, designed to train a homogeneous profession in a single career.⁷¹

It is at this point that the phase of production in the juridical field's development is succeeded by that of insufficiency. Insufficiency stands, first, for the perceived inadequacy of law teaching in providing a generalized education appropriate for anything but law practice. Second, it stands for law's inability, despite its ascendancy during the postwar period, to develop a robust capacity for intellectual self-explanation beyond internalist doctrinalism and vapid normativity. The result was a sense of crisis in the process of production of state elites, and a much more extensive turn to social science expertise in the 1950s and 1960s, sparking new struggles to sustain the hegemony of law that have continued into the twenty-first century.

70. Realism "left much of law's symbolism intact . . . [L]egal realism is lawyer's law." In that form it has become orthodoxy—"the self conception of legal professionals." John Brigham & Christine Harrington, *Realism and its Consequences: An Inquiry into Contemporary Sociological Research*, 17 INT. J. SOC. L. 41, 44 (1989). See also Charles W. McCurdy, *The Liberty of Contract Regime in American Law*, in THE STATE AND FREEDOM OF CONTRACT, 161–97 (Harry N. Scheiber ed., 1998); Edward S. Robinson, *Law—An Unscientific Science*, 44 YALE L.J. 235 (1934–35).

71. STEVENS, *supra* note 56, at 209–10.

The standardized law school provided no education capable of equipping lawyers with the capacity to govern the state. With perhaps the exception of the most elite eastern schools, post-World War II American law schools did not confer upon their graduates the equivalent of Oxford “Greats” or the French *Grandes Écoles*—the essential mandarin qualification for state elites. Law had prevailed in the modern regulatory state created by the New Deal and war. But in the state’s Cold War configuration, social science once more became a potent rival tool of state service. Indeed, by the 1960s, state sponsorship of social science as a policy resource encouraged the development of systematic study of law as a social and material phenomenon, to the point where wholly new sites for law study were developing beyond the existing boundaries of the juridical field.⁷²

Successively, policy science, process jurisprudence, Law & Society, and Critical Legal Studies—accompanied throughout by continuous development in Law & Economics—articulated alternative sites for encounters between law and developing public and private demand for trained technocratic elites. Each was influenced, in one form or another, by the earlier realist interest in the conjunction between law and social science. Each might also be termed a “constructed” site, in that the disciplinary encounter was deliberately planned and created rather than—as in the case of realism—its advantages generally invoked but only haphazardly realized. In the 1960s, for example, the Russell Sage Foundation systematically underwrote attempts to create disciplinary interaction between law and social science by funding four university centers—at Berkeley (1960), Wisconsin (1962), Denver (1964), and Northwestern (1964)—and by sponsoring the establishment of the Law and Society Association and the *Law and Society Review*. These moves ensured that an apparatus of institutions appeared to sustain Law & Society as a field of study and expertise outside the juridical field.⁷³

The emergence of Law & Society beyond the networks of the law school, the investment in it of public and private money, and the involvement of scholars whose research and careers were located not in law but in the social sciences (notably sociology and political science) in positions of institutional leadership all underscore the considerable potential represented in the Law & Society idea for radical innovation in the definition of juridical expertise. Having established its distinct scholarly locale, however, Law & Society followed a trajectory that fell back into, and was thus limited by, a legal orbit. Rather than blurring and ultimately transcending disciplinary boundaries in the fashion Felix Cohen had advocated, Law & Society (as its prototypically conjunctive self-description, “law

72. Leon Lipson and Stanton Wheeler, *Introduction to LAW AND THE SOCIAL SCIENCES* 3–5 (Leon Lipson and Stanton Wheeler eds., 1986).

73. Bryant Garth and Joyce Sterling, *From Legal Realism to Law and Society: Reshaping Law for the Last Stages of the Social Activist State*, 32 *LAW & SOC'Y REV.* 409, 417–55 (1998); Felice J. Levine, “His” and “Her” Story: *The Life and Future of the Law and Society Movement*, 18 *FLA. ST. U. L. REV.* 69, 73–75 (1990); SCHLEGEL, *supra* note 69, at 238–51.

and . . .” suggests) remained stuck at the “pre-critical” first step of the functional approach, in which the objective was to explain distinctively “legal” outcomes by locating law in explanatory social and economic contexts. As a domain of knowledge, that is, Law & Society was focused on explaining the legal. David Trubek has explained how its law-centeredness accounts for both Law & Society’s successes *and* its failures.

[F]rom the beginning, the interests of the legal academy strongly influenced the law and society idea. While the law and society movement succeeded in creating a new object of study and a new domain of knowledge, it did so within a ‘legally-constructed’ domain. Thus, law and society knowledge, while different from the traditional knowledges produced in the legal academy, necessarily reflects the needs and interests of legal elites.⁷⁴

Notwithstanding Law & Society’s location at a remove from the juridical field, its characteristic law-centeredness gave the juridical field’s institutions control over the flow of socio-legal knowledge into the realms of state and social decision-making. As Willard Hurst had put it in the mid-1950s, “Lawyers continue to be a key policy-making and high policy-executing group in our society; the law schools are, therefore, one of the truly strategic points for moving social science knowledge, and philosophy about society into the currents of decision in the community.”⁷⁵

So powerful was the gravitational pull of the juridical field that even the most radical of the postwar sites of disciplinary encounter, Critical Legal Studies (CLS), would find it impossible to escape its orbit. Politically left wing, CLS originated as a critical reaction to Law & Society, particularly to its dominant research practice, the ascription of objective meaning through empiricist social scientific inquiry. But though determined, like Felix Cohen, to blur the law/society divide and ultimately transcend it altogether through resort to critical theory, Critical Legal Studies too would end up instead casting itself primarily in law-centric terms.

Part of the explanation is institutional: CLS was, far more than Law & Society, a phenomenon of the legal academy, founded and largely led by legal scholars trained and in many cases based at elite law schools.⁷⁶ But the explanation

74. David M. Trubek, *Back to the Future: The Short, Happy Life of the Law and Society Movement*, 18 FLA. ST. U. L. REV. 1, 78 (1990).

75. Bryant G. Garth, *James Willard Hurst as Entrepreneur for the Field of Law and Social Science*, 18 LAW & HIST. REV. 37, 54 (2000) (quoting James Willard Hurst).

76. Harvard and Stanford became important CLS bastions; Yale was an influential point of origin. CLS’s elite origins, connections, and ambitions are clearly described in John Henry Schlegel, *Notes Toward an Intimate, Opinionated and Affectionate History of the Conference on Critical Legal Studies*, 36 STAN. L. REV. 391 (1984). See also G. Edward White, *The Inevitability of Critical Legal Studies*, 36 STAN. L. REV. 649, 670–71 (1984).

is also intellectual. CLS's critique of Law & Society scholarship was in large part aimed at the latter's excessive reflexivity. In 1985, for example, Robert Gordon could be found writing of CLS's prevailing understanding that law's "norms, rules, procedures, reasoning processes, etc. have an autonomous content, have an independent influence upon the actions of legal officials and ordinary persons in society" and that legal ideas "are immensely powerful influences in the formation of social purposes and in the ways such purposes are acted upon."⁷⁷ No less important was CLS's emphatic denial of the core assumption upon which Law & Society's field of encounter between social science and law had been founded in the first place; namely, that resort to social science to undertake empirical mapping of "exogenous forces" would produce systematic and objective results. In the mature CLS project of the 1980s, law's virtual autonomy as institutional formation, profession, discipline, and discourse became established as the point of departure, and internal critique the strategy. Hence, while CLS aspired to transcend the law/society distinction, what it in fact achieved was more a reversal of social science's received causal polarities. In the functionalist tradition, "the *fundamental* operations of th[e] world originate before law and go forward independently of it; they fashion in general outline (if not in tiny detail) the agendas and limits of legal systems and are beyond the power of law to alter."⁷⁸ CLS produced the opposite: "the notion of the fundamentally constitutive character of legal relations in social life."⁷⁹ Indeed, it produced the claim that law was constitutive not merely of social life but of all life. For law was constitutive of consciousness itself—of human imagination in all its artifactitious potency.⁸⁰

The rise of CLS and its centrality in the juridical field's intellectual debates throughout the 1980s confirmed that the field's center of gravity lay with the institutions from whose network Law & Society at its inception had attempted to depart. It is perhaps surprising that such an avowedly radical and transformative politics of law as Critical Legal Studies would find itself following an agenda largely reflective of the internal doctrinal preoccupations of law and law schools, an outcome that, by the mid-1990s, had apparently run CLS out of steam and out of influence.⁸¹ One explanation is provided simply by adapting Trubek's

77. Robert W. Gordon, "Of Law and the River," and of Nihilism and Academic Freedom, 35 J. LEGAL EDUC. 1, 14 (1985). See G. Edward White, *From Realism to Critical Legal Studies: A Truncated Intellectual History*, 40 SW. L.J. 819, 835 (1986), for his observation that the work of the most notable of the early CLS scholars—Horwitz, Kennedy, Unger and Tushnet—was "qualitative and even doctrinal" in methodology, and emphasized interest in "legal doctrine, legal consciousness, and the ideological structures in which legal rules were embedded."

78. Robert W. Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57, 103 (1984).

79. *Id.* at 104.

80. The contrast between CLS and Law & Economics on this point is marked. It was the most zealous proselytizer of the latter who would announce "the decline of law as an autonomous discipline." See Richard A. Posner, *The Decline of Law as an Autonomous Discipline*, 100 HARV. L. REV. 761 (1987).

81. GARY MINDA, POSTMODERN LEGAL MOVEMENTS: LAW AND JURISPRUDENCE AT

observations on the fate of Law & Society to include CLS. Far more than Law & Society, we have seen, Critical Legal Studies was configured within “a ‘legally-constructed’ domain.” From the beginning of its formation in the half century after 1870, the modern juridical field had pursued institutional and discursive innovation in scholarship, teaching, and professional practices whenever law appeared to be losing intellectual authority or strategic state influence. CLS knowledge, although obviously “different from the traditional knowledges produced in the legal academy,” was created in accordance with the field’s terms for innovation, and hence, one might conclude, necessarily “reflects the needs and interests of legal elites” in maintaining law’s resilience.⁸²

A different explanation would grant CLS’s law-centeredness an independent rationality and would allow CLS its initial radical integrity. Bryant Garth and Joyce Sterling have argued that Law & Society’s move back to law following its development as a spatially distinct endeavor signifies law’s success in reestablishing itself as a discourse of state expertise and governance after a period of uncertainty in which other expertises—sociology, political science—demonstrated their capacity to compete with it to guide state projects. “Law as the traditional language of the state appeared to be falling behind in the competition to define social problems and produce legitimate solutions.”⁸³ But, as in the past, law regrouped, appropriated the social science that it needed, and reaffirmed its ascendancy in the state. We might then acknowledge CLS as a radical critique developed within law and professing a transformative legal politics that confronted resurgent law on its own ground and sought to redirect its ascendancy along different paths.⁸⁴

CENTURY’S END 125–26 (1995).

82. Trubek, *supra* note 74, at 8. Although at first sight this might seem far-fetched, Minda provides a telling commentary on how non-mainstream legal knowledges can serve the elite ideological purpose of maintaining law’s resilience:

It is a critical time for jurisprudential studies in America. It is a time for self-reflection and reevaluation of methodological and theoretical legacies in the law. At stake is not only the status of modern jurisprudence, but also the validity of the Rule of Law itself. In the current era of academic diversity and disagreement, the time has come to seriously consider the transformative changes now unfolding in American legal thought. The challenge for the next century will certainly involve new ways of understanding how the legal system can preserve the authority of the Rule of Law while responding to the different perspectives and interests of multicultural communities. . . . The proliferation of new forms of competing jurisprudential discourses, the willingness of some to try new methods, and the expression of discontent and resistance signify the end of neither professional discourse nor law as we have known it—all may simply be symptomatic of change from the old to the new.

Id. at 256–57.

83. Garth and Sterling, *supra* note 73, at 456.

84. This is one of Robert Gordon’s strongest themes in his debate with Paul Carrington over the meaning of CLS. See Gordon, *supra* note 77, at 1–9, 13–16.

D. Conclusion to Part One

Writing the history of the juridical field shows us both why “[l]aw in the United States historically has been able . . . to gain the position of setting the key terms of legitimacy,”⁸⁵ and how. Culturally and politically, law has occupied a position of advantage in discussions over the substance of rules compared with other modalities and ideologies of action. It has solidified that position of advantage in a structure of national legal practices—discursive, institutional, and organizational—that continuously and actively reinforce the United States’ inertial political-cultural tendency toward the ascendancy of law in rule production.

In noting that the history of the juridical field has been very much a history of the management of encounters between law and other disciplines, however, we can also see that the history of law, at least in the twentieth century, has been a history of law’s difficulties when it comes to the necessities of adequate self-explanation. Debates over the appropriateness, terms, and likely outcomes of rules occur in two realms, not one: the realm of law as a locale of rule production, and the realm of law as a locale of juristic and scholarly explanation, or legitimation, of the form and expression of rule production.

A 1997 article by Edward Rubin assists in illustrating the relationship between these two realms.⁸⁶ According to Rubin, in the realm of rule production, law-trained state decision makers are fully possessed of a distinctive methodology and practice that render their activities “epistemologically coherent.”⁸⁷ Law-trained scholars seek to improve the quality of these activities through prescriptive intervention “according to the scholar’s own views about law or public policy.”⁸⁸ They “instruct[] judges.”⁸⁹ They articulate arguments that conceivably can affect decision making. They are, that is, “inevitably and intensely involved with the subject matter of their research.”⁹⁰ In this incarnation, legal scholarship is not a descriptive or a critical, but a prescriptive practice. Legal scholars “are not trying to describe the causes of observed phenomena, but to evaluate a series of events, to express values, and to prescribe alternatives.”⁹¹ They are actively participating in the production of rules. In this realm law is a discipline sufficient unto itself. It grants a role to other disciplines only insofar as they service its primacy.⁹²

85. Dezalay and Garth, *supra* note 28, at 307.

86. Edward L. Rubin, *Law And and the Methodology of Law*, 1997 WIS. L. REV. 521 (1997).

87. *Id.* at 541.

88. *Id.* at 525.

89. *Id.* at 529.

90. *Id.*

91. *Id.* at 527.

92. In Bourdieu’s analysis,

[P]ractices within the legal universe are strongly patterned by tradition, education and the daily experience of legal custom and professional usage. They operate as learned yet deep structures of behavior within the juridical field—as . . . habitus. They are significantly unlike the practices of any other social universe. And they are specific to the juridical field; they do not derive in any substantial way from the practices which structure other social

In the realm of legitimation, however, law seeks the aid of other disciplines “in characterizing various interactions between law and external phenomena.”⁹³ No more here than in the process of rule production does law propose to yield to the disciplines, for “the prescriptive stance of law is not only an effort to influence public decision-makers” but is also itself “a mode of understanding.”⁹⁴ But that mode of understanding is quite insufficient when it comes to coping with “reality,” with the “intense relationships” between law and the “external forces . . . [and] events” to which legal scholars must react, or with “the effects on such events that their recommendations to legal decision makers will produce.”⁹⁵ A self-referential, internally generated legal discourse might be entirely sufficient for legal scholars to communicate with judges or practitioners, but not if rules are to be explained and their legitimacy confirmed to other decision-makers (legislators, administrators) and to wider audiences—notably public opinion and the interests to which public opinion responds. Even as it “must continue to develop its own methodology for framing its characteristic prescriptions to legal decision-makers,” legal scholarship “must rely on other disciplines to characterize external events and effects.”⁹⁶ Here, in what Rubin denotes as “structured debate about social norms,” is where social science properly appears, not to resolve issues of “proper choice of purpose,” but to inform them and explain them.⁹⁷ In this field of encounter, the disciplines are drawn in to play an essential (though still subordinate) role in rule production.

By distinguishing law’s self-sufficiency as a modality of deployment of power and authority from its inadequacy as a modality of explanation and legitimation of the results, we can see that law has been more receptive to encounters with disciplines in which law’s terms are accepted and its capacity to explain or refine or legitimate its performance in rulemaking interactions with external phenomena improved, than to encounters in which the disciplines attempt to intrude upon law’s terms for deployment of determinative power and authority over rulemaking. The question that faces an “interdisciplinary” law school, therefore, is whether to enable law’s future disciplinary encounters simply to reproduce this pattern, or instead to permit the disciplines to probe law’s “rules for the production of the rules” and systematically unpack the structure of national legal practices that supports them. Without answering this question at this point, let us now proceed

activities or realms. Thus, they cannot be understood as simple ‘reflections’ of relations in these other realms. They have a life, and a profound influence, of their own. Central to that influence is the power to determine in part what and how the law will decide in any specific instance, case, or conflict.

Richard Terdiman, *Introduction* to Bourdieu, *supra* note 26, at 807.

93. Rubin, *supra* note 86, at 541.

94. *Id.* at 546.

95. *Id.* at 543, 550.

96. *Id.* at 553.

97. *Id.* at 555.

to examine how one discipline in particular—history—has fared in its encounters with law.

II. HISTORY AND LEGAL HISTORY

Descriptions of recent research in legal history as the work that “may well be the most exciting . . . currently being done on law,”⁹⁸ and of virtually all modern history as “critical” when brought into conjunction with the realm of law,⁹⁹ might encourage one to believe that of all the disciplines disposed to probe the juridical field, none has greater capacity to bring about a dramatic exposure of “the rules for the production of the rules”¹⁰⁰ than history. The specific claims require examination.¹⁰¹ But so does the general record of history’s disciplinary encounter with law. Though there are clear grounds for belief in the critical potential of history, the history of legal history suggests that critique has not been uppermost in the field’s twentieth-century agenda.

A. What History Is

Some 140 years ago, Friedrich Nietzsche wrote an “untimely meditation” on the relationship between consciousness of the past and what it means to be human. “Consider the cattle, grazing as they pass you by: they do not know what is meant by yesterday or today, they leap about, eat, rest, digest, leap about again, and so from morn till night and from day to day, fettered to the moment and its pleasure or displeasure, and thus neither melancholy or bored.”¹⁰² Nietzsche’s cattle lived unhistorically, contained wholly by the present, unaware of any past, unaware indeed of anything but the moment. To be human by contrast meant to possess an awareness of the historical, and as a consequence, to live a life braced “against the great and ever greater pressure of what is past.”¹⁰³ To be human meant, no less, to live in envy of the cattle, to seek relief from the pressure of the past by forgetting it, in order to begin to think anew. For history was a “dark, invisible burden,” a “consuming fever,” a “mighty . . . movement” that always threatened to sweep all before it, against which Nietzsche stood to speak—“untimely”—of the importance of evading history’s coercive embrace.¹⁰⁴

Forgetting, Nietzsche argued, was essential to action. Yet it was neither possible, nor necessarily desirable, wholly to escape the historical. Humanity

98. Robert W. Gordon, *Foreword: The Arrival of Critical Historicism*, 49 STAN. L. REV. 1023, 1024 (1997).

99. *Id.* at 1029.

100. Dezalay and Garth, *supra* note 28, at 311.

101. See text accompanying notes 166–219 *infra*.

102. FRIEDRICH NIETZSCHE, *On the Uses and Disadvantages of History for Life*, in UNTIMELY MEDITATIONS 59–123, 60 (R.J. Hollingdale trans., 1983).

103. *Id.* at 61.

104. *Id.* at 59, 60, 61.

needed history in order to be human rather than cattle. “The unhistorical and the historical are necessary in equal measure for the health of an individual, of a people and of a culture.”¹⁰⁵ But history was needed to serve specific purposes; not the purposes of “the idler in the garden of knowledge,” but purposes that were “rough and charmless.” Humanity needed history “for the sake of life and action” and for no other reason.¹⁰⁶

B. Lessons of History

Everyone can claim some sort of relationship to the past. Everyone is his/her own historian, by dint of personal awareness of the trivia of life circumstance that have produced them as they are, or as they appear to themselves to be. Everyone can be some sort of historian also in the larger, necessarily collective, sense of associating in acts of remembrance or awareness that evoke the past and speculate about its meaning.

“History” as an evocation of the past is etymologically indistinguishable from history as practice or discipline, but the two—history the past and history the disciplinary practice—are quite distinct. In 1968, in the introduction to a book on the consciousness and practices of a group of American historians eminent in the early years of the discipline, Richard Hofstadter observed, “Memory is the thread of personal identity, history of public identity.”¹⁰⁷ In naming the construction of public identity as the job of historical practice, Hofstadter identified the formative purpose of the discipline, but also the context that constantly challenges it. For history as discipline lives within a broader civic discourse of “history” that, in invoking the past, makes its own potent claims to historical awareness and knowledge. Indeed, civic discourse crafts “lessons of history” from among the totality of acts of evocation of the past, from which—as Nietzsche warned—escape is difficult.

When invoked to dispense civic lessons, history takes on a purposeful, coercive appearance. Take, as an example, an editorial entitled “The Right Side of History in Iraq” published in the *Chicago Tribune* at the height of armed Shi’ite opposition led by Muqtada al-Sadr’s Mahdi Army to the Coalition Provisional Authority.¹⁰⁸ History, in that editorial, is at once an invisible undertow in human affairs, “an unsentimental progression of events,” and a didactic field of force with a consciousness all of its own.¹⁰⁹ In this particular case, history was “determined to leave the insurgents behind.” History would teach even the most intractable insurgent the necessity of staying on “the right side of history.” And in teaching

105. *Id.* at 63.

106. *Id.* at 59.

107. RICHARD HOFSTADTER, *THE PROGRESSIVE HISTORIANS: TURNER, BEARD, PARRINGTON* 3 (1970).

108. *The Right Side of History in Iraq*, CHI. TRIB., June 16, 2004, §1 at 28.

109. *Id.*

that lesson “history’s outline begins to grow clear.”¹¹⁰ History, here, is not a discipline; it is the elemental power that dictates the course of human affairs, against which Nietzsche wrote.¹¹¹ It is an objective, dispassionate force—*unsentimental*; it has both direction and substance—a *progression* of *events*; its progression is linear, and its linearity embodies movement away—it would *leave* the insurgents *behind*; and its linearity also expresses a guiding consciousness capable of moral judgment—it was *determined* to leave the insurgents behind. By recognizing history’s will to progress, and by obeying its directives for action, humanity would find itself in a better place, on history’s *right side*, in conformity with its *outline*. Nonconforming recalcitrants would be left in its wake, *behind*.¹¹² To fail to bow to history is to place oneself in a future outside history—irrelevant, invisible, despicable, and disposable.

Might one claim that this editorial is an illustration of the deployment of history to serve “life”? Every trope employed suggests the opposite. When Nietzsche wrote his “untimely meditation” he did so precisely to reject such totalized representations of human action because they rendered the past inertial, the determinant (gravedigger) of the present; because they denied humanity plasticity, the capacity for transcendence, “to develop out of oneself in one’s own way,” to think and act unhistorically.¹¹³ Simultaneously, however, Nietzsche recognized the impossibility of avoiding history altogether. The objective was to make history serve life. But how?

C. Archetypes of History

Nietzsche wrote of the existence of three modalities (social scientists might be tempted to call them ideal types) of history—the monumental, the antiquarian, and the critical—each of which came complete with its particular liability.¹¹⁴ History in the monumental mode was history as action in the service of greatness—the proud narration of exemplary deeds, of inspiring events, of triumph over pettiness. As classic exponents one need think no further than the Whig historians of the nineteenth century, like Macaulay and Bancroft, or their successors, like Churchill.¹¹⁵ The *Chicago Tribune*’s Iraq editorial is a convenient

110. *Id.*

111. One does not encounter civic leaders enjoining us to place ourselves on “the right side” of political science. One does not read of anthropology’s determined judgments in the editorial pages of newspapers, or of its outline for mankind. There is no Sociology Channel on cable TV. Economics provides perhaps the only close parallel.

112. For similar attributions of will to history, this time from a professional historian, see *Hearing on Impeachment Inquiry, Pursuant to H.J. Res. 581, 105th Cong. (1997–1998)*, available at <http://www.cnn.com/ALLPOLITICS/stories/1998/12/08/transcripts/wilentz.html> (last visited July 16, 2010) (quoting Sean Wilentz, Professor at Princeton University, on the impeachment of President William Jefferson Clinton: “[H]istory will track you down and condemn you for your cravenness.”).

113. NIETZSCHE, *supra* note 102, at 62.

114. *Id.* at 67–77.

115. *See, e.g.*, THOMAS BABINGTON MACAULAY, *THE HISTORY OF ENGLAND FROM THE*

exemplar of monumental history in a contemporary setting. The liability of the monumental mode, of course, is all that's omitted: "the past itself suffers *harm*: whole segments of it are forgotten, despised, and flow away in an uninterrupted colourless flood, and only individual embellished facts rise out of it like islands."¹¹⁶ Monumental history appropriates elements of the past to serve particular current or future outcomes. In its course, personalities become exaggerated and deformed; narratives become means to indoctrinate; causation is lost in the power attributed to the demands of history, to ineffable purposes, to "historical 'effects in themselves.'"¹¹⁷

History in the antiquarian mode means, superficially, mere collection of past facts. Somewhat more subtly it means reverence for what was: the present is but the tip of an iceberg of accumulated validity. Put into action—theorized—it means history pursued not as appropriation and validation but as continuation and reassurance: the Burkean creation of stable identities through seamless connection of now to then. But just as the liability of the monumental lies in its overweening discrimination, the liability of the antiquarian lies in its inability to discriminate. Veneration accords an equal validity to all that is recovered. Committed to stability and reassurance, the antiquarian cannot see change or difference that is not in accord with its own incrementalist theory of causation.¹¹⁸

History in critical mode is the antidote to both the monumental and the antiquarian. Instead of the past appropriated to the extent that it enables the construction of an exemplary guide to particular futures, or revered in its wholeness to preserve contemporary life, it is the past interrogated, judged, and condemned in order to free life from the oppressive present to which that past stands prior. To Nietzsche, critical history might have been a means to throw off the suffocating restraint of all pasts: "Every past . . . is worthy to be condemned—for that is the nature of human things: human violence and weakness have always played a mighty role in them."¹¹⁹ All might be better forgotten. But critical history's purpose was not to enable the past to be ignored; rather it lay in the formation of its own kind of remembrance, so that the past that made a particular present worthy of destruction might be fully known. This was no exercise in inclusion of the innocent, a redress of the grievances of losers, a gathering in of "paths not taken": all were the product of that past; none could dissociate themselves from its "aberrations, passions and errors, and . . . crimes." All being implicated, "the best we can do is to confront our inherited and hereditary nature

ACCESSION OF JAMES II, 5 vols. (1848); GEORGE BANCROFT, HISTORY OF THE UNITED STATES OF AMERICA, FROM THE DISCOVERY OF THE AMERICAN CONTINENT, 10 vols. (1864–75); WINSTON S. CHURCHILL, A HISTORY OF THE ENGLISH-SPEAKING PEOPLES, 4 vols. (1958–62).

116. NIETZSCHE, *supra* note 102, at 71.

117. *Id.*

118. *Id.* at 72–75.

119. *Id.* at 76.

with our knowledge of it, and though a new, stern, discipline combat our inborn heritage and implant in ourselves a new habit, a new instinct, a second nature, so that our first nature withers away.”¹²⁰

The recognition of the totality of implication renders critical history as tragedy. In the struggle for transcendence, the chance of success is modest. “The reconciliations that occur at the end of Tragedy . . . are somber; they are more in the nature of resignations of men to the conditions under which they must labor in the world.”¹²¹ But struggle is the measure of living. It is in this sense that critical history serves life. Hence the liability of the critical is the intellectual’s effete passivity, *ennui*, lack of purpose; or worse, irresponsibility; or worst of all, mere scholasticism: “instruction without invigoration . . . knowledge not attended by action . . . history as a costly superfluity and luxury.”¹²²

The modalities of nineteenth- and twentieth-century historical practice have reproduced the essentials of Nietzsche’s typology. The monumental and the antiquarian are the ideal types of modernist historical practice, represented both in Whig, Marxist, Progressive, Liberal, and other forms of generalizing, determinist or reductionist historical metanarrative that attribute a developmental “direction” to history, and in history’s resolute empiricism, its facticity centered on the recovery of past events whether unique and serendipitous or recurrent. These archetypes are well represented in the contrast between the prototypes of modernist historiography: faith in objectivity through abstraction, in the discovery of truth through research on the past guided by the future-oriented touchstone of human progress; and reliance on systematic empiricism, avoidance of future-oriented universals or law-like statements, embrace of study of the past “for its own sake” and on its own terms.¹²³

Modernist history’s prototypes have coexisted and interacted within an overall appreciation of historical practice as a mode of scientific inquiry, although with very different emphases on what “science” means. Modernist metanarrative history embraced the language of scientific theorizing in proposing determinist laws of historical development to guide empirical investigation of the past. Modernist common sense empiricism eschewed law-like scientism but not scientific technique: systematicity, trained expertise in discovery and observation of archived sources, the metaphor of the laboratory. Antiquarianism is supposedly that which professional modernist historical practice defined itself against, yet it is what professional historical practice in its early days came closest to reproducing (and indeed continues unconsciously to encourage, albeit in ways that are not

120. *Id.*

121. HAYDEN WHITE, *METAHISTORY: THE HISTORICAL IMAGINATION IN NINETEENTH CENTURY EUROPE* 9 (1973).

122. NIETZSCHE, *supra* note 102, at 59.

123. For a critical account of the prototypes of modernist history, see KEITH JENKINS, *ON “WHAT IS HISTORY?” FROM CARR AND ELTON TO RORTY AND WHITE* (1995).

consciously “antiquarian”). The initial professionalization of history in late nineteenth-century America created a self-referential and internalized disciplinary discourse, in which norms of value-neutrality and factualism reigned. The standardization of practice assured the interchangeability of the products—“the [laid-up] stores of well-sifted materials,” the small groups of facts “properly classified and logically dealt with”—that the discipline’s empiricist division of labor accumulated.¹²⁴ James Franklin Jameson wrote in 1910 of the historian as an honest artisan fashioning mounds of knowledge-bricks “without much idea of how the architects will use them, but believing that the best architect that ever was cannot get along without bricks.”¹²⁵ Edward Cheyney offered a more expansive rendition of the same metaphor:

The scientific writer of history . . . builds a classic temple: simple, severe, symmetrical in its lines, surrounded by the clear bright light of truth, pervaded by the spirit of moderation. Every historical fact is a stone hewn from the quarry of past records; it must be solid and square and even-hued—an ascertained fact. . . . His design already exists, the events have actually occurred, the past has really been—his task is to approach as near to the design as he possibly can.¹²⁶

How reassuring it was, that the past should accumulate so cleanly, prove so uniformly reproducible, to an inherent design of its own. The aesthetic of collective cumulative endeavor survived throughout the twentieth century in professional history’s monograph tradition, and its rite of “making a contribution” to the accumulation of knowledge.

D. History in the Juridical Field: The Historical School

In nineteenth-century Europe, in the German historical school established through the intellectual leadership of Friedrich Karl von Savigny, law found its first theory of development in just such a modernist scientific conception of history. To the historical school, history was a repository of exemplary prior instances of action or ideas, but also much more—a “living connection, which links the present to the past,” that explained law not as a natural or formal rule system but as an embodiment of *Volksggeist* (spirit of the people) with whose total historical development it was “inseparably interwoven.”¹²⁷ Savigny conceived of

124. PETER NOVICK, THAT NOBLE DREAM: THE OBJECTIVITY QUESTION AND THE AMERICAN HISTORICAL PROFESSION 55 (1988) (quoting James Franklin Jameson); *Id.* at 55 (quoting Karl Pearson).

125. *Id.* (quoting James Franklin Jameson).

126. *Id.* (quoting Edward Cheyney).

127. GEORGE G. IGGERS, THE GERMAN CONCEPTION OF HISTORY: THE NATIONAL

law not as something consciously created but as the accumulation “of a people’s historical and cultural experience, as a silently growing body, expressing itself in the community’s convictions.”¹²⁸ Savigny’s conception of national legal practices as granular instances of *Volksgeist* was intended to forestall contemporary attempts to create law consciously through codification or legislation. In place of legislation, Savigny exalted the capacity of jurists, to whom fell responsibility for “the more technical parts of law,” whose life’s work it was to trace and render explicit the rules immanent in the customs and practices of the *Volk*, thereby revealing a path of “complete undisturbed, national (*einheimische*) development.”¹²⁹ Tracing jurists’ ideas historically traced the organic development of law. Here was a potent example of the “history”-induced inevitability (paralysis) against which Nietzsche raged.

Law’s historical theory of its own development began to circulate in the U.S. juridical field in the second half of the century, particularly after the Civil War. In important respects—tracing legal evolution through the ideas of jurists, emphasizing the determinative authority of jurists over the expression of law in rule systems—aspects of German legal science became incorporated in the Langdellian transformation of the juridical field. But as a theory of law, “historical legal science,” or more generally “historism,”¹³⁰ fell apart at the end of the nineteenth century in the face of law’s own self-reconstitution as an autonomous discipline. Insistence on the sufficiency of explanations that simply invoked the sheer organic weight of the past were no longer convincing in an era of rapid social transformation. Indeed, it was the philosophical disintegration of history in its broadly Hegelian, nineteenth-century sense—the unfolding of Spirit in time—in the face of the critique of Nietzsche and others that helped to constitute the first explicitly “critical” approaches to the law/history relationship. The German jurist Rudolf von Jhering, for example, rejected the Historical School’s emphasis on law’s national spirit and unconscious growth for a “practical jurisprudence” that sought to locate law much more explicitly in time and social experience, and above all in conscious action and agency.¹³¹ Law’s development was not “merely the result of unconscious growth, conditioned by innate popular character” and hence reducible to a system of concepts designed and manipulated by scholar experts. Rather, law lay “in actual social life,” where it was begotten by social necessity—“conscious struggles to achieve certain ends through law.”¹³²

TRADITION OF HISTORICAL THOUGHT FROM HERDER TO THE PRESENT 66 (1968).

128. Matthias W. Reimann, *Holmes’s Common Law and German Legal Science*, in THE LEGACY OF OLIVER WENDELL HOLMES, JR. 83 (Robert W. Gordon ed., 1992).

129. PETER STEIN, LEGAL EVOLUTION: THE STORY OF AN IDEA 60, 62 (1980).

130. Stephen A. Siegel, *Historism in Late Nineteenth Century Constitutional Thought*, 1990 WIS. L. REV. 1431, 1435 at note 11, 1437–51 (1990) (describing historism as a pervasive “pseudo-scientific” consciousness or philosophy of history influencing nineteenth-century social inquiry).

131. Munroe Smith, *Four German Jurists*, 10 POL. SCI. Q. 664, 682 (1895).

132. STEIN, *supra* note 129, at 66, 67. In DER GEIST DES RÖMISCHEN RECHTS (1852–),

For Jhering, such a clear articulation of Nietzsche's critical modality of history would actually be the salvation of history as a means to the development of a theory of the law. History would be released from inevitabilist accounts of the unfolding of legal development and forced to address uncertainties—change and causation.¹³³ “It should not content itself with telling what happened, what changes occurred; it should discover the reason, the ‘why,’ of the facts described, and the forces that underlie and determine the changes. Nor should legal history content itself with this alone: it should show the causal relationship between antecedent and subsequent facts, how changes begot other changes.” To do so, Jhering argued, legal history had to emancipate itself from law. It should “exist for itself, as an independent science.”¹³⁴

This did not happen; at least, not in America. In their response to the late nineteenth century's disciplinary reconstitution of knowledge, American historians certainly attempted to establish history as an independent science, but they eschewed explicit purposiveness as so much “philosophy.” As we have seen, their history would be narrowly empirical, a mode of inquiry that would produce factualist bricks to an implicit, naturally-occurring design. Most American historians abjured any broad architectonic role to the social sciences, notably sociology and political science.¹³⁵ In the juridical field, Oliver Wendell Holmes, Jr. ventured toward the critical Nietzschean standpoint embraced by Jhering, identifying history not simply as a means to understand law on its own terms but to demystify it, to show that law's life was revealed by context—“the felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men”—not by any self-referential “logic.”¹³⁶ But Holmes' skepticism would later lead him in a different direction than the experiential, wondering in *The Path of the Law* whether it would not be a gain “if every word of moral significance could be banished from the law altogether, and other words adopted

quoted in *id.* at 65, Jhering writes, “Life does not exist for the sake of concepts, but concepts for the sake of life. It is not logic that is entitled to exist, but what is claimed by life, by social relations, by the sense of justice—and the logical necessity, or logical impossibility, is immaterial.”

133. Jhering sounds this theme in the opening pages of *THE STRUGGLE FOR LAW* (John J. Lalor trans., Callaghan & Company 2d ed. 1915) (1872), where he writes, at 1–2, that “The life of the law is a struggle—a struggle of nations, of the state power, of classes, of individuals. All the law in the world has been obtained by strife. . . . The entire life of the law, embraced in one glance, presents us with the same spectacle of restless striving and working of a whole nation, afforded by its activity in the domain of economic and intellectual production.”

134. Jhering's reflections on legal history were contained in one of his last works, a fragment on legal historiography published two years after his death as an essay in a collection entitled *ENTWICKLUNGSGESCHICHTE DES RÖMISCHEN RECHTS* (1894) [History of the Evolution of the Roman Law], and remarked on by Munroe Smith in *Four German Jurists. III. Bruns, Windscheid, Jhering, Gneist*, 12 *POL. SCI. Q.* 21, 32 (1897).

135. See generally NOVICK, *supra* note 124, at 61–108.

136. OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 1 (1881).

which should convey legal ideas uncolored by anything outside the law.”¹³⁷ Holmes’ modernist skepticism helped to kill the nineteenth century’s historical school in the American juridical field, in other words, but unlike Jhering Holmes did not point the field toward any new “emancipated” replacement. As a result, though legal history continued to be written in the juridical field after the turn of the century, it lost the centrality enjoyed by the historical school, becoming a fringe activity that tended to normalize whatever law’s current state of affairs might be.

E. Roscoe Pound’s History

Musing, in the early 1920s, on the historical school’s significance, Roscoe Pound characterized its adherents as participants in a general attempt to resolve a central problem of nineteenth-century legal thought, the problem of reconciling the universalist impulse of the Enlightenment with human circumstance:

[T]he social interest in the general security ha[d] led men to seek some fixed basis for an absolute ordering of human action whereby a firm and stable social order might be assured. But continual changes in the circumstances of social life demand[ed] continual new adjustments to the pressure of other social interests as well as to new modes of endangering security.¹³⁸

Nineteenth-century historical jurisprudence had attempted to join stability with adjustment in an organic and incrementalist theory of origins and adaptation that afforded little room for self-conscious rationalizing interventions.

It did not think of a law which had always been the same but of a law which had grown. It sought stability through establishment of principles of growth, finding the lines along which growth had proceeded and would continue to proceed. . . . Law was not declaratory of morals or of the nature of man as a moral entity or reasoning creature. It was declaratory of principles of progress discovered by human experience of administering justice and of human experience of intercourse in civilized society; and these principles were not principles of natural law revealed

137. Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 464 (1897). History, Holmes wrote, must be a part of “the rational study of law” for “without it we cannot know the precise scope of rules which it is our business to know. It is a part of the rational study, because it is the first step toward an enlightened skepticism, that is, toward a deliberate reconsideration of the worth of those rules” (469). Thereafter, the study of history should be writ small. “I look forward to a time when the part played by history in the explanation of dogma shall be very small, and instead of ingenious research we shall spend our energy on a study of the ends sought to be attained and the reasons for desiring them” (474).

138. ROSCOE POUND, INTERPRETATIONS OF LEGAL HISTORY 1 (1923).

by reason, they were realizations of an idea, unfolding in human experience and in the development of institutions—an idea to be demonstrated metaphysically and verified by history.¹³⁹

Pound accepted that historical jurisprudence had been an advance on natural law reasoning in its attempts to accommodate social change. But it was flawed by its own vulnerability to change. Historical jurisprudence lodged legitimacy in custom and recognized that custom could change over time, but controlled change by privileging the organic continuity of the *Volk*, the homogenous people, over the “current speculation” that motivated reformers and legislatures. Too much change, and historical jurisprudence lost its explanatory capacities; heterogeneity thinned the credibility of shared custom. In the U.S. case, the influence of historical jurisprudence had waned decisively in the late nineteenth and early twentieth century for precisely this reason. Its ideology of custom in common could not cope with the massive transformations of industrialization, immigration, and urbanization, with all their attendant demographic dislocations, cultural diversifications, class formation, and conflict, or with the new social knowledges whose development these changes sharply accelerated. Historical jurisprudence was too conservative, too dogmatic, too impervious to anything other than the slow grind of organic evolution. “It assumed progress as something for which a basis could be found *within itself*. . . . It assumed that a single causal factor was at work in legal history and that some one idea would suffice to give a complete account of all legal phenomena.”¹⁴⁰

Like Jhering, thirty years before, Pound called for a new legal history to replace the old—“for a sociological legal history, a study of the social effects which the doctrines of the law have produced in the past and of how they have produced them,” a history that would not “deal with rules and doctrines apart from the economic and social history of their time.”¹⁴¹ But Pound’s words proved cheap. When some years later he turned to history to expound at length upon the course of American law, in his lectures on *The Formative Era*, Pound completely repudiated his earlier interest in a new legal historiography. The hermetically sealed “taught legal tradition” he celebrated in his lectures—received from England, transmitted through successive generations of lawyers and judges tempered by training and practice, resistant to dramatic conflictual change—was, he now declared, “much more significant in our legal history than the economic conditions of time and place.”¹⁴²

Robert Gordon has written that failure “to develop an extensive external historiography of law” during the first half of the twentieth century represented “a

139. *Id.* at 9.

140. *Id.* at 19 (emphasis added).

141. ROSCOE POUND, *THE SPIRIT OF THE COMMON LAW* 213 (1921).

142. POUND, *supra* note 64, at 82–83.

loss of nerve” brought about by “an anxious solicitude” for the fate of the U.S. juridical field’s common law tradition amid circumstances (wrenching social and economic change) that threatened it.¹⁴³ Pound’s volte-face between 1921 and 1936 illustrates that loss of nerve, if indeed that is what it was. But there is another way to understand Pound’s dismissal of the standpoint—extrinsic causality—he had seemed earlier to embrace. Amid the crisis of the New Deal’s administrative law revolution, the “taught tradition” put rule production away in a safe preserve, under the control of an expertise the construction and transmission of which was organized from within the juridical field itself—precisely where Pound had located it at the beginning of his career.¹⁴⁴

F. James Willard Hurst’s History

As the only scholar in the first half of the century to attempt a general history of American law, Roscoe Pound became, inevitably, a principal point of orientation for those—first Willard Hurst, after him Morton Horwitz—whose work would dominate the century’s second half. Judged by the conventions of contemporary historical practice, better *historians* than Pound slowly gathered at Columbia, where Charles Beard (Political Science) and James Harvey Robinson (History) had earlier presided: Pound’s near contemporary, the acerbic Julius Goebel, was joined somewhat later in the law school by Joseph Henry Smith and, in the History Department (no doubt to Goebel’s dismay), by Richard B. Morris.¹⁴⁵ A few others outside the legal academy could also be found engaged in historical research on American law, notably John R. Commons in the 1920s, Perry Miller much later.¹⁴⁶ None was more original than Commons, none more

143. Gordon, *supra* note 35, at 29.

144. See text accompanying notes 58–64 *supra*. See also JOHN FABIAN WITT, PATRIOTS AND COSMOPOLITANS: HIDDEN HISTORIES OF AMERICAN LAW 221–34 (2007) (describing Pound’s alienation from the New Deal revolution in administrative law).

145. All are best known for their work in the legal history of the colonial and early national periods. For representative work see Goebel’s early essay, *King’s Law and Local Custom in Seventeenth Century New England*, 31 COLUM. L. REV. 416 (1931), and his much later HISTORY OF THE SUPREME COURT OF THE UNITED STATES: ANTECEDENTS AND BEGINNINGS TO 1801 (1971). Joseph H. Smith is best known for his classic APPEALS TO THE PRIVY COUNCIL FROM THE AMERICAN PLANTATIONS (1950), for THE LAW PRACTICE OF ALEXANDER HAMILTON: DOCUMENTS AND COMMENTARY (1964), undertaken in collaboration with Goebel, and—also in collaboration with Goebel—for the production of numerous volumes of CASES AND MATERIALS on early American law and on the development of legal institutions. Morris’s later career was almost entirely taken up with the framing of the American Constitution and its subsequent history, but his early career produced two books on early American law remembered among legal historians: STUDIES IN THE HISTORY OF AMERICAN LAW: WITH SPECIAL REFERENCE TO THE SEVENTEENTH AND EIGHTEENTH CENTURIES (1930), and GOVERNMENT AND LABOR IN EARLY AMERICA (1946). Both attracted criticism, the latter mainly for its rather indiscriminate empiricism, the former, much more spectacularly, for ill-informed intrusions upon matters of law. See Karl Llewellyn, *Book Review*, 31 COLUM. L. REV. 729 (1931), and *infra*, text at note 190.

146. See JOHN R. COMMONS, LEGAL FOUNDATIONS OF CAPITALISM (1924); PERRY MILLER, THE LIFE OF THE MIND IN AMERICA, FROM THE REVOLUTION TO THE CIVIL WAR (1965).

fluent than Miller. Still, in so tiny a field—in 1931 Karl Llewellyn described American legal history as “substantially unoccupied” and “near-empt[y]”¹⁴⁷—Pound cast a long shadow. None challenged his “formative era” synthesis before Hurst in the 1950s and Horwitz, in very different fashion, in the 1970s. Their distinct breakouts twice altered the trajectory of American legal history, decisively in Hurst’s case, dramatically in Horwitz’s.

Hurst had encountered Pound when he was a law student at Harvard in the early 1930s; he thought Pound dogmatic and arrogant.¹⁴⁸ Influenced by the Realism that Pound was increasingly driven to reject, Hurst would set out actually to achieve what Pound had done no more than talk about: an externalist sociology of juridical action and institutions. Hurst, writes William Novak, stressed the “living interplay of law and social growth” and “law’s operational ties to other components of social order.” He “strove to underwrite his work with a systematic and elaborate conceptual framework designed to link his close empirical investigations of nineteenth-century American law to perennial questions about ‘the general course of social experience.’”¹⁴⁹ Indeed, Hurst’s empirical research revealed a causality that undermined Pound’s careful discriminations among spheres of expertise, and reversed his post-Progressive taught tradition. Theorizing law as the expression of social purpose arising concretely from struggles among interests, Hurst observed, “[i]n the interaction of law and American life the law was passive, acted upon by other social forces, more often than acting upon them.”¹⁵⁰ This was the first resolutely externalist conceptualization of causality in the U.S. field.

The use of law to further self-interest is, of course, the leitmotiv of *Law and the Conditions of Freedom*, Hurst’s own account of American law’s formative era. Still a phenomenon of the first half of the nineteenth century, but otherwise

Commons would later be dismissed by neoclassical economists, just as Miller would be by lawyers. See Edmund W. Kitch, *The Fire of Truth: A Remembrance of Law and Economics at Chicago, 1932–1970*, 26 J.L. & ECON. 163 (1983); Lawrence M. Friedman, *Heart Against Head: Perry Miller and the Legal Mind*, 77 YALE L.J. 1244 (1968) (book review). Between Commons and Miller one can point to other isolated forays into research on legal thought and institutions undertaken by historians much better known for other work, such as DANIEL J. BOORSTIN, *THE MYSTERIOUS SCIENCE OF THE LAW: AN ESSAY ON BLACKSTONE’S COMMENTARIES* (1941), and OSCAR HANDLIN & MARY FLUG HANDLIN, *COMMONWEALTH: A STUDY OF THE ROLE OF GOVERNMENT IN THE AMERICAN ECONOMY: MASSACHUSETTS, 1774–1861* (1947).

147. Llewellyn, *supra* note 145, at 730, 732. In 1993, Willard Hurst observed that it was “literally true” that, as of the mid-1930s, “there were probably only three or four practicing legal historians in the United States.” Hendrik Hartog, *Snakes in Ireland: A Conversation with Willard Hurst*, 12 LAW & HIST. REV. 370, 385 (1994).

148. Hartog, *supra* note 147, at 374.

149. William J. Novak, *Law, Capitalism and the Liberal State: The Historical Sociology of James Willard Hurst*, 18 LAW & HIST. REV. 97, 99, 100 (2000).

150. JAMES WILLARD HURST, *THE GROWTH OF AMERICAN LAW: THE LAWMAKERS* 4 (1950). The second sentence of the book reads, “Men wanted national independence largely for economic reasons, but they said they wanted it because their legal rights were invaded”(3).

completely distinct from Pound's taught transatlantic common law tradition, Hurst's American law sprouted from rich democratic Midwestern sod, immanent in the actions of ordinary citizens who contrived institutions to lend legality to the pre-existing facts (settlements) they had created on the ground. For Hurst, ordinary Americans—not juridical elites—were makers of law. They did so “primarily by action,” hardly pausing to construct any lasting framework “except in areas which we saw most directly contributing to the release of private energy and the increase of private options.”¹⁵¹ Multiple egotistic struggles to realize self-interest generated functional socio-legal structures. With constitution-making out of the way, “the nineteenth century was prepared to treat law more casually, as an instrument to be used wherever it looked as if it would be useful.”¹⁵²

Hurst is famous for the instrumentalism immanent in this vision of American law. Instrumentalism, however, was but a surface phenomenon. As producers of outcomes, the structures it spawned reached no further than the short-term calculus that Hurst called “bastard pragmatism.”¹⁵³ Below instrumentalism lay consensus, something altogether different. For Hurst, the deep underlying structure of consensus was a necessary condition of his jurisprudence of self-interest: social consensus, conscious and conditioned, supplied law's meta-character, allowing interests to fight for relative advantage without risking systemic rupture. Consensus mediated the fight.¹⁵⁴

In the prolegomenon to his entire scholarly project, written in the late 1940s, Hurst underscored the production and reproduction of consensus as a basic function, foundational to the social order. The job was law's to perform. Political argument over the meaning of gain, or its distribution, was no more than a “vent for emotion.”¹⁵⁵ The real work was done in the juridical field, whose agencies,

151. JAMES WILLARD HURST, *LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH-CENTURY UNITED STATES* 5, 10 (1956).

152. *Id.* at 10. See also JAMES WILLARD HURST, *LAW AND SOCIAL ORDER IN THE UNITED STATES* 23–24 (1977).

153. See, e.g., JAMES WILLARD HURST, *LAW AND SOCIAL PROCESS IN UNITED STATES HISTORY* 147 (1972).

154. Hurst saw consensus (custom) as a condition of law production:

The most creative, driving, and powerful pressures upon our law emerged from the social setting. Social environment has two aspects. First, it is what men think: how they size up the universe and their place in it; what things they value, and how much; what they believe to be the relations between cause and effect, and the way these ideas affect their notions of how to go about getting the things that they value. Second, it is what men do: their habits, their institutions.

HURST, *supra* note 150, at 11. In *Social Science on a Lawyer's Bookshelf: Willard Hurst's Law and the Conditions of Freedom in the Nineteenth-Century United States*, 18 *LAW & HIST. REV.* 59, 80–81 (2000), Carl Landauer notes that Hurst portrayed the nineteenth century as “a fully articulated cultural structure” and “a carefully structured intellectual system in which the parts work perfectly together.” Fundamentally, Landauer concludes, “Hurst was describing the working of a value system. ‘The tone of this society,’ he stated about early nineteenth-century America, ‘was set by men for whom life's meaning lay in striving, creation, change, and mobility.’ All had ‘the same ‘life goals and values.’”

155. HURST, *supra* note 150, at 442.

protocols and personnel—legislatures, courts, executive and administrative bodies, lawyers—were handed the “ideal function” of “order[ing] social relations . . . protect[ing] the individual on the one hand, and the community on the other.”¹⁵⁶

The job for the juridical field, hence, was to be both functional and objective—find facts, make policy, and see to its execution “with substantial neutrality toward special interests.”¹⁵⁷ But the field’s capacities for neutrality were hampered by Americans’ preoccupation “with the economy as a field for private adventure,” which bred a historic indifference to the creation of efficient public institutions and left law open to the influence of special interests.¹⁵⁸ The supposedly hermetic juridical field of earlier legal historiography was in fact only too vulnerable to externalities:

Main currents in the history of all the principal agencies of lawmaking showed this in one fashion or another. The late-nineteenth-century courts yielded uncritically. . . . The bar fell so far into the governing temper of the time as to be content with the role either of technician or partisan, and forfeited much of its public standing as spokesman of the general interest.¹⁵⁹

The legislature showed no more capacity to identify and defend a public interest. Only the executive showed any potential. The argument was devastating to Pound’s celebratory *Formative Era*. Hurst could agree that law should perform “as mediator of the general interest” but not that it had succeeded in doing so over time. History’s job was not to participate in mythmaking but to assess law’s performance, “to trace the manner in which legal institutions had dealt with the resulting tensions in one field of public policy after another.”¹⁶⁰

One can legitimately identify Hurst’s history as the first systematic attempt to write a history of the creation and production of national legal practices.¹⁶¹ Given its predecessors, the question is why *this* history began to come about at this time: Why was Hurst successful in influencing legal-historical inquiry to move away from complaisant descriptions of “the production of the rules” in the juridical field to probe for the circumstances of rule production—the “rules for the production of the rules”? And how deeply, in fact, did Hurst’s new history probe?

The answer is organizational rather than intellectual. Hurst’s genre of legal

156. *Id.* at 439.

157. *Id.* at 443.

158. *Id.* at 444.

159. *Id.* at 445.

160. *Id.* at 446.

161. In 1956 Hurst identified his project as “a long-term program of research in the history of the interplay of law and other social institutions in the growth of the United States.” HURST, *supra* note 151, at vii.

history did not become paradigmatic until more than twenty years after Hurst began writing, and more than ten years after the circle of those whom he had influenced and supported began to produce their own “externalist” historical scholarship.¹⁶² Paradigm status came about through the exercise of considerable entrepreneurial capacities to build his genre, through calculated professional choice and strategy, rather than through some spontaneous shift in historical imagination. Examining that effort at paradigm construction, moreover, indicates that Hurst’s historiography was but one manifestation (and not the most important) of a more general critique that served far more than scholarly-analytic purposes. History was Hurst’s personal *métier* and vehicle, but the fundamental purpose of Hurst’s activities is better understood if placed outside any framework of scholarly ambition for history in law per se. Rather, Hurst’s professional goal, as had been Langdell’s (and the young Pound’s), was to stimulate the process of writing new rules for the production of rules so as to maintain law’s ascendancy within the juridical field.

To appreciate this, three aspects of Hurst’s effort must be highlighted. Most obvious, its location: professionally, Hurst was firmly situated within the juridical field, and he wrote for its attention. Second, its position: a half-century’s tenure at Wisconsin defined Hurst’s orientation to the juridical field as one decisively outside the orbit of the traditional centers of influence in the field—the eastern elite schools that had to that point produced the field’s dominant accounts of itself. Finally, standpoint: the strategic intellectual stance Hurst espoused was not that of history per se but, much more broadly, of “social science”—always, in the twentieth century, the disciplinary genre most clearly associated (as history was *not*), with innovation in the juridical field.

The call for innovation that Hurst answered arose from the combination of circumstances charted earlier in this article:¹⁶³ the failure of legal realism to achieve a decisive alteration in legal pedagogy, the resultant complacency in the postwar legal profession stemming from the continued narrowness of the training offered by traditional centers of influence, and, consequently, the sense of crisis arising from the profession’s difficulties in asserting capacities for political leadership in the postwar period.¹⁶⁴ Added to professional crisis was a perception that the social

162. Mark Tushnet noted in 1972 that, at the time of its publication in 1964, Hurst’s most ambitious empirical study (on which he had spent some seventeen years) *LAW AND ECONOMIC GROWTH: THE LEGAL HISTORY OF THE LUMBER INDUSTRY IN WISCONSIN* (1964) “received little attention” and, until the early 1970s, had been “largely ignored.” See Mark Tushnet, *Lumber and the Legal Process*, 1972 WIS. L. REV. 114 (1972). Robert Gordon also traces the rise of the Hurstian perspective to the early 1970s. Gordon, *supra* note 35, at 55. Lawrence M. Friedman, probably the most important disseminator and exemplar of Hurstian legal history, published the first edition of his *A HISTORY OF AMERICAN LAW* in 1973. Harry Scheiber was instrumental in introducing historians at large to Hurst’s work at about the same time. See his 1970 review article, *At the Borderland of Law and Economic History: The Contributions of Willard Hurst*, 75 AM. HIST. REV. 744 (1970).

163. See text accompanying notes 65–75 *supra*.

164. Garth, *supra* note 75, at 38, 54.

science disciplines were once more forging ahead (as they had in the 1890s and again in the 1920s) in the competition to furnish the key epistemological site for authoritative state decision making. Hurst's answer—his stress on the necessity that “empirical research and social science” be brought fully into the juridical field—was his answer both to law's crisis and the social sciences' challenge. It envisaged innovation as a broadening of the juridical field's capacities through reform controlled from within. Like Pound at the turn of the century, Hurst sought to renew the legal-academic establishment by appropriating expertise from outside. Also like Pound, law was to remain on top.¹⁶⁵

III. CRITICAL LEGAL HISTORY

Willard Hurst's campaign to renovate American legal pedagogy was successful in both its major aspects: promoting innovation in, while retaining initiative for, the juridical field. Socio-legal teaching and research was launched, but as we have seen its ambit was successfully contained within a legally constructed domain. New rules for the production of rules within the field were written, and the prior rule-formation paradigm (the taught tradition) declared obsolete. No less an observer than Supreme Court Justice Byron White acknowledged the change in 1971, praising the turn in legal research from “narrow study of judicial doctrine” to “deal[ing] with the ties between law and society.”¹⁶⁶

White's comments mark the early 1970s as a pivotal moment for Law & Society within the juridical field, but also for the spread of socio-legal history beyond it. As an entrepreneur for Law & Society, Hurst had recommended a general externalism, and since the early 1960s it had been coming on line.¹⁶⁷ But it is indisputable that by the early 1970s Hurst's legal history had also gained an appreciative audience among American historians. Symbolically, Hurst was invited to write the keynote essay for the volume *Law in American History*, published in 1971 by Harvard's impeccably establishment Charles Warren Center for Studies in American History. It is in that volume's introduction that Justice White can be found endorsing Hurst's “law and society” perspective over “doctrine.”¹⁶⁸

It is noteworthy, then, that it was precisely at this ceremonial moment celebrating the triumph of externality throughout the juridical field, and of socio-legal history's admission to the canon of “American History,” that we should encounter Morton Horwitz, then a young Assistant Professor at Harvard Law

165. In *Willard Hurst and the Administrative State: From Williams to Wisconsin*, 18 LAW & HIST. REV. 1, 14 (2000), Daniel Ernst notes that Hurst “agreed with [Felix] Frankfurter that ‘the expert should be on tap, but not on top’—unless that expert was a lawyer.”

166. Byron R. White, *Introduction to LAW IN AMERICAN HISTORY*, vi (Donald Fleming and Bernard Bailyn eds., 1971).

167. Richard Posner dates law's “decline” as an autonomous discipline from the mid-1960s. See Posner, *supra* note 80, at 761.

168. White, *supra* note 166.

School, entering upon a new and distinct struggle to define the proper ambit for legal studies, one that named not society but legal doctrine—the real meaning of the rules—as the essential terrain.¹⁶⁹ Like Hurst, Horwitz embraced a standpoint wider than history per se, being a prime mover in the Critical Legal Studies movement. Also like Hurst, Horwitz's preferred *métier* was legal history. Thereafter their sensibilities parted company.

In America, Horwitz observed quite appropriately, legal history had been written almost exclusively by lawyers. Horwitz speculated that scholars from outside the juridical field had absented themselves because writing legal history “inevitably involves mastery of technical legal doctrine,” which always left the outsider “paralyzed with fear.”¹⁷⁰ But what kept historians untutored in law from writing legal history did not really interest Horwitz; like all the law-trained legal historians before him, Horwitz was writing to gain attention within the juridical field. His particular objective was to expose the reality of what his predecessors had created—a history of continuities and intact traditions and doctrinal necessities, all of which was “to pervert the real function of history by reducing it to the pathetic role of justifying the world as it is”—and to overthrow it.¹⁷¹

Horwitz's target here was Roscoe Pound's celebration of law's internalized constancy under the tutelage of heroic judges and sympathetic legal intellectuals. He spoke out for “the real function of history”—corrosive critique—against Pound's “dominant form of legal history.”¹⁷² Pound's form, of course, was no longer dominant. Had not Hurst and his acolytes been pounding Pound for more than twenty years? Yet Horwitz was no less critical of Hurst's approach, as his immensely influential *Transformation of American Law* (1977) would demonstrate. Hurst measured outcomes by process—how effectively the goals of a presumptively shared national consciousness and national purpose were realized. But social *process* did not acknowledge social *struggle*. Asymmetric distributions of wealth and power left Horwitz skeptical of histories that could represent legal innovations as instrumental responses to consensual “social needs.” The disproportionate accrual of benefits to entrepreneurial and commercial groups during the “formative era” signified that legal action was guided by conscious politics of “expropriation of wealth,” of “subsidies to growth” coerced from others. Once redistribution had been achieved, the dynamic legal innovation that had achieved it was replaced by “a scientific, objective, professional and apolitical conception of law,” late nineteenth-century formalism, which camouflaged law's “political and redistributive functions.”¹⁷³

169. Morton J. Horwitz, *The Conservative Tradition in the Writing of American Legal History*, 17 AM. J. LEGAL HIST. 275 (1973).

170. *Id.* at 275.

171. *Id.* at 281.

172. *Id.* at 278, 283.

173. MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW: 1780–1860*, at xvi,

Horwitz's assault on lawyers' perversions of history was the first in a line of more elaborated analyses that would coalesce in the early 1980s as "Critical Legal History" (CLH), the most productive and sustained expression of Critical Legal Studies (CLS). Written largely from within the elite eastern establishment that Hurst had targeted, the defining characteristic of the genre would be its rejection of Hurst's externalism, its preoccupation with doctrine in particular, and the law's internalities in general.¹⁷⁴

As it developed over the decade following Horwitz's assault on "the conservative tradition," CLH's form and expression evolved. Initially, its adherents identified CLH as a socio-legal genre, albeit with a "new left" bite. Much as Hurst's earliest thoughts on legal history had been influenced by reading Charles and Mary Beard, CLH flirted with the English radical historians, E.P. Thompson and Douglas Hay. Its earliest manifestations demonstrated some affinity with Nietzsche's sense of the critical—fighting with the present's structures of authorization and limitation through remembrance of the past of suffering and violence that underwrites it; and simultaneously recognizing that those structures were very deeply embedded and very difficult to alter. It was obvious, wrote the genre's leading historiographer, Robert Gordon, in the first comprehensive statement theorizing CLH, published in 1982, that there exist "many constraints on human social activity—scarcities of desired things, finite resources of bodies and minds, production possibilities of existing and perhaps all future technologies, perhaps even ineradicable propensities for evil—that any society will have to face."¹⁷⁵ What Gordon wanted to emphasize, however, was that material conditions did not of themselves dictate a specific set of social arrangements "in history or in our own time."¹⁷⁶ And he wanted to show that this realization could be beneficial to political action. Recognition that there were no objective laws of social change operating automatically in closed causal systems independent of, or despite, human imagination, was at one level, Gordon noted, deeply depressing, one might say tragic. It meant that history, as the *Tribune's* cliché had it, was not on "our" side. But it was also liberating, for it led on to the conclusion that history was not on any side, and that "the real enemy"—and hence solution—"is us . . . the structures we carry around in our heads, the limits on our imagination." Change was difficult. People had to "break out of their accustomed ways." This was rare. Success was rarer. Nevertheless the point was to stress the underdetermination of material constraints visible in "concrete histories of particular societies" in order to relocate the potential for social change in "our"

266 (1977).

174. The trend was given decisive definition, meaning, and a name in Robert W. Gordon's famous 1984 article, *Critical Legal Histories*, *supra* note 78.

175. Robert W. Gordon, *New Developments in Legal Theory*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 291 (David Kairys ed., 1982).

176. *Id.*

recognition of our own responsibility for the way things were.¹⁷⁷ By the early 1980s, in other words, CLH had given up on Horwitz's attempt in *Transformation* to show that determinable relationships existed in historical time between legal doctrines and asymmetric socio-economic outcomes. Critical legal historians continued to accept Horwitz's emphasis on the intellectual history of legal doctrine, but switched to "subversive" exposure of the politics of legal knowledge. The objective became not to reveal law's implication in particular social and economic outcomes but rather its plasticity and indeterminacy.

So far so good. People had a capacity to act; the trick was first to make them aware of it, and then persuade them of the necessity. Critical legal historians made the study of "legal consciousness" their point of entry. But as they did so, CLH became less and less concerned with the consciousness of masses—the field-level socio-legal domain—and more and more caught up in investigation of the legal consciousness of elites and the constructions of formal mandarin legality. As Horwitz's reversion to doctrine at the very outset of the CLS era suggested, CLH's reason for being lay in the realm of struggles *within* the juridical field over the meaning of the rules that the field produced.¹⁷⁸ Excavating doctrine—"taking dominant legal ideologies at their own estimation and trying to see how their components are assembled"—was more exciting, and more important to the CLS project, than reporting on "the grimy details" of how ruling classes attained and used power.¹⁷⁹ Amid the excitement, Gordon had noted that "we'll never understand the power that legal forms hold over our minds unless we see them at work up close in the most ordinary settings."¹⁸⁰ Nevertheless, grime would get the shorter shrift.

The choice of focus was important. Hurst's socio-legal paradigm had been responsible for sparking the first sustained efforts at professional historical research on law; it would remain highly influential among the growing numbers of scholars who for the first time were being trained in legal history *as historians*.¹⁸¹

177. *Id.* at 290, 291.

178. *See* text accompanying notes 76–84 *supra*.

179. Robert W. Gordon, *The Past as Authority and as Social Critic: Stabilizing and Destabilizing Functions of History in Legal Argument*, in *THE HISTORIC TURN IN THE HUMAN SCIENCES* 360 (Terence J. McDonald ed., 1996).

180. Gordon, *supra* note 78, at 124.

181. *See, e.g.*, ARTHUR F. MCEVOY, *THE FISHERMAN'S PROBLEM: ECOLOGY AND LAW IN THE CALIFORNIA FISHERIES, 1850–1980* (1986); VICTORIA SAKER WOESTE, *THE FARMER'S BENEVOLENT TRUST: LAW AND AGRICULTURAL COOPERATION IN INDUSTRIAL AMERICA, 1865–1945* (1998). Students of Morton Keller have tended to show a critical appreciation for Hurst while taking a greater interest in developing a legal history more oriented to questions of governance and state capacities, consonant with Keller's interests. *See, e.g.*, MICHAEL GROSSBERG, *GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH-CENTURY AMERICA* (1985); HENDRIK HARTOG, *PUBLIC PROPERTY AND PRIVATE POWER: THE CORPORATION OF THE CITY OF NEW YORK IN AMERICAN LAW, 1730–1870* (1983); WILLIAM J. NOVAK, *THE PEOPLE'S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA* (1996).

“The Horwitz thesis,” as *Transformation’s* argument came to be known, was equally influential among historians. Legal scholars would spend years excoriating the book. John Phillip Reid of New York University School of Law, for example, denounced Horwitz as a “conspiratorial materialis[t],” and called upon the legal academy to rally to protect the gullible from the seductive manipulations of iconoclasts intent on sacking “the temple of legal history.”¹⁸² Historians treated *Transformation* with considerably greater respect, awarding it the 1978 Bancroft Prize. Most dwelt less on the “complex and technical” details of its argument than on its account of law’s socio-economic effects, which enabled them to assimilate *Transformation* to the now well-established socio-legal paradigm. Not many historians would follow CLH’s subsequent turn away from what Robert Gordon would term “evolutionary functionalism” (a breathtakingly wide category in which Gordon included literally every form of social-historical theorizing, from Marx and Weber to Hurst, and also Horwitz prior to CLS) to the indeterminacy thesis.¹⁸³ These remained largely a preoccupation of law-based academics.

The more CLH favored the mandarin domain of doctrinal disputation, the more its exponents found reason to depart from their early recognition of the durability of “accustomed ways” in favor of representations of structures of thought as ever more plastic, contradictory, contested, and plural. Deconstruction of doctrine taught that there were no “*necessary* consequences of the adoption of [any] given regime of rules.”¹⁸⁴ As Gordon put it, “if the legal rules and processes that in part constitute the workings of a liberal-capitalist society are contradictory at the core, there must always be alternative arrangements—already built in, as it were—to those that a society at any given time happens to privilege.”¹⁸⁵ By the mid-1990s, CLH had produced so indeterminate a world that—to restate Gordon’s words—privilege had become a matter of happenstance. In its maturity, that is, CLH moved to examine the rules for the production of the rules, only to conclude that there were none.

To CLS/CLH, indeterminacy was a move in an intellectual-analytic game. Springing from an initial confrontation with instrumentalism, indeterminacy confronted and undermined dogma. Indeterminacy rendered structures perpetually malleable, legal traditions perpetually multiple. Every form of legality, and every historical statement, became a constructed artifact. By turning critical history into a field of play, however, critical legal historians risked turning their practice into the realization of critical history’s preeminent liability—purposelessness, irresponsibility, scholasticism. There is, to use Francis Barker’s word, a fundamental “impertinence” in the elite intellectual’s account of the liberating promise of contingency and indeterminacy, the call to recognize

182. John Phillip Reid, *A Plot Too Doctrinaire*, 55 TEX. L. REV. 1307, 1321 (1977).

183. Gordon, *supra* note 78, at 59–102.

184. *Id.* at 101, 125; *see also* Gordon, *supra* note 179, at 358–63.

185. Gordon, *supra* note 179, at 361–62.

opportunity in plasticity, that undermines its moral integrity. The vast majority of the world needs no instruction in indeterminacy. Its “normal experience . . . has been for centuries that of unstable turbulent uncertainty.”¹⁸⁶ This is an uncertainty inflicted not desired, to be escaped not sought.

The intellectual’s claim that plasticity is to be embraced as liberation, rather than feared as simply another effect of power, does not accord with any sensible understanding of the current conjuncture. Gordon, to his great credit, eventually recognized the problem. “The notion that every form of legality [indeed of consciousness] is a constructed artifact . . . tends . . . to deprive people of any strong basis for confidence in transcendent standpoints for critique of the present order.”¹⁸⁷ But in 1995, at least, he had no answer. Critical Legal History was at a dead end.

