

Foreword: “Law As . . .” II, History As Interface for the Interdisciplinary Study of Law

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I. Temporalities.....	4
II. Fugacities.....	7
III. Innovations	10
IV. Possibilities	14
Conclusion.....	17

This issue of the *UC Irvine Law Review* contains sixteen articles based on papers originally presented at the second “Law As . . .” symposium, held March 9–11, 2012, at the University of California, Irvine School of Law. Those works join eighteen articles published by the *UC Irvine Law Review* in September 2011, following the inaugural “Law As . . .” symposium held in April 2010.¹ Together, the two collections (and those to come) comprise a body of research that I believe represents the beginnings of a distinct trajectory in interdisciplinary legal scholarship. This trajectory deploys history as an interpretive practice—that is, as a theory, a methodology, and even a philosophy—by which to engage in research on law. Simultaneously it proposes history as a substantive arena in which other interpretive research practices—those of anthropology, literature, political economy, political science, political theory, rhetoric, and sociology—can engage with law. The result is a capacious interdisciplinary jurisprudence inflected by history rather than by the positivism of the social sciences, which holds out the possibility, a century after their divorce, of reuniting metaphysics with materiality.²

The first “Law As . . .” symposium opened the engagement by proposing that legal historians reconsider their default participation in the theory and practice of “law and.” Invented in the early 1900s in the distinction between “law in the

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1. Symposium, “*Law As . . .*”: *Theory and Method in Legal History*, 1 U.C. IRVINE L. REV. 519 (2011).

2. Christopher Tomlins & John Comaroff, “*Law As . . .*”: *Theory and Practice in Legal History*, 1 U.C. IRVINE L. REV. 1039, 1040 (2011).

books” and “law in action,” grounded in legal realism, and popularized by the law and society movement, “law and” relies on empirical context to situate law as a domain of activity. It explains law through its relations to cognate but distinct domains of action (society, polity, economy, culture) by parsing the interactions among them. Legal history conceived in accordance with this approach attempts to reveal the effect of law, or to explain the reality of law, by assessing change over time in law vis-à-vis that contextualizing domain (society, polity, economy, culture) from which it is held relationally distinct.³ Why is this problematic? After all, as Catherine Fisk and Robert Gordon wrote in their foreword to the first collection, the “and” stands “as a reminder that one should study law not as distinct from all else, as entirely self-contained and self-generating, or as a ‘brooding omnipresence in the sky.’”⁴ Unfortunately, “what may be a matter of rhetorical convenience becomes a crucial but largely unexamined ontological statement and cognitive habit.”⁵ The result is that “‘law and’ scholarship perpetuates the idea that, even though law is situated in society, law is distinct from society and can, or must, be studied in relation to it.”⁶

The goal of the first symposium was to exert critical pressure on legal history by forcing it out of its mainstream socio-legal comfort zone, first by proposing that explanations of law “are not to be found, either necessarily or sufficiently, in its relations to other things,”⁷ and second by requiring that legal history interact with scholars engaged in distinctively interdisciplinary projects in the realm of legal studies—some conceived historically, some not. It was successful. During two beautiful spring days in Irvine, 150 people gathered to discuss sixteen papers divided among four panels. Four commentators led the discussion—John Comaroff, Robert Gordon, Morton Horwitz, and Christopher Tomlins—assisted by four moderators—Catherine Fisk, Risa Goluboff, Ariela Gross, and Hendrik Hartog. The panelists addressed a lively audience made up of faculty, graduate students, and law students from the University of California, Irvine, and from other universities within the region, joined by participants from throughout the United States, Canada, and beyond.

Quite intentionally, the second symposium was organized rather differently, as an extended workshop without a large audience, to maximize the opportunity for intensive discussion among focused and committed interlocutors.⁸ Once more, papers were commissioned and circulated in advance. Once more, we met over two full days, although this time we hunched over a table in a cramped seminