

# The Historical Consciousness of the Resistant Subject

Norman W. Spaulding\*

I. À la place de la Révolution .....	677
II. A “revolution in knowledge worthy of the name of Copernicus” .....	678
III. Avoiding Resistance.....	681
IV. Resistance “time out of mind” .....	687
V. Counterhistory.....	689

## I. À LA PLACE DE LA RÉVOLUTION

The first scene always includes a shot of the *corpus delicti*. And it *is* the first scene, quite irrespective of where it appears in the sequence. Of course, the face is not always depicted, the head not always beheld as Macbeth’s before the curtain, or Louis XVI’s before the throng in what theretofore had been La Place Louis XV. Indeed, the body need not be that of a noble, need not be real, need not even be an immediately identifiable individual, though identity is always put in question by the scene, always assigned. Our gaze may be carried up from a trail of blood, a limb out of joint, or down the bloodied wall of a room that could be our own; it may be fixed photographically, trained on the ghastly appearance of an entire corpse in situ, hanging distended from a tree, or burning in effigy; it may pan down slowly, forensically, from a mound of freshly dug soil to the familiar hole, empty or full, but in either case far too massive and misshapen for a single grave; finally, it may be made to linger on the trace of the body removed. And even when both body and trace are missing, the first scene will be haunted by that absence, as by the ghost in Hamlet, or suspended as a scene of redemptive death to come for which we are invited to wait, and to long. At the limit of suspension, the redemptive death we await, the one for which we are enjoined proleptically to long, is none other than our own.

This first scene—not the murder itself, but the scene of death—marks the

---

\* Sweitzer Professor of Law, Stanford Law School. I am grateful to Christopher Tomlins, Robert Gordon, Ariela Gross, Amalia Kessler, Dan Edelstein, Ian Haney Lopez, Hilary Schor, Nomi Stolzenberg, Kurt Shaw, and the participants and commentators at the UC Irvine School of Law “Law As . . . : Theory and Method in Legal History” symposium (Apr. 16–17, 2010).

appearance of the resistant subject. The distinctive feature of the first scene and its repeated representations is that the death it calls to mind cannot be ascribed to fate, the will of God, or the necessities of any state of nature. Nothing about replacing the guillotine at La Place de la Concorde with the obscure obelisk from the Luxor Temple in 1836 concealed the human agency behind Louis XVI's decapitation and the prior destruction of the statue honoring his grandfather à La Place de la Révolution. Though the hieroglyphs engraved on the obelisk honoring Amun-Ra and the long reign of the pharaoh Rameses II (whose body now remains on display, preserved intact, at the Museum of Egyptian Antiquities) surely tempt us to forget the scene of death and the terrible responsibility which belong to us alone.<sup>1</sup>

We recall this first scene, rewrite it, bowdlerize it, substitute it, dream it, and above all, try to forget it over and over, not only to condemn, to contain, and, as the case may be, to inspire revolutionary and counter-revolutionary acts of resistance, but to mediate countless more mundane, bloodless repetitions of resistance, lawful and otherwise. It is the scene of resistance. Memory, history, and law are constantly engaged not only to justify our imagination of this scene, but to end it, and to eliminate the evidence of it. The scene of the dead sovereign, which in modernity is always also the scene of the dead self, not only marks the appearance of the resistant subject, but frames that subject's historical consciousness.

## II. A "REVOLUTION IN KNOWLEDGE WORTHY OF THE NAME OF COPERNICUS"<sup>2</sup>

It may seem strange to speak of the "historical consciousness" of the resistant subject. After all, Freud's resistant subject is defined by a certain mnemonic incapacity. Resistance, Freud explains in *The Interpretation of Dreams*, is a kind of censor that relies upon transference, displacement, inversion, overdetermination, etc., to conceal unconscious dream-thoughts in dream-content.<sup>3</sup> And resistance induces the betrayal of memory, producing not only "fragmentary," but "positively inaccurate and falsified"<sup>4</sup> waking memories of what we have dreamed.<sup>5</sup> "Doubt whether a dream or certain of its details have been

---

1. See MUSÉE CARNAVALET, DE LA PLACE LOUIS XV À LA PLACE DE LA CONCORDE 112–17 (1982); SIMON SCHAMA, CITIZENS: A CHRONICLE OF THE FRENCH REVOLUTION 668–71, 674, 748–50 (1989); ROBERT SOLÉ, LE GRAND VOYAGE DE L'OBÉLISQUE (2004). The obelisk's original cap was stolen in the sixth century B.C.; the current gold cap was installed by the French in 1998 to mark the visit of the now deposed President of Egypt, Hosni Mubarak. See *id.* at 239.

2. JACQUES LACAN, ÉCRITS: A SELECTION 114 (Alan Sheridan trans., Tavistock Publications 1977) [hereinafter A SELECTION]. See also JACQUES LACAN, ÉCRITS 334 (Bruce Fink trans., W.W. Norton & Co. 2006) [hereinafter ÉCRITS].

3. SIGMUND FREUD, THE INTERPRETATION OF DREAMS 174–75, 340–46 (James Strackey ed. & trans., Avon Books 1965) (1990) [hereinafter INTERPRETATION OF DREAMS].

4. *Id.* at 550.

5. See *id.* at 580–81.

correctly reported,” he writes, “is once more a derivative of the dream-censorship, of resistance to the penetration of the dream-thoughts into consciousness. This resistance has not been exhausted even by the displacements and substitutions it has brought about; it persists in the form of doubt attaching to the material which has been allowed through.”<sup>6</sup> The resistant subject not only suffers bouts of amnesia, forgets what was dreamt altogether, but doubts even what she does remember.

At least in Freud’s early writing, the subject must be made to remember. The work of analysis consists in opening the subject’s access to the historical consciousness resistance refuses. As Lacan explains, “the condition of the continuity in the anamnesis, by which Freud measures the completeness of the cure . . . is not a question of biological memory, nor of its intuitionist mystification, nor of the paramnesia of the symptom, *but of remembering, that is, of history.*”<sup>7</sup> This suggests that resistance must be overcome in order to address the subject’s symptoms. Tellingly though, it is resistance itself that offers the analyst a way in. So it would be more accurate to say that resistance must be addressed in order to overcome the subject’s symptoms.<sup>8</sup>

As we already know . . . a complete reversal of all psychical values takes place between the dream-thoughts and the dream. . . . If, then, an indistinct element of a dream’s content is in addition attacked by doubt, we have a sure indication that we are dealing with a comparatively direct derivative of one of the proscribed dream-thoughts. The state of things is what it was after some sweeping revolution in one of the republics of antiquity or the Renaissance. The noble and powerful families which had previously dominated the scene were sent into exile and all the high offices were filled by newcomers. Only the most impoverished and powerless members of the vanquished families, or their remote dependents, were allowed to remain in the city; and even so they did not enjoy full civic rights and were viewed with distrust. The distrust in this analogy corresponds to the doubt in the case we are considering. . . . It is precisely the fact that doubt produces this interrupting effect upon an

6. *Id.* at 554 (citation omitted). *See also id.* at 555 (“The forgetting of dreams, too, remains inexplicable unless the power of the psychical censorship is taken into account.”).

7. *ÉCRITS*, *supra* note 2, at 213; *see also id.* at 217 (“What we teach the subject to recognize as his unconscious is his history. . . .”); *id.* at 215 (discussing analyst’s methodological attention to “monuments,” “archival documents,” “semantic evolution,” “traditions,” and “traces”); *id.* at 335 (“[T]heir function presupposed history at its very core, their discipline being the one that had reconstructed the bridge between modern man and ancient myths.”).

8. As Lacan puts it, “The resistances themselves . . . are used as long as possible in the direction [sens] of the progress of the discourse. And when it is time to put an end to them, we manage to do so by giving in to them.” *Id.* at 249–50. Compare Lacan’s discussion of resistance, censorship and law, in JACQUES LACAN, *THE SEMINAR OF JACQUES LACAN: BOOK II*, at 127 (Jacques-Alain Miller ed., Sylvana Tomaselli trans., 1988) [hereinafter *SEMINARS, BOOK II*].

analysis that reveals it as a derivative and tool of psychic resistance. Psychoanalysis is justly suspicious. One of its rules is that *whatever interrupts the progress of analytic work is resistance*.<sup>9</sup>

Resistance not only lights the path of analysis, following Freud's striking analogy, it appears à la place de la révolution. This scene, the place of liberation now haunted by survivors of the ancien régime, is the scene of distrust and self-doubt that cannot be avoided. Is it possible to approach L'Obélisque de Louxor and its hieroglyphs à La Place de la Concorde free of confusion, doubt, uncertainty? Is it possible to avoid imagining the guillotine? The missing head? The following terror?<sup>10</sup>

The problem for the resistant subject is not, then, any mnemonic incapacity, but rather that she remembers far too much, wants memory more than anything, and is on account of that excess of memory, as Nietzsche well understood, obliged to forget.<sup>11</sup> The dream work of the resistant subject—her repeated displacements, forgetting, confusion, and doubt—is itself a kind of memory work, memory working, reaching for consciousness, simultaneously reconstructing and quailing at falsifications of the first scene. Analysis does not confer historical consciousness on this view. Rather, analysis is possible only because the resistant subject is already entrenched in historical consciousness, already remembering, already overwhelmed by memory.

This is to state what Lacan insisted was a Copernican revolution in Freud's theory of psychoanalysis. If resistance cannot be overcome, if the internal division resistance reveals is irreducible, if we cannot, as Freud admits, pierce what he called "the dream's navel,"<sup>12</sup> analysis may mitigate certain symptoms, but the specific historical consciousness underlying both the Enlightenment and the Reformation is undone. A project whose trajectory is self-mastery leads to the paradoxical discovery that "man is a decentered subject,"<sup>13</sup> that the subject no

9. INTERPRETATION OF DREAMS, *supra* note 3, at 554–55.

10. A parallel set of questions could of course be posed regarding the history of the American Revolution and ex post resistance running to civil war and touching upon the most basic constitutional failure of the nation (failure based on an illicit division, it should go without saying, in the very constitution of legal subjects). *See* U.S. CONST. art. I, § 2, cl. 3; U.S. CONST. art. I, § 9, cl. 1; U.S. CONST. art. IV, § 2, cl. 3. Is it possible, we might ask, to approach the Constitution free of doubt, confusion, distrust, and uncertainty? Do the Reconstruction Amendments, ratified under the politically and legally strained circumstances prevailing after the Civil War, resolve or deepen those doubts? Do they redeem the liberal subject or mark the liberal subject as already dead? *See* Norman W. Spaulding, *Constitution as Countermonument: Federalism, Reconstruction, and the Problem of Collective Memory*, 103 COLUM. L. REV. 1992 (2003). On the terror in France, see SIMON SCHAMA, *CITIZENS: A CHRONICLE OF THE FRENCH REVOLUTION*, ch. 17 (1989); DAN EDELSTEIN, *THE TERROR OF NATURAL RIGHT* (2009).

11. *See generally* FRIEDRICH NIETZSCHE, *ON THE ADVANTAGES AND DISADVANTAGES OF HISTORY FOR LIFE* (Peter Preuss trans., Hackett Publ'g Co. 1980) (1874).

12. INTERPRETATION OF DREAMS, *supra* note 3, at 564.

13. SEMINARS, BOOK II, *supra* note 8, at 47. *See* ÉCRITS, *supra* note 2, at 355 ("[I]t is in the disintegration of the imaginary unity constituted by the ego that the subject finds the signifying

more revolves about the ego than the sun and solar system about the earth.

Just to start raising the question as to what the ego is requires one to detach oneself from what we might call the religious conception of consciousness. Implicitly, modern man thinks that everything which has happened in the universe since its origin came about so as to converge on this thing which thinks . . . unique, precious being, pinnacle of creation, which is himself, with this privileged vantage-point called consciousness. This perspective leads to an anthropomorphism which is so deluded that one has to start by shedding the scales from one's eyes, so as to realize what kind of illusion one has fallen prey to.<sup>14</sup>

But detachment from this religious conception of consciousness underlying the Enlightenment project is itself resisted. We *want* self-mastery. So as soon as the scales are shed, both subject and analyst are predisposed to forget *precisely* what has been revealed. In his later work, "Freud chose to remind us that the unconscious as such cannot be reached and makes itself known in a fashion which is paradoxical, painful, and cannot be reduced to the pleasure principle. He thus brings back into the foreground the essence of his discovery, *which we tend to forget*."<sup>15</sup> It is not enough to disassemble the guillotine or rename the scene—we substitute hieroglyphs in their place, inviting amnesia. Anything to avoid Freud's discovery of decentered, resistant subjects and the death instinct in the seemingly inexhaustible repetition of traumatic experience. Anything à la place de la révolution.

### III. AVOIDING RESISTANCE

This is the position not only of the resistant subject and her analyst, but of

material of his symptoms." This is what Lacan calls Freud's "revolution in knowledge worthy of the name of Copernicus." A SELECTION, *supra* note 2, at 114.

14. SEMINARS, BOOK II, *supra* note 8, at 47–48. See ÉCRITS, *supra* note 2, at 250 ("But you cannot possibly [understand the meaning of the subject's discourse] if you cleave to the idea that the subject's ego is identical to the presence that is speaking to you.").

15. SEMINARS, BOOK II, *supra* note 8, at 65 (emphasis added). Freud's theory, Lacan elsewhere writes,

constitutes an objection to any reference to totality in the individual, since the subject introduces division therein, as well as in the collectivity that is the equivalent of the individual. *Psychoanalysis is what clearly relegates both the one and the other to the status of mirages. This would seem to be something that could no longer be forgotten, were it not precisely psychoanalysis that teaches us that it is forgettable*—confirmation of which turns out . . . to come from psychoanalysts themselves, their 'new tendencies' representing this forgetting.

ÉCRITS, *supra* note 2, at 242 (emphasis added). Lacan was writing against the tradition of ego-psychology. He accused his colleagues of having forgotten the central insights of Freud, most fundamentally the linguistic structure of the unconscious—and he was "excommunicated" for it. See LACAN, THE FOUR FUNDAMENTAL CONCEPTS OF PSYCHO-ANALYSIS 1–13 (Alan Sheridan trans., 1977) [hereinafter FOUR FUNDAMENTAL CONCEPTS]; see also SEMINARS, BOOK II, *supra* note 8, at 65; *id.* at 228 ("There is only one resistance, the resistance of the analyst. The analyst resists when he doesn't understand what he is dealing with.").

modern political philosophy, legal thought, and, to a certain extent, history. Predicated as it is on the myth of consent veiled beyond history in a so-called state of nature, modern political philosophy cannot address the resistant subject. Revolution and resistance are reduced to exceptional events—aberrations verging on the ahistorical and nearly always charged with the terror of anarchy.<sup>16</sup> Even natural law theorists, in whom one would expect to find some degree of insouciance regarding the defiance of law, solemnly burden the “right” of civil disobedience with elaborate preconditions no ordinary resistant subject could meet.<sup>17</sup>

A few contemporary theorists have insisted that political philosophy begin from the position of the resistant subject. But they generally seek either to liberate the subject from her resistant position (typically by demanding the standard accoutrement of liberal subjects), or to abjure the normative dimension of political philosophy, shifting to a kind of melancholic documentary mode perfectly matched to the malaise of the subordinated identity groups they depict. Resistance is represented, alternately, as futile, as a merely reactive stance, as everywhere and nowhere, or as a form of interpretive action more or less cabined on the knowledge side of the power/knowledge circuit.<sup>18</sup> We are, in the end, instructed in our underlying desire to be punished, our attachment to injury and subjection, and the naivety and embarrassing (indeed, totalitarian) implications of nineteenth- and twentieth-century revolutionary ideologies.<sup>19</sup> Politics, the normative dimension of which is supposed to inspire public sacrifice, reduces to base forms of self-sacrifice (docility and suicide, even suicide bombing) or the justification and critique of forced sacrifice for others (oppression, exclusion, war, and now chillingly plural holocausts). In neither case may the resistant subject apprehend