A. Critical Historicism

In the later 1990s the impasse besetting CLH seemed temporarily to abate as Robert Gordon announced (somewhat in the manner of a preacher at a revival meeting) the arrival of a new iteration of the genre, “critical historicism.” Proclaiming its products perhaps “the most exciting work currently being done on law,”¹⁸⁸ Gordon underlined the sense of occasion by resort to a rather exotic metaphor. The arrival of critical historicism represented nothing less than the presentation of credentials by “an accredited envoy from Other Genres to the City of Law,” and recognition of the envoy “as a category of intellectual practice relevant to law.”¹⁸⁹

As Gordon’s metaphor suggests, the key characteristic of critical historicism was its apparent transfiguration of “legal history” by transcending the conceptual tension between its disciplinary components—“law” and “history.” Legal history had had few practitioners between the demise of the historical school at the turn of the twentieth century and the efflorescence of Hurst’s socio-legal paradigm fifty years later, but that had not prevented self-appointed guardians from policing the juridical field’s borders. In 1931, for example, Karl Llewellyn took to the *Columbia Law Review* to ridicule the young Richard Brandon Morris for his “depressing and grotesque” intrusions upon matters of law. Morris should have had “a careful professional go over his manuscript” to eliminate his “curious errors.”¹⁹⁰ Twenty years later, Hurst himself echoed Llewellyn in observing that scholars without legal training who entered legal terrain would require “lawmen” to guide their

186. FRANCIS BARKER, *THE CULTURE OF VIOLENCE: ESSAYS ON TRAGEDY AND HISTORY* 111 (1993).

187. Gordon, *supra* note 179, at 364–65.

188. Gordon, *supra* note 98, at 1023, 1029.

189. *Id.* at 1023.

190. Llewellyn, *supra* note 145, at 729, 731.

expeditions clear of facile error born in ignorance.¹⁹¹ As more non-lawyer historians entered the field in the 1970s, John Reid took up the refrain, fearing, in 1978, that innocents abroad in law would be gulled by Horwitz's *Transformation*.¹⁹² Another New York lawyer, Robert A. Ferguson, offered his own variation to greet the early twenty-first century.¹⁹³ Whether it was the 1930s, the 1950s, the 1970s, or the 1990s the observation was the same: legal history might indeed benefit from the participation of outsiders—but only under the guidance of those trained in “the law.” Even CLS's iconoclasts had voiced a certain ambivalence. We have already encountered the young Horwitz's provocative observation that historians avoided encounters with legal history because of their fear of its technicalities.¹⁹⁴ *Sotto voce*, Robert Gordon had implied the same himself in downplaying the significance of history written at the field level of the socio-legal domain in favor of investigation of the legal consciousness of elites and their elaborated constructions of formal mandarin legality.¹⁹⁵ Critical historicism, however, threw open the gates of the juridical field to all comers: “any approach to the past . . . that inverts or scrambles familiar narratives of stasis, recovery or progress; anything that advances rival perspectives . . . or that posits alternative trajectories that might have produced a very different present,” was admissible.¹⁹⁶ When it came to law, history's capacity to up-end had become limitless: “virtually all history as practiced by modern historians” bore critically upon law.¹⁹⁷

The exoticism of his metaphor notwithstanding, Gordon was unable to demonstrate that critical historicism actually represented any real break in the relationship between CLH and the “legally constructed domain” from which it sprang. Critical historicism's “arrival” is announced to a legal audience in one of law's elite spaces (the pages of the *Stanford Law Review*). Its desire for admission—recognition of its “relevance”—is palpable. The encounter itself occurs within a closed system—hermetic, circular. By whom is the envoy received? One part of the juridical field. By whom accredited? Another part. For these best and brightest critical historicists are not really from “other genres” at all. The envoy is actually a delegation of five law professors (if we include Gordon) and a single constitutional historian—to lawyers, always the most tolerable breed of

191. Garth, *supra* note 75, at 48.

192. Reid, *supra* note 182, at 1321.

193. Robert A. Ferguson, *Reviews of Books*, 59 WM. & MARY Q. 481 (2002). The best legal history, Ferguson argued, was that which paid proper attention to “hard-edged peculiarities and concrete particularities of legal doctrine and legal procedure.” *Id.* at 482. Nothing was to be gained from attempts by historians to seek an independent standpoint on law; even when the move was worthwhile they would find that legal scholars had always already anticipated in their own work the critique that the move implied. *Id.* at 483.

194. See HORWITZ, *supra* note 169.

195. Gordon, *supra* note 179.

196. Gordon, *supra* note 98, at 1024.

197. *Id.*

historian.¹⁹⁸ They have traveled from their various law schools to “City Central” to have their craft formally certified as an appropriate “category of intellectual practice” for law professors to pursue. Solemnly, the City has granted membership.

Critical historicism’s arrival as savior to the project of writing CLH was a subtext to Gordon’s main claim, maintained consistently throughout his career as CLH’s historiographer, that CLH has always been subversive because it disrupts the mainstream modes of relationship between law and history—what I have here called the monumental, the antiquarian—that serve to reassure us “that what we do now flows continuously out of our past, out of precedents, traditions, fidelity to statutory and Constitutional texts and meanings.”¹⁹⁹ CLH’s project had been temporarily derailed by the deviant doctrinalism preached during CLS’s playful heyday. Hence the subtext of escape: The new critical historicism that the *Stanford Law Review* symposium celebrated was no longer confined to doctrinal history. It was “*any* approach that unsettles the familiar strategies that we use to tame the past in order to normalize the present.”²⁰⁰

On the reading so far, the “arrival” of critical historicism powerfully suggests that the history of law practiced and recognized within the juridical field remains a closed loop. Lawyers write history for their own purposes, whether critical or conventional. The most obvious of those purposes is to use history as a vehicle to commend, defend, reform, replace, or simply argue about, the rules. Within the juridical field, that is, history always ends up, ultimately, as a modality of jurisprudential debate. And jurisprudence, we have seen, is prescriptive.²⁰¹ “When it is not pursuing the analytic question of the conditions of legal validity, contemporary jurisprudence is telling us how judges should rule or how regulatory regimes should work.”²⁰²

Another reading allows a more generous conclusion. Legitimizing “*any* approach to the past” as long as it unsettles routines, Gordon argues, brings “virtually all history as practiced by modern historians” to bear on law.²⁰³ As such, critical historicism is a break in the trajectory of critical legal-historical scholarship, a departure from its former practices. It opens the juridical field to the whole range of disciplinary practices developed by professional historians, practices noted but as quickly forgotten in CLH’s rapid early 1980s slide from the social to the doctrinal.

But how does “virtually all history”—the monumental? the antiquarian?—

198. See, e.g., HORWITZ, *supra* note 169, at 275.

199. Gordon, *supra* note 98, at 1023.

200. *Id.* at 1024 (emphasis added).

201. See text at note 18 *supra*.

202. PAUL KAHN, *THE CULTURAL STUDY OF LAW: RECONSTRUCTING LEGAL SCHOLARSHIP* 1 (1999).

203. Gordon, *supra* note 98, at 1024.

suddenly become critical history? Gordon's claim for historical practice's immanent criticality in the domain of law is founded on the proposition that professional historians' purposes and working assumptions are in basic conflict with those of lawyers. History and law are distinct forms of expertise; historians and lawyers are distinct breeds of trained intellect. "Lawyers are monists, historians are pluralists." That is, "lawyers want to recover a single authoritative meaning from a past act or practice while historians look for plural, contested, or ambiguous meanings." Second, "Lawyers are overtly presentist: they want to bring past practices into the present to serve present purposes." Historians are not interested in presentism, but difference—the dead past, the pastness of the past, the disparity between past and present, the breaks and "great epistemic shifts" that render past and present irreducibly discontinuous.²⁰⁴

Both propositions are, I think, open to dispute. It is not difficult to think of monist histories, nor are they necessarily bad history nor necessarily "uncritical" because of it. (Can one think of a more monist history than Charles Beard's decidedly critical *Economic Interpretation of the Constitution of the United States*?)²⁰⁵ Nor is the identification of "history" with "the past" and its "difference" all that helpful. First, the very idea of a separated "past" is problematic. As Keith Jenkins observes, following Hayden White, the past as such has no accessible reality, no rhyme nor rhythm of its own. It is sublime—incomprehensible, uncontrollable, uncontrolled, disorderly. The past leaves only fragments or remnants that are already historicized in the very act of their preservation; that is, the remnants exist only because they are texts—archaeological, documentary, visual—from which "data" can be extracted and organized into other texts—chronicles and chronologies and narratives—which impose order and sequence on events and ideas using theories or assumptions or literary forms or common sense. From this perspective the past furnishes not history but only material "waiting to be appropriated with reference to the social formation wherein the appropriations are being variously legitimated."²⁰⁶ Second, a sizeable proportion of modern history has in fact been composed in the course of present-minded searches for "usable pasts."²⁰⁷ Indeed, the creation of histories that purport to explain a current present is, one assumes, a prime motivation for critical historians. Nor, finally, can the

204. *Id.* at 1024–25.

205. CHARLES A. BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES (1913).

206. JENKINS, *supra* note 123, at 175–76.

207. The concept originated with Van Wyck Brooks. See Van Wyck Brooks, *On Creating a Usable Past*, 64 THE DIAL 337 (1918). For recent uses see, e.g., TOWARD A USABLE PAST: LIBERTY UNDER STATE CONSTITUTIONS (Paul Finkelman and Stephen E. Gottlieb eds., 2009); RESTORATION AND HISTORY: THE SEARCH FOR A USABLE ENVIRONMENTAL PAST (Marcus Hall ed., 2009); Carnegie Council Conference, *The Search for a Usable Past*, http://www.cceia.org/resources/articles_papers_reports/716.html (last visited Sept. 19, 2010). Other examples can be found at Tomlins, *History*, *supra* note 26, at 393, note 340.

temporality of history be confined to what's done with, as if it could be contained. "The past can be seized only as an image which flashes up at the instant it can be recognized. . . . To articulate the past historically . . . means to seize hold of a memory as it flashes up at a moment of danger."²⁰⁸ As Barker has put it, history is the seizure of "that disturbing, critical irruption into the present."²⁰⁹

So the idea that "virtually all history as practiced by modern historians" is critical when mixed with law seems to me based on a dubious assumption of essentialist—as opposed to political, or strategic, or disciplinary (or all three together)—distinctions between lawyers and historians. History might well have the desired up-ending effect when introduced into legal discourse because to place distinct expertises in apposition will produce dissonance. But dissonance is not critique. History simply produces narratives of stasis and progress that are different from those produced by the expertise of law.

More to the point, how in fact does modernity's pluralist history, sensible of the past's pastness, ambiguity, contingency, and so forth actually enliven the project of CLH? After all, the history practiced by virtually all modern historians embraces no expressly critical philosophical purpose: it does not put itself, for example, in the service of "life and action." Indeed, the opposite. History's current default definition of its own practice is entirely conventional: sequentialist in time, contextualist in method, and separatist in philosophy. "[I]t is the people of the 1780s, not the people of 2006, that the historian is interested in."²¹⁰ The expertise of history sequesters past phenomena within a realm of context on the far side of a temporal *caesura* where—"butterflies on pins"²¹¹—they serve no particular purpose at all. There is, that is, nothing necessarily "critical" that history introduces into the legal realm. Far more likely, at the beginning of the twenty-first century, one will simply reproduce professional history's current preoccupation with complexity²¹²—the production of an infinity of outcomes that will enable one to provide whatever "past" for law one desires, critical or apologetic, antiquarian or heroic.

In fact, Gordon argues that the critical contribution of history is precisely plurality itself. "What is common to many of these approaches is that they treat law—meaning not just legal texts but legal instruments, processes, rituals, interactions, discourses—as cultural artifacts, imaginative constructs, historically contingent and perpetually contested and renegotiated."²¹³ But perpetual

208. Walter Benjamin, *Theses on the Philosophy of History*, in WALTER BENJAMIN, ILLUMINATIONS 253, 255 (Hannah Arendt ed., 1969).

209. BARKER, *supra* note 186, at 108.

210. Gordon S. Wood, *Righteous Anger*, THE NEW YORK REVIEW OF BOOKS, <http://www.nybooks.com/articles/archives/2006/may/11/righteous-anger/> (last visited Nov. 12, 2010).

211. CONSTANTIN FASOLT, THE LIMITS OF HISTORY 151 (2004).

212. See text accompanying notes 248–50 *infra*.

213. Gordon, *supra* note 98, at 1029.

contingency is really of interest only to the intellectual, the “host of pure thinkers who only look on at life, of knowledge-thirsty individuals whom knowledge alone will satisfy and to whom the accumulation of knowledge is itself the goal.”²¹⁴ What the infinite plurality of modern (post-modern?) historical practice conveys is nothing so much as a new form of burial in the past. Once more “all that has ever been rushes upon mankind”—this time, not as “a science of universal becoming”²¹⁵ but as a blizzard of atomized narratives that, all together, create a chaos of relativized possibilities, of happy/unhappy individualities.

Modern (post-modern) historians’ desire to complexify is convivial to critical historicism precisely insofar as it reproduces and spreads wide the totalized contingency prized by the mandarin mode of critical doctrinal history. But unfortunately history that is infinitely interpretable, a history of niches that grants everyone their own history, is not critical history at all, but history dispersed, atomized, neutralized. “Virtually all history” is not a compelling conceptual-organizational structure for the subject. It is an evasion of responsibility, both moral and political, to advance hypotheses, assign priorities, make causal statements, explain outcomes.

Above all, critical history cannot be enlivened by history that is infinitely interpretable because infinite interpretation is a convenient means to overall indifference and forgetfulness. The critical historian’s job is remembrance and explanation. After alternative possibilities have been uncovered, lost voices allowed to speak, contingencies explored and so on, things still come out a certain way. We need to know why. “In ultimate epistemological senses it may [be necessary] to exercise some scepticism about [one’s] own groundedness, but this is quite different from beginning in a programmatic way from that lack of foundation.” Nor should we fear “general statements about the structure and transformation of history which are not rooted for their ‘truth’ . . . in a single and particular historical moment.” The point of such a metanarrative is to disburden ourselves of “the dead weight of the apparent past in order that [we] may remember.”²¹⁶

When at the end of the nineteenth century, shortly before his death, Rudolf von Jhering wrote that legal history “should not content itself with telling what happened, what changes occurred” but that it should discover “the reason, the ‘why,’ of the facts described, and the forces that underlie and determine the changes,” and also the causal relationships “between antecedent and subsequent facts,” between changes and other changes,²¹⁷ he was describing a form of history grounded upon explanation. Like Pound, whom he influenced, Jhering wrote as a critic of nineteenth-century historical jurisprudence who was informed by

214. NIETZSCHE, *supra* note 102, at 77.

215. *Id.*

216. BARKER, *supra* note 186, at 107.

217. *See* JHERING, *supra* note 134.

developments in the kindred disciplines (social science). Unlike Pound, he proposed not a new *jurisprudence* but a legal history emancipated from law, an independent explanatory discipline of its own. If the energy so evident in the second half of the twentieth century in the substantive conjunction between history and law is to be sustained into the twenty-first century, and especially if the conjunction is to provide the interpretive edge for study of law that CLH sought, an independent explanatory legal history seems essential. There is no need to adopt Jhering's terms, positing underlying determinative forces, in order to achieve that objective. The world may indeed be "socially constructed" rather than materially "determined." But that does not make it any the more malleable or objective causal explanation any the less consequential. Social constructions can prove immensely durable.²¹⁸

If, however, we are to seek an explanatory legal history, we must seek emancipation from the conventions of contemporary history as well as of law. When Nietzsche wrote of humanity's need for a "rough and charmless" history he meant precisely a history that was *not* dedicated to the service of pure knowledge. "The superfluous is the enemy of the necessary."²¹⁹ At the beginning of the twenty-first century we can justifiably claim that both law and history encompass a great deal more knowledge than a hundred years ago. It is far less clear whether the "more" that is known stands in the service of life.

IV. TOWARD A STRUCTURAL HISTORY OF NATIONAL LEGAL PRACTICES

In Parts 2 and 3 of this article, I have tried to demonstrate that the century of the historical school was followed by a half century of essential irrelevance for history vis-à-vis law, followed by a half century of resurgence, led first by the "externalist" scholarship of Willard Hurst, then by the revived doctrinalism of the Critical Legal Historians. Because these phases coincide roughly with those canvassed in Part I's synoptic history of the juridical field it makes sense to ask what role history has played as a resource (a practice, a discourse) available for deployment as the juridical field has constituted and reconstituted itself. What does the form of history's mobilization in the explanatory practices that have sustained or criticized law's identity and effectivity tell us about each phase of the American juridical field's development?

History within the juridical field is history within a field of power that sets "the key terms of legitimacy."²²⁰ When Willard Hurst invented modern American legal history, he did so by opening the discipline outward. Robert Gordon first employed his urban metaphor at the Hurstian peak, when he congratulated Hurst

218. As we have seen, CLS/CLH acknowledged this in its early days. *See, e.g.*, Gordon, *supra* note 79. Later statements, however, placed ever greater stress on the contingency of all social (and historical) phenomena.

219. NIETZSCHE, *supra* note 102, at 59.

220. Dezalay and Garth, *supra* note 28, at 307.

for lowering the drawbridge and “throw[ing] open the gates” of the city to traffic from general historiography.²²¹ But Hurst, we saw, always thought the tourists needed an official guide, once inside, lest they wander into places they did not belong. Non-lawyers, Hurst said, would be “hampered chiefly by their ignorance, first, of the law’s jargon, and, secondly, of the techniques of reading between the lines so that one does not take more seriously than he should what the law declares.”²²² The phrase “techniques of reading between the lines” is a particularly useful indicator that, for all its openings to the outside, the emphasis in Hurst’s historiography lay on maintaining the whip hand within the field. Such a reading is necessarily entirely subjective—not in other words a matter of technique at all, but art. And so it has remained. Law’s encounters with history reproduce the history of law’s disciplinary encounters in general. Law is receptive to encounters with disciplines that improve its capacity to explain itself, or refine its performance in setting the key terms of legitimacy. Law has shown far less interest in encounters with disciplines that instead intrude upon law’s terms for deployment of power and authority, reading not between the lines but anywhere they like, treating law as a subject, like any other.

Investigation of the uses made of history within the juridical field refines our understanding of the ways in which the American juridical field composes and maintains law, and how in the process it ensures that its actions are perceived as effective and legitimate. In addition, investigation permits self-conscious refinement of history as a critical practice deployable in the enterprise identified by Dezalay and Garth as “explain[ing] the ‘rules for the production of the rules’” which I have embraced as the framework for this article.²²³ As Dezalay and Garth put it, “the content and the scope of rules produced to govern the state and the economy cannot be separated from the circumstances of their creation and production.”²²⁴ In America, rules of governance emerge in the course of interaction among distinct discourses, disciplines, and professions, but the interaction is one in which law, besides being a participant, also sets “the key terms of legitimacy.”²²⁵ All those who seek to influence the production of the rules (the process of formation and reformation of the rules that govern state and social action) assume the juridical field’s foundational character as a given. “[T]here is very little effort to explain the ‘rules for the production of the rules.’ Instead, the discourses within the disciplines tend to proceed in a quasi-legalistic mode, describing what the rules should be.”²²⁶ They do not discuss “what makes

221. Gordon, *supra* note 35, at 54, 55.

222. Garth, *supra* note 75, at 48 (quoting James Willard Hurst).

223. Dezalay and Garth, *supra* note 28, at 311.

224. *Id.* at 307.

225. *Id.*

226. *Id.* at 311.

the credibility of law” or “how the law is made.”²²⁷ They buy into law’s prescriptive discourse and, insofar as they try to go it one better, simply reproduce it.

A different approach is necessary if we are to understand the rules that are produced. It is even more necessary if we are to understand *how* they are produced—“the production and legitimation of law itself”—for as we have already established, the production of rules is necessarily a process with formative rules of its own. “[T]he circumstances of production shape the range of possibilities that are likely to be contemplated and implemented—or ignored.”²²⁸

To understand the rules produced, Dezalay and Garth argue, one must “examine their genesis—where they come from, what material was used to create them, and what conflicts were present at the time.”²²⁹ As they acknowledge, this means writing history. It is of course a truism that the law is historical, that current rules are a product of the past, recent or remote—“some ancient statute, or old writing of a court, or in the exposition by one of the old writers, from Glanvil or Bracton to Coke, Hale or Blackstone.”²³⁰ CLH, whatever its failings, successfully debunked that smooth, irreversible, linear temporality. But the history described here is different: inquiry into the rules for the production of the rules is nothing less than inquiry “into the structural history of the creation and production of national legal practices.”²³¹ The subjects of that inquiry are “national histories and disciplinary evolutions”²³²—the institutional structures within which the production of rules occurs, the methods of research and theories of formation embraced by those who are engaged in rule production, and the networks through which their output becomes influence.

To write this history of the juridical field necessarily includes writing the history of the field’s own legal-historical practices. The history of law has been an intellectual practice largely contained within the boundaries of the juridical field. But history, just like law and the social sciences, is also a mode of research and a theory of formation. History is rarely capable of producing specific rules of governance itself, but it certainly produces discourses of causation that powerfully contextualize the production of rules by others, and thus helps to define the terrain of rule production. History is a particularly powerful resource in the hands of the state and its agents, for it allows them to create broad narratives of necessity and progress to explain their actions, and thereby create a context within which more instrumentalist discourses can safely nest their recommendations.²³³ In

227. *Id.* at 311, 312.

228. *Id.* at 307, 312.

229. *Id.* at 307.

230. W.J.V. Windeyer, *History in Law and Law in History*, 11 ALTA. L. REV. 123, 123 (1973).

231. Dezalay and Garth, *supra* note 28, at 311.

232. *Id.*

233. As Thomas Bender has written:

[I]t was in the nineteenth century that history, as a professional discipline, and the nation,

considering the construction of the rules for the production of the rules, then, it is crucial to pay attention to past uses made of history—legal and general—both as a modality of inquiry into law, and as a resource to which participants in the juridical field have turned to sustain the security and authority—maintain the meta-character—of the juridical field itself.

For the most part in the U.S. case, history written within the juridical field has provided justification for each successive iteration of the field. This was the role played by historical jurisprudence before Langdell, as it was in the case of later nineteenth-century histories of the Anglo-American common law tradition, Pound's taught legal tradition, Hurst's socio-legal empiricism, and even Critical Legal Studies' new doctrinalism.²³⁴ Critical historicism's embrace of "virtually all" history might, I have conceded, represent a departure, or it might be thought of as just another form of cooptation, or confinement, simply part of the general drift to methodological pluralism that has been the juridical field's latest (though not uncontested²³⁵) self-reinvention. Assuredly, history within the juridical field is not merely dutiful in its performances. Multiple perspectives have existed within its overall trajectory. Even those modes of scholarship that have mobilized history for purposes of critique within the juridical field—Hurst's external paradigm, Critical Legal History—have tended, however, to channel its forms to ensure that they serve internally defined prescriptive purposes.

On the evidence of recent years, legal history *outside* the juridical field has become more fully attuned to critique than prescription, to the dismantling of processes of rule production so as to reveal "the rules for the production of the rules." One can argue that this has occurred solely by default. Historians are only rarely members of the community of rule recommenders, although they can of course be found occasionally in the ranks of public intellectuals propagandizing for particular outcomes. The late nineteenth-century reorganization of inquiry did not constitute history as an instrumental social knowledge as it did the social sciences, and little has occurred since to alter that state of affairs. Dezalay and Garth note, following Wallerstein, that "the division of the roles of the disciplines is the product mainly of the nineteenth-century state. Political science thus focuses on national government . . . anthropology focuses on colonial relationships."²³⁶ History enjoys no similarly demarcated role. Unable, despite its best efforts, to

as the new and dominant form of political subjectivity and power, established a tight connection that amounted to collaboration. With the founding of research universities in Europe and, in a more complicated way, in the United States, historians and humanities scholars produced national histories and certified national literatures and cultures, which in turn helped to sustain the project of making the modern nation-state.

Thomas Bender, *Historians, the Nation and the Plenitude of Narratives*, in *RETHINKING AMERICAN HISTORY IN A GLOBAL AGE* 16 (Thomas Bender ed., 2002).

234. In justifying each successive iteration, each mode of history, of course, is subversive of the previous iteration.

235. See text accompanying note 241 *infra*.

236. Dezalay and Garth, *supra* note 28, at 311.

develop a systematic (positivist) prescriptivism of its own, history has been left to choose among mythmaking, sheer description, and interpretation.²³⁷ It is perhaps not surprising that, even if only by default, attempts to understand “why law is what it is,” discussion of “what makes the credibility of law,” scrutiny of “the black box that produces the law and more generally the rules of the game for governance,” have an opportunity to creep onto its agenda.²³⁸

V. CONCLUSION: INTERDISCIPLINARITY AND IRVINE’S NEW LAW SCHOOL

*Rough winds do shake the darling buds of May
And summer’s lease bath all too short a date.*²³⁹

It remains, finally, to return to the question raised at the end of Part I; that is, to consider what bearing the examination undertaken in this article—of the development of the American juridical field and of the relationship of history to the juridical field—has on the country’s 200th law school and its interdisciplinary project.

One way to understand the UC Irvine School of Law’s definition of its agenda is that it is nothing more than an expression of the most recent set of moves by which law seeks to maintain disciplinary and professional ascendancy vis-à-vis competing forms of expertise over the production of rules, and over the rules for the production of the rules. In the service of maintaining ascendancy, law as discipline has continuously oscillated between seeking modes of intellectual commonality with other disciplines, perceived as useful sources of intellectual and social capital, and fending them off. “Interdisciplinarity” can thus be understood as simply the latest in a set of relationships that over time has facilitated the absorption into the juridical field’s domain of as much disciplinary expertise from outside itself as necessary to sustain law’s overall purpose. Historically, we have seen, the juridical field has always appropriated whatever expertise it needs to survive and regenerate. As Pierre Schlag writes of CLS, for example:

[P]art of [its] legacy . . . was to broaden the range of intellectual authorities and perspectives consulted in legal education and legal scholarship. Working alongside other tendencies, such as law and literature, law and economics, law and society, feminist jurisprudence, and postmodernism, CLS participated, for a time at least, in a broadening of the intellectual life of American law schools.²⁴⁰

237. These three genres accord with Nietzsche’s division—the monumental, the antiquarian, and the critical. See NIETZSCHE, *supra* note 102, and text accompanying notes 114–122 *supra*.

238. Dezalay and Garth, *supra* note 28, at 312–13.

239. SHAKESPEARE’S SONNETS 56 (William J. Rolfe ed., 1884).

240. Pierre Schlag, *Critical Legal Studies*, in THE OXFORD INTERNATIONAL ENCYCLOPEDIA OF LEGAL HISTORY 298 (Stanley N. Katz ed., 2009).

The interdisciplinary turn, we might conclude, exemplifies simply the adaptation of an old strategy to current conditions.

That interdisciplinarity excites intense opposition within the juridical field—witness, for instance, Robert Ferguson’s leaden contempt for the contemporary academy’s “cant about interdisciplinarity”²⁴¹—does nothing to negate this analysis. Innovators in the field, from Langdell through the realists, through Law & Society, Law & Economics, and CLS, have always aroused vituperation. All have left deep imprints. To cite Schlag once more, the “anti-intellectual regression” of recent years notwithstanding, the various “broadening” tendencies of the past half-century have meant that the American legal academy has become “less parochial and more theoretically sophisticated” than it was in the 1960s and 1970s.²⁴² “Law and . . .” scholarship has proliferated. So have “dual degree” (J.D./Ph.D.) academics and degree programs, particularly at elite law schools. The result has been “a professionalization of legal scholarship—yielding work of greater methodological rigor.”²⁴³ In other words the juridical field has once again successfully invested in non-juridical expertise, enhanced its professional claims, improved the quality of its product (both scholarly and pedagogical) and, thereby, maintained its rulemaking ascendancy.