---

16. See John Locke, *The Second Treatise of Civil Government*, in TWO TREATISES OF GOVERNMENT (Thomas Cook ed., Hafner Press 1973) (1690); JOHN RAWLS, A THEORY OF JUSTICE 363–77 (1971). Not just revolution or resistance, but participation, is diminished by other modern political theorists. On Joseph Schumpeter’s reduction of participation to voting and the influence of his ideas on Berelson, Dahl, Sartori, and Eckstein, see CAROLE PATEMAN, PARTICIPATION AND DEMOCRATIC THEORY 4–13 (1970).

17. Above all, self-interested resistance is precluded. See HANNAH ARENDT, CRISES OF THE REPUBLIC (1972); HANNAH ARENDT, ON REVOLUTION (1965); see also WILLIAM SIMON, THE PRACTICE OF JUSTICE (1998).

18. See JUDITH BUTLER, THE PSYCHIC LIFE OF POWER (1997); CHARLES MILLS, THE RACIAL CONTRACT (1997); CAROLE PATEMAN, THE SEXUAL CONTRACT (1988); Judith Butler, *Subjection, Resistance, Resignification: Between Freud and Foucault*, in THE IDENTITY IN QUESTION 229–50 (John Rajchman ed., 1995). On the effort to liberate the subject from her resistant position through liberal contract theory, see Charles Mills, *The Domination Contract*, in CONTRACT & DOMINATION 79–105 (Carole Pateman & Charles Mills eds., 2007).

19. See, for example, Wendy Brown’s lacerating discussion of “contemporary political projects” directed at “emancipatory political aims,” in STATES OF INJURY: POWER AND FREEDOM IN LATER MODERNITY ix (1995); *id.* at 7 (noting the manner in which “ideals of freedom . . . emerge to vanquish their imagined enemies, but in this move . . . frequently recycle and reinstate rather than transform the terms of domination that generated them”).

herself as decentered *and act*.<sup>20</sup>

The resistant subject is equally anathema to legal thought. Constitutions more or less immediately replace revolutions, citizens (or rather abstractions about citizenship) replace resistant subjects, and the rule of law approximates religious ritual.<sup>21</sup> Obelisk. Hieroglyph. Exegetical obsession. Monumental history. Law a civic religion. Lawlessness a breach of faith. There is interminable debate about the location of interpretive authority, about whose exegetical work is dispositive (judges, lawyers, legislators, executives, citizens), but the methods of interpretation (structural, textualist, originalist, purposivist) and the means of asserting interpretive authority (political expression, democratically accountable legislative action, bureaucratic mediation, and “adversarial legalism”<sup>22</sup>) remain circumscribed within boundaries set by law.

Popular constitutionalism decentralizes interpretive authority, moving it from bench and bar to the citizen subject.<sup>23</sup> And it demonstrates quite provocatively that ordinary legal processes cannot in fact contain the means of asserting interpretive authority. (Most strikingly in the American context, the Constitution is regularly “amended” without resort to the process Article V sets out, and, when necessary, by raw force.) But the demonstration is riddled with anxiety, with a desire to reduce extra-legal means to the legal process, to show that irreducibly extra-legal means are nevertheless orderly, or at least oriented toward law, and, of course, to avoid the twin spectres of anarchy and tyranny. This anxiety is the first clue that even popular constitutionalists are not in fact concerned with resistant subjects. Their objective is not to address resistance but rather to affirm

20. Even Bonnie Honig, who turns most promisingly to an agonistic conception of politics that does not relegate resistance to a revolutionary founding, who sees the folly in resistance strategies that seek merely to expand the rights of liberal subjects, and who is unafraid of “rupture” and of “democracy’s self-overcoming,” is reluctant to admit and fully explore the question of agonism internal to the subject. BONNIE HONIG, *EMERGENCY POLITICS* (2009); *see also* WILLIAM CONNOLLY, *IDENTITY\DIFFERENCE* (1991). I am otherwise in deep sympathy with Honig’s account of the paradox of politics and most grateful to Christopher Tomlins for pointing out the connection. *See* BROWN, *supra* note 19, at 21–22 (naming a parallel “paradox” of resistance to power).

21. *See* HONIG, *supra* note 20, at 26–28, 32–33; SANFORD LEVINSON, *CONSTITUTIONAL FAITH* 11–14 (1988); Joseph Story, *Address Delivered Before the Members of the Suffolk Bar, in* THE LEGAL MIND IN AMERICA: FROM INDEPENDENCE TO THE CIVIL WAR 70–71 (Perry Miller ed., 1961).

22. The term is Robert Kagan’s. *See* ROBERT A. KAGAN, *ADVERSARIAL LEGALISM* 3–4 (2001). On the methodological and normative oscillations of American legal thought, *see generally* MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870–1960: THE CRISIS OF LEGAL ORTHODOXY* (1992); Thomas C. Grey, *Modern American Legal Thought*, 106 *YALE L.J.* 493–505 (1996).