When UC Irvine Law articulates its interdisciplinary and public service vision of “the ideal law school for the twenty-first century” it speaks quite precisely the language of legal-professional innovation through investment in expertise and in new areas of rule production for the juridical field to enter. Its claim is that it will do “the best job in the country of training lawyers for the practice of law at the highest levels of the profession” and that it is “uniquely positioned to build a new school that is relevant to law practice and legal scholarship in the twenty-first century and that pushes the frontiers of the profession.”²⁴⁴ These professional-technocratic claims are married to a very traditional (since Langdell) regime of standards and selectivity:

Drawn from top law schools across the country, UCI Law’s faculty has been ranked ninth in the nation in a recent study of scholarly impact. The law school’s high selectivity enabled it to field an inaugural class of 60 students with a median grade point average and LSAT scores that put it on par with classes at law schools rated in the top twenty in the nation by *U.S. News & World Report*. The 84-member second class, the Class of 2013, has comparable grades and test scores and is equally as impressive. Currently, students enjoy a faculty-to-student ratio of 6 to 1, which

241. Ferguson, *supra* note 193, at 482.

242. Schlag, *supra* note 240, at 298.

243. *Id.*

244. Our Difference, U.C. Irvine Sch. Law, http://www.law.uci.edu/our_difference.html (last visited Nov. 2, 2010).

ensures small classes and easy access to professors outside the classroom.²⁴⁵

A second, potentially more interesting, way to understand the UCI Law phenomenon is to see it as something more than simply an expression of the juridical field's passion for the latest in extrinsic *techné* to blend with its infrastructural *poiesis*, and instead situate it at the beginning of the next wave of innovation—which, as a beginning, necessarily has a certain ragged uncertainty to its eventual outcome. To return one more time to Schlag, this time on the distaff side, the past half-century's "broadening" has excited reactive "regression"—"a return, even in elite institutions, to a prescriptive, largely doctrinal scholarship" that, though methodologically more sophisticated than in the past as a result of law schools' widened intellectual horizons, nevertheless manifests "a kind of return to 'scholastic' irrelevance."²⁴⁶ UCI Law's desire to be "relevant to law practice and legal scholarship in the twenty-first century" might hint at a push back against the threat of regression to an irrelevant scholastic mean.²⁴⁷

If so, what direction might that push take? One possibility is simply a redoubled effort to maintain the momentum of indiscriminate "broadening" in the face of "regression." And indeed, that is more than likely, given the early twenty-first century academy's preoccupation with "complexity." Complexity is the current aesthetic not simply in history but across a whole array of fields of study. Its emphases—complete contingency, perpetual contest and continuous renegotiation²⁴⁸—are entirely at one with CLS's indeterminacy thesis, which is perhaps why Schlag thinks reports of CLS's death are somewhat exaggerated. "Its ideas . . . remain—an unfinished project, a dissident strain, ready to be activated."²⁴⁹ Why, though, would one want to reactivate this particular strain? I have already argued that as an intellectual practice, complexity/indeterminacy produces nothing other than more of itself. As a professional legal-academic practice, meanwhile, CLS assisted the juridical field's self-renewal—which, though it might have been an outcome unintended, does not exactly count as dissidence.²⁵⁰

245. About UC Irvine School of Law, U.C. Irvine Sch. Law, http://www.law.uci.edu/about_uci_law.html (last visited Nov. 2, 2010).

246. Schlag, *supra* note 240, at 298.

247. U.C. IRVINE SCH. LAW, *supra* note 244.

248. *See, e.g.*, Gordon, *supra* note 98, at 1029.

249. Schlag, *supra* note 240, at 298.

250. As Robert Gordon wrote in response to Paul Carrington's polemic against the "nihilism" that CLS represented, "On the whole, CLS people have declined to reduce law to the status simply of an instrument of class or state domination. They believe that the law does contain doctrines and processes that facilitate domination, but also that it contains rules that restrain, and utopian norms and possibilities for argument and action that can liberate people," and that "[t]he colossal irony of your article is its labeling as 'nihilists' the members of this group, who are actually among the most hopeful people around—people who think things really can change for the better and are committed

I have argued that the alternative to complexity is the production of explanation. The default setting for “explanation” in legal studies is actually the original positivist version of “law and . . .” popularized by the early Law & Society movement during the movement’s initial phase outside the juridical field. “Law and . . .” relies on empirical context to situate law as a domain of activity. First mooted at the turn of the twentieth century, encouraged by the realists, “law and . . .” considers law’s most important determinative context to be the social, and the social to be empirically verifiable, such that law is held to be an empirical and social phenomenon. Hence it explains law and legal outcomes through their relations to cognate but distinct domains of action—society, polity, economy, human behavior, and motivation—by parsing the interactions among them.

Though shaken by the era of “critique” that substituted complexity for causal explanation, “law and . . .” was never laid to rest, and in recent years has taken on renewed vigor in the form of two variations on the theme, Empirical Legal Studies (ELS) and New Legal Realism (NLR). ELS and NLR manifest significant differences. According to a recent and authoritative assessment, “ELS’s methodological vision is more quantitative than qualitative, more confirmatory than exploratory, and more contemporary than historical.”²⁵¹ NLR is eclectic—open “to a wide range of social science methods and theories,” rather than ordaining any particular methodology, and favoring “a ‘ground level up’ perspective” that “embraces qualitative as well as quantitative work.”²⁵² Where ELS favors “quantitative technique, topical immediacy, and definitive hypothesis testing,” NLR attempts to “balance formal law and context, combine multiple methods, and eschew oversimplifying assumptions.”²⁵³ Their differences notwithstanding, ELS and NLR are united by a common emphasis on empirical research and common claims to a heritage in legal realism and “law and . . .” Though it is perhaps unnecessary to make the point, given the argument of this article, both “are best understood as efforts to legitimate empirical research within the legal academy itself.”²⁵⁴

In its Hurstian (pre-critique) mode, legal history also exhibited the influence of “law and . . .” through its resort to synchronic relational metaphors of conjunction/disjunction, to which it added diachronic temporality as a further and essential relational index. Methodologically, legal history in this mode approached phenomena by situating them in temporally discrete empirical contexts (for example, periods), and attempted to reveal the effect of law, or to explain the reality of law, by assessing change over time in law vis-à-vis the contextualizing

to changing them!” See Gordon, *supra* note 77, at 4, 9.

251. Elizabeth Mertz and Mark Suchman, *Toward a New Legal Empiricism: Empirical Legal Studies and New Legal Realism*, 6 ANN. REV. LAW SOC. SCI. 555, 558 (2010).

252. *Id.* at 561–62.

253. *Id.* at 562–63.

254. *Id.* at 556.

domain (whether society, polity, or economy) from which it was held relationally distinct. As a participant in the practice of “law and . . .”, legal historical scholarship has broadly relied for its animating problematics upon the same relational hypotheses that at successive moments over the last half-century preoccupied “law and . . .” theory: the autonomy/instrumentalism opposition; the relative autonomy compromise; and more recently the varieties of “constitutive” theorizing, notably legal constitutiveness (law constitutes social processes) and mutual constitutiveness (law is at one and the same time constitutive of and constituted by social processes). Legal history also drew on “law and . . .” scholarship’s matching range of relational characterizations (functionalism, managed conflict, coercion-resistance, legitimation-disruption, agency-disempowerment) and distributive effects (plurality, equilibrium, efficiency, utility).²⁵⁵ When it comes to the most recent innovations in “law and . . .”—ELS and NLR—legal history generally has more in common with NLR. It exhibits the same methodological eclecticism and the same “emergent style of inquiry, consonant with pragmatism, in which investigators move between theory and empirical research with each informing the other,” and embraces the same “recursive” (mutually influential) relationship between law and society.²⁵⁶ It is not difficult, however, to imagine legal historical research in conformity with the quantitative, confirmatory emphases of ELS.

Participation in “law and . . .” theorizing has been highly productive in legal-historical scholarship. Still, even though the turn to complexity that resulted from CLS’s critique of “law and . . .” has proven barren, the critique itself was nonetheless devastating. In its default mode, “law and . . .” produced a causally functional and empirical account of law. CLS showed that whatever the realm of action in relation to which law is situated, the outcome was the same—indeterminacy marked by complexity and contingency. Critique did not dispense with the components of the default account (“law” and “society”): that is, it did not produce a new account. It simply made any and every expression of the received account inexpressible in causal or functional terms. The turn away from critique to empiricism represented by ELS and NLR has not resolved this problem, but instead has elided it: essentially, ELS’s “quantitative technique, topical immediacy, and definitive hypothesis testing” reproduce the functionalism of the original default mode; NLR’s attempts to “balance formal law and context, combine multiple methods, and eschew oversimplifying assumptions,” meanwhile, situate NLR not in contradistinction to the fetishization of complexity but actually as a revised expression of it.

Empiricism, in short, will not of itself help us steer past “law and . . .” while

255. These problematics and relational characterizations are discussed at greater length in Tomlins, *How Autonomous*, *supra* note 26.

256. Mertz and Suchman, *supra* note 251, at 562.

simultaneously avoiding steering into the complexity fetish. An attempt at new theorizing might. Suppose we try dispensing with theory built from the conjunctive metaphors of the relational approach and its (broken) conception of causality and instead reach for different metaphors and the explanatory possibilities they imply. What would they be? One possibility is optical metaphors—that is, metaphors of seeing, of “looking like” (or unlike), of focal length (blurring), of “scope.” Instead of parsing relations between distinct domains of activity, between law and what is extrinsic to it, the objective of optical theory would be to imagine them as the same domain: what do we get if we imagine law and economy (for example) as the *same* phenomenon—that is, law *as* economy, or economy *as* law?²⁵⁷ It is noticeable that we seem to have no difficulty in thinking of law optically in some domains but not in others: for example, law *as* expertise seems to pose less current conceptual dissonance than law *as* society.

Complementing theory that starts from optical conceptions is theory that starts from conceptions of scale. As Annelise Riles has written, “an implicit notion of scale—of the difference between large and small—is a crucial foundation for the effect of perspective.”²⁵⁸ Perspective is “a *way of looking*”²⁵⁹ that both actors and observers can vary according to the results they desire to produce. But, Riles observes, modern knowledge tends to assume that whatever the perspective (for example the global, the local) scale is a constant. What, then, should one make of “movement between levels of scale that itself sometimes collapses scale and sometimes reconstructs it”?²⁶⁰ How does placing scale at the center of our problematic, instead of assuming its constancy, rebound on perspective? Perspective, from the standpoint of modern knowledge, whether conventional or critical, is taken “to be perspective *on* something, something that itself is not a perspective but rather a kind of raw material for observation,” but once one notes the inconstancy of scale, perspective becomes “its own subject matter . . . the act of viewing and the material that is viewed are one and the same.”²⁶¹

For purposes of investigation resulting in explanation, finally, scope and scale must be made elements of the same theoretical conjuncture. How? By turning to a revived conception of structure. I have already had resort to structuralist concepts in embracing Bourdieu’s theory of the juridical field and recommending the possibilities inherent in “a structural history of national legal practices.” How, though, avoid the criticism of structuralist theory as merely a static model of motion reliant upon “underlying social forces”?²⁶² By resort to an

257. For one suggestive set of examples, see JAMES C. SCOTT, *SEEING LIKE A STATE: HOW CERTAIN SCHEMES TO IMPROVE THE HUMAN CONDITION HAVE FAILED* (1999).

258. Annelise Riles, *The View from the International Plane: Perspective and Scale in the Architecture of Colonial International Law*, 6 L. & CRITIQUE 39, 40 (1995).

259. *Id.* at 48.

260. *Id.* at 50.

261. *Id.* at 54.

262. See Mariana Valverde, *The Sociology of Law as a ‘Means against Struggle Itself,’* 15 SOC. &

older structuralism, notably Walter Benjamin's notion of constellation which, by allowing us to comprehend structure both imagistically and temporally, inserts history at the very center of theory. Constellation stands for the synchronicity not of objects *in* time but of objects *with* time and with their observer, who (as Riles has emphasized) stands at a point of particularity. The point is made in Benjamin's essay on Eduard Fuchs: "[A]ny consideration of history worthy of being called dialectical . . . [requires the researcher] to abandon the calm, contemplative attitude toward his object in order to become conscious of the critical constellation in which precisely this fragment of the past finds itself with precisely this present."²⁶³ Benjamin's dialectics were devoted not to theoretical mediation of relations among underlying forces but to surfaces and to the construction of representation—"the thread of [allegorical] expression" that created images by conjoining moments.²⁶⁴ Benjamin's historical materialism was, hence, "a given experience"—the past in the experience of *now*:²⁶⁵

Every present is determined by those *images* which are synchronic with it: every now is the moment of a specific recognition. . . . It isn't that the past casts its light on the present or the present casts its light on the past; rather an image is that in which the past and the present moment flash into a constellation. In other words, image is dialectic at a standstill.²⁶⁶

Dialectic at a standstill is the constellation of scope and scale in structure, a non-relational (monadic) theory of representation that creates a distinct and historical account of relationality. That account beckons legal studies in two directions. First, the very tenacity of the conjunctive conceptualizations that underpin both modernity's "law and . . ." theorization and its postmodern apotheosis—complexity—lead one to the question, why did differentia of appearance (of economy, polity) come about? How did they become so powerful? By examining the production of differentiation we are led to questions of purpose and effect. As law came to be distinguished in its appearance from cognate phenomena, what optics, aesthetics, functions, or claims did it take up to further its project, and why? How was its own differentiation represented within or explained by law? Such an agenda suggests that the objective is not to "get rid" of relationality or to challenge the familiar domains of polity, society, and economy, but to discuss whether current relational theorizations have indeed become

LEGAL STUD. 591 (2006).

263. Walter Benjamin, *Eduard Fuchs, Collector and Historian*, in WALTER BENJAMIN: SELECTED WRITINGS, vol. 3, 1935–38, 262 (Howard Eiland and Michael W. Jennings eds., 2002).

264. WALTER BENJAMIN, THE ARCADES PROJECT, at 460 para. N1a, 6 (Howard Eiland & Kevin McLaughlin trans., 1999).

265. Benjamin, *supra* note 263, at 262.

266. BENJAMIN, *supra* note 264, at 463 para. N3, 1.

insufficient for the purposes of legal history and to explore what other theorizations might offer.

But the legal theorist might also take this theory of representation further, to the point where one imagines law as a system of allegorical representation that completely displaces (renders inaccessible) what is being represented. What would “law and . . .” become if relationality were foreclosed? How would our perspectives on familiar domains change if the economic, the social, the political could be imagined only from and in law? How would law’s familiar cognates appear?

Traveling via critique, we have arrived at an intellectual moment in which, a century after its invention, wide cracks have appeared in the relational perspective on law. Interdisciplinarity stands for a number of possible outcomes in response: simply more of the same (the indiscriminate “broadening”/complexity strand); a refined empiricism (the ELS/NLR strand); or an effort to develop new theory (the “scope/scale/structure” strand). Though the different strands have different implications, whichever strand one follows one is more or less fated to play some kind of role in the perennial quest of the juridical field for self-renewal.

There is a place for history in the development of each of these three strands. It will be clear that I think the third “theorizing” strand has the most to offer. At the turn of the twentieth century, Oliver Wendell Holmes, Jr. and Roscoe Pound substituted society for history as law’s principal signifier as a matter, so to speak, of policy. They fated legal history to become what, in due course, it has indeed become—an account of relationality. Perhaps we have arrived at a juncture at which history can once again undertake to do something more substantial. Perhaps that is why, here at Irvine, history was identified as a central component of the ideal interdisciplinary law school’s intellectual equipment. Or so I like to think.