23. *See, e.g.*, LARRY D. KRAMER, *THE PEOPLE THEMSELVES* 7–8 (2004); MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* x (1999); 1 BRUCE ACKERMAN, *WE THE PEOPLE* 21, 91, 272–73 (1991) (describing “dualist” theory of constitutional interpretation and amendment); 2 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS*, Part II *passim* (2000) (discussing historical evidence of “dualist” theory in relation to the constitutional turmoil of the Civil War and Reconstruction).

the sovereignty of the citizen subject, *surtout* à la place de la révolution.<sup>24</sup>

As psychoanalytic theory suggests, history can address resistance, both individual and collective, by taking memory seriously. But historians have come late indeed to the question of memory, obsessed as they have been with the objective implications of the interdependence of law, history, and national identity. Hegel gave the most direct and enduring statement of that interdependence in his *Lectures on the Philosophy of History*: “Only in a State cognizant of laws,” he argued, “can distinct transactions take place, accompanied by such a clear consciousness of them as supplies the ability and suggests the necessity of an enduring record.”<sup>25</sup> Families and clans have subjective memory, but only the nation-state offers the conditions in which history may be written:

Family memorials, patriarchal traditions, have an interest confined to the family and the clan. The uniform course of events which such a condition implies, is no subject of serious remembrance; though distinct transactions or turns of fortune, may rouse Mnemosyne to form conceptions of them—in the same way as love and the religious emotions provoke imagination to give shape to a previously formless impulse. But it is the State which first presents subject-matter that is not only adapted to the prose of History, but involves the production of such history in the very progress of its own being.<sup>26</sup>

For anyone accustomed to thinking about law and history in terms of the ways in which the rule of law (especially the interpretive work of the courts) depends upon and reflects certain assumptions about the past, certain historiographic conventions, or the ways in which social and political history draw into relief contingent developments in the law, the claim that there can be no history without law must surely come as something of a surprise.

But as Hayden White, interpreting Hegel, explains,

[w]here there is no rule of law, there can be neither a subject nor the kind of event that lends itself to narrative representation. . . . [N]arrativity . . . presupposes the existence of a legal system against which or on behalf of which the typical agents of a narrative account militate. And this raises the suspicion that narrative in general, from the folktale to the novel, from the annals to the fully realized “history,” has to do with the topics of law, legality, legitimacy, or, more generally, authority.<sup>27</sup>

24. See HONIG, *supra* note 20, at 23–24 (revealing the Kantian underpinnings of deliberative democracy’s hesitant endorsement of popular sovereignty); KRAMER, *supra* note 23, at 33–35.

25. GEORG WILHELM FRIEDRICH HEGEL, *THE PHILOSOPHY OF HISTORY* 61 (J. Sibree trans., Dover Publications 1956) (1837).

26. *Id.* at 60–61.

27. HAYDEN WHITE, *THE CONTENT OF THE FORM* 12–13 (1987). “If, as Hegel suggests, historicity as a distinct mode of human existence is unthinkable without the presupposition of a system of law in relation to which a specifically legal subject could be constituted, then historical self-



History needs the legal subject to “serve as the agent, agency, and subject of historical narrative.”<sup>28</sup> Moreover, it is simply not possible to narrate events without turning to law and moralizing, for “every fully realized story . . . is a kind of allegory.”<sup>29</sup> To narrate is to “endow[] events, whether real or imaginary, with a significance that they do not possess as a mere sequence.”<sup>30</sup> And “every historical narrative has as its latent or manifest purpose the desire to moralize the events of which it treats.”<sup>31</sup> Narrative form works to bridge the gap between events and the normative order promised or imagined by law. Historical narrative, specifically, targets the real, “makes the real desirable, makes the real into an object of desire, and does so by its imposition, upon events that are represented as real, of the formal coherency that stories possess.”<sup>32</sup> No history without law.

What then of history when the authority of law is contested, fractured, not just to the point of conceptual disagreement, but of social disorder, to the point of open resistance, revolution, fratricidal violence, constitutional failure? And what to make of White’s seemingly contradictory thesis that historical discourse only arises when more than one account of the real is possible? “In order to qualify as historical,” he insists, “an event must be susceptible to at least two narrations of its occurrence. Unless at least two versions of the same set of events can be imagined, there is no reason for the historian to take upon himself the authority of giving the true account of what really happened.”<sup>33</sup>

If, as this rather powerfully suggests, resistance is the domain of historical discourse, why put history in relation to law at all? White contends that historical discourse is intimately, indeed, formally, bound up with the maintenance of legal authority—and all the more so when that authority is contested.

Where there is ambiguity or ambivalence regarding the status of the legal system . . . the form in which the subject encounters most immediately the social system in which he is enjoined to achieve a full humanity, the ground on which any closure of a story one might wish to tell about a past, whether it be a public or a private past, is lacking.<sup>34</sup>

And it is just such moments of resistance that produce the most anxiety, and, concomitantly, the most aggressive narrative efforts to provide the missing closure we crave—to mend history, and in so doing, protect, re-establish, or legitimize the

---

consciousness, the kind of consciousness capable of imagining the need to represent reality as history, is conceivable only in terms of its interest in law, legality, and legitimacy, and so on.” *Id.* at 13–14.

28. *Id.* at 13.

29. *Id.* at 14. “Where, in any account of reality, narrativity is present, we can be sure that morality or a moralizing impulse is present too.” *Id.* at 24. “A narrative account is always a figurative account, an allegory.” *Id.* at 48.

30. *Id.* at 14.

31. *Id.*

32. *Id.* at 21.

33. *Id.* at 20.

34. *Id.* at 14.

system of law that would otherwise be threatened.<sup>35</sup> History centers the subject, offers order à la place de la révolution.<sup>36</sup>

At the limit of the desire for closure and order, Clio surrenders to Nomos. History, now firmly in the hands of philosophy, *becomes* law: Hegel's dialectic and *Reason in History*;<sup>37</sup> Marx's species-being and economic determinism;<sup>38</sup> Comte's positivism and *loi des trois états*;<sup>39</sup> and Spencer's "Progress: Its Law and its Cause."<sup>40</sup> Even sober, post-Hegelian efforts to "discipline" history,<sup>41</sup> to professionalize the field, remove it from political, and especially utopian, imagination, nevertheless surrender it to law, here as a concealed (which is to say, objective, neutral, empirically verifiable) plot:

Insofar as historical stories can be completed, can be given narrative closure, can be shown to have had a plot all along, they give to reality the odor of the ideal. This is why the plot of a historical narrative is always an embarrassment and has to be presented as "found" in the events rather than put there by narrative techniques.<sup>42</sup>

With Lacan, then, we might say that modern historians have had as much trouble interrogating their own desire, understanding the sources of their own resistance, and understanding the roots of the discipline in resistance, as have analysts.<sup>43</sup> They have forgotten history's status as muse, forgotten altogether that Clio is the offspring of one of Mnemosyne's nine nights with Zeus.<sup>44</sup>

35. *See id.* at 30.

36. "[T]his value attached to narrativity in the representation of real events arises out of a desire to have real events display the coherence, integrity, fullness, and closure, of an image of life that is and can only be imaginary. The notion that sequences of real events possess the formal attributes of the stories we tell about imaginary events could only have its origin in wishes, daydreams, reveries." *Id.* at 24.

37. GEORG WILHELM FRIEDRICH HEGEL, *REASON IN HISTORY* (Robert S. Hartman ed. & trans., Bobbs-Merrill 1953).

38. Karl Marx, *Economic and Philosophic Manuscripts of 1844*, in *THE MARX-ENGELS READER* 66 (Robert C. Tucker ed., 2d ed. 1978).

39. AUGUSTE COMTE, *DISCOURS SUR L'ESPRIT POSITIF*, ch. 1 (1844).

40. WHITE, *supra* note 27, at 61–63.

41. *Id.* at 61.

42. *Id.* at 21; *see also id.* at 62, 65.

43. "[W]hat is the analyst's desire? What must there be in the analyst's desire for it to operate in a correct way? Can this question be left outside the limits of our field, as it is in effect in the sciences—the modern sciences of the most assured type—where no one questions himself as to what there must be in the desire, for example, of the physicist? There really must be a series of crises for an Oppenheimer to question us all as to what there is in the desire that lies at the basis of modern physics. . . . In any case, the analyst's desire can in no way be left outside our question . . ." *FOUR FUNDAMENTAL CONCEPTS*, *supra* note 15, at 9–10.

44. *See* APOLLODORUS, *THE LIBRARY OF GREEK MYTHOLOGY* 7 (Keith Aldrich trans., 1975) (by Mnemosyne Zeus had Calliope, Clio, Melpomene, Euterpe, Erato, Terpsichore, Urania, Thalia, and Polymia—nine muses of the arts).

## IV. RESISTANCE “TIME OUT OF MIND”

White, following Arendt, dates the surrender of history to law, revealingly, with the “linkage of history and politics in those ideologies that took shape in the wake of the French Revolution.”<sup>45</sup> But the entanglement of the two stretches back to pre-revolutionary efforts to place law *beyond* history altogether. As J.G.A. Pocock has argued:

If it is no longer as certain as it once was that the extension of monarchical authority and the reception of Roman law went everywhere hand in hand, the fact remains that the sixteenth and seventeenth centuries were throughout western Europe a time of collision between the authority of kings and local or national privileges, liberties and constitutions. Many of these latter were rooted in feudal custom, some could even be dimly traced back to the customs of the Germanic invaders of the empire, and all were more or less permeated by the essential medieval idea of law as a thing ancient, immanent and unmade, proof against invasion by human wills because no will had made it. Since there was an increasing tendency to claim sovereignty in the full sense for the king, it was natural that those who sought to defend threatened privileges or liberties should emphasize in return that their rights were rooted in a law which no king could invade.<sup>46</sup>

Pocock locates the practice first with French jurists and their humanist critique of the medieval approach to Roman law during the French Wars of Religion. Medieval jurists looked almost exclusively to Roman law and to its accumulated interpretive gloss; the humanists rejected the gloss, pressed for return to the original text itself, and developed techniques for setting that text in the original “context of a reconstructed society.”<sup>47</sup> “Inadequate, piecemeal and *ad hoc* their work may have been, but the essentials of the historical method were there and were known to be there. In this way the legal humanists came to be historians . . .”<sup>48</sup>

But the very obstacles to reconstructing Roman law and society revealed an unbridgeable gap between past and present—this notwithstanding the ubiquity of Roman law in European society. Undeterred, the French jurists turned the gap into a chasm, questioning the authority of the Justinian Code precisely because it was ancient law developed for and suited only to its own historical context. As Pocock explains, “[i]n the name of a more accurate interpretation, a historical interpretation had been formulated; and in the name of historical interpretation,

45. WHITE, *supra* note 27, at 62.

46. JOHN GREVILLE AGARD POCOCK, *THE ANCIENT CONSTITUTION AND THE FEUDAL LAW* 16 (1987).

47. *Id.* at 9–10.

48. *Id.* at 10.

the relevance of the past to the present was apparently being denied. *The moment was revolutionary*,” not only for the development of modern history as a discipline, a decisive break with medieval concepts of unmediated continuity with the past, but for its political implications.<sup>49</sup> “[T]he tension,” Pocock emphasizes, “could not be allowed to endure.”<sup>50</sup>

So the humanists turned to feudal custom. The appeal

from written to customary law is part of a fairly widespread reaction that was going on in sixteenth-century juristic thought; and one of the attractions of custom was precisely that it offered a means of escape from the divorce of past and present threatened by the criticisms of the historical school. Because Roman law was written and unchangeable, it could be subjected to grammatical analysis and proved to belong to a past state of society, but because custom was by its nature unwritten law, the usages of the folk interpreted through the mouths of judges, it could be argued with some plausibility that it could never become obsolete.<sup>51</sup>

Custom also offered resistant subjects a uniquely salient response to monarchical authority, inviting repeated appeals “to ‘the ancient constitution’, [sic] of seeking to prove that the rights it was desired to defend were immemorial and therefore beyond the king’s power to alter or annul.”<sup>52</sup>

Sir Edward Coke, who represents the apotheosis of the political turn in the humanist critique, situates law quite literally beyond history, “in the memory of the people.”<sup>53</sup> A custom “doth never become a Law to bind the people, until [sic] it hath been tried and approved time out of mind.”<sup>54</sup> This concept of law and the ideas of obligation following from it (“no man ought to take it on himself to be wiser than the laws”<sup>55</sup>) would of course deeply influence Burke’s conservative response to the French Revolution, and Pocock is at pains to demonstrate the historical inaccuracy of the thesis as well as the strategic limitations it contained and the resistance it provoked in political philosophers responsible for the development of social contract theory.<sup>56</sup> But in seventeenth-century England it offered a way around the overdetermination of the Norman Conquest<sup>57</sup>—what

49. *Id.* at 11 (emphasis added).

50. *Id.*

51. *Id.* at 14–15.

52. POCOCK, *supra* note 46, at 16. “[A] truly immemorial constitution could not be subject to a sovereign; since a king could not be known to have founded it originally, the king now reigning could not claim to revoke rights rooted in some ancestor’s will.” *Id.* at 51. See also MICHEL FOUCAULT, “SOCIETY MUST BE DEFENDED”: LECTURES AT THE COLLÈGE DE FRANCE 1975–1976, at 72 (1997).

53. POCOCK, *supra* note 46, at 33.

54. *Id.* at 33.

55. *Id.* at 35.

56. *Id.* at 51–52, 54–55; *id.* at 162 (Hobbes); *id.* at 235–37 (Locke); Foucault, *supra* note 52, at 99 (Hobbes); *id.* at 124 (Grotius, Pufendorf).

57. POCOCK, *supra* note 46, at 53.

Michel Foucault, in a set of lectures on pre-revolutionary historiography, aptly calls a “terrible,” uniquely “painful historical” and “difficult juridical category.”<sup>58</sup> The turn to law “time out of mind” also provided leverage to those insisting, against the encroachments and usurpations of the king drawn into relief by the elaboration of customary rights, that sovereignty rested with parliament.<sup>59</sup> Before there can be a sovereign citizen subject, or any narrative history of her nation and identity, sovereignty itself must be decentered—Louis XV’s statue must be torn from its pedestal before the guillotine for his grandson is erected in its place.

#### V. COUNTERHISTORY

Law as memory, as oral, unwritten, folklore; law driven beyond history by memory; modern history arriving, with resistant subjects, at the first scene. Pocock is fixed on the emergence of modern history from this pre-revolutionary period—fixed, that is, on resistance to the Whig interpretation of history. But notice that the interdependence of law, memory, and history in the conjunction of custom and revolutionary politics, however contingent and errant in the period, draws history back toward Mnemosyne. It also draws history away from both determinism (utopian and otherwise) and the concealed plots of empiricism to the struggles of culturally and temporally specific groups. Further, it explicitly identifies the desire of resistant subjects for authority in “time out of mind” and, to meet that desire, the discipline of law (philosophy, or science, as necessary). Perhaps most significantly, it exposes the division, discord, and contradiction at the beginning of any attempt to reconstitute the authority of law. Narratives of consent always arrive *after* the first scene to represent and rename, à La Place de la Concorde, what was missing beforehand—what has been missing “time out of mind.”

The harder Coke et al. worked to show that the rights of Englishmen rested in immemorial custom, the more clear the absence and ambiguity of record evidence became, and the more charged and conflicted became debate about the Norman Conquest. The harder François Hotman and other French jurists worked to ground French national identity and constitutional authority in the invasion of Gaul by the Franks and the primordial nature of their customs, the more clear and paradoxical the fact of Roman Conquest (and imperium) became.<sup>60</sup> In both cases, Foucault contends, establishing “that it is no longer possible to recite a lesson in public right whose function is to guarantee the uninterrupted nature of the genealogy of kings and their power,” presented “the problem of what Étienne Pasquier, who was one of Hotman’s followers, calls ‘the other succession,’ or in

---

58. FOUCAULT, *supra* note 52, at 110.

59. POCOCK, *supra* note 46, at 46, 49; *see also* FOUCAULT, *supra* note 52, at 72.

60. POCOCK, *supra* note 46, at 15. The parallels are not exact (the breadth of English common law made claims of custom resting in time immemorial more salient than in countries more strictly committed to the Justinian Code).

other words . . . [w]hat happens . . . when States do not succeed one another as [a result of] a sort of continuity that nothing interrupts . . . ?”<sup>61</sup> What happens, that is, when history exposes the genesis of sovereignty in “contingency and [the] injustice of battles”<sup>62</sup>

Hotman would be followed by the nobiliary reaction of Boulainvilliers, by the “bourgeois revolutionary project,” and, of course, all the while, by royalist retrenchment.<sup>63</sup> Pocock traces a related arc in the historiography of seventeenth-century England.<sup>64</sup> In both cases, the monumental history supporting the crown’s claims of absolute sovereignty was gradually disassembled. We could say then, with Pocock, that this was the “first great age of modern historiography,”<sup>65</sup> and that surely would be correct. But Foucault’s use of the term “counterhistory”<sup>66</sup> better captures the “inevitably partisan”<sup>67</sup> purposes of the resistant subjects responsible for these histories and the structures of resistance in which they emerged:

The idea of revolution, which runs through the entire political workings of the West and the entire history of the West for more than two hundred years, and whose origins and content are still, as it happens, very enigmatic, cannot, in my view, be dissociated from the emergence and existence of this practice of counterhistory. After all, what could the revolutionary project and the revolutionary idea possibly mean without this preliminary interpretation of the dissymmetries, the disequilibriums, the injustice, and the violence that function despite the order of laws, beneath the order of laws, and through and because of the order of laws?<sup>68</sup>

Counterhistory à la place de la concorde—before the L’Obélisque de Louxor, before and as a condition of modern historiography, before and as a condition of revolution. Counterhistory, moreover, revealing origins marked by conflict

61. FOUCAULT, *supra* note 52, at 119.

62. *Id.* at 72.

63. *Id.* at 136. With respect to royalist efforts to recolonize history, Foucault points in particular to the establishment in 1781 of the “Bibliothèque de législation—note the terms carefully—d’administration, histoire et droit public”—a “ministry of history” made by merging the *Dépot de chartes* and the *Bibliothèque de finances*. *Id.* at 137.

64. From Coke to Spelman, to Hale, Filmer, Brady, and Burke. POCOCK, *supra* note 46, at 107, 120–23 (Spelman); *id.* at 170–81 (Hale); *id.* at 182–228 (Filmer, Brady); *id.* at 243 (Burke).

65. *Id.* at 245.

66. FOUCAULT, *supra* note 52, at 72.

67. POCOCK, *supra* note 46, at 245.

68. FOUCAULT, *supra* note 52, at 78–79. Counterhistory is endorsed more or less explicitly in Wendy Brown’s argument for “genealogical politics,” WENDY BROWN, POLITICS OUT OF HISTORY 96–134 (2001), and implicitly in Honig’s deconstruction of the standard temporal dimensions of liberal political consciousness and her call for a “(counter)politics” attentive to “remainders.” HONIG, *supra* note 20, at 141. *See also id.* at 10 (“[E]mergencies in the real world have a history, and one of the requirements of political integrity . . . is surely the need to own up to our implication in the histories by which we, at any particular moment, may feel . . . assaulted”); *id.* at 15, 19.

running time out of mind—origins that cannot be reduced to any *concorde*. Resistant origins.

How else are we to address resistant subjects—subjects constituted only in scenes that might have been otherwise? And how else are resistant subjects themselves to address the order of laws?

Yet in legal history, American legal history in any event, resistance, its histories and historiography remain opaque. This is due in no small part to the fact that the field has oscillated between a profound attachment to the rule of law—or rather attachment to ideas about the rule of law which themselves oscillate between reducing resistance to mere lawlessness and catching it up almost immediately in reassuring narratives of legal reform—and attachment to narratives of legal subordination in which resistance is represented either as heroic or tragic. In neither case, it must be said, is the centered legal subject placed in doubt. We are, in short, repeatedly tempted by our attachment to law to forget that resistance is not something to be overcome, but rather the point of entry for modern history. And we either blink at the underlying structures of resistance that shape American law (most concretely the adversary system and its thoroughgoing dependence on narrative representation, decentralized access to counsel, federalism, and separation of powers), or we fail to recognize and interpret the operation of these structures *as* structures of resistance.

Hegel was not wrong—no history without law. But from the perspective of counterhistory, law must be detached from the desire for order and studied as a site of resistance. We cannot save the centered subject. She lies before us, in the first scene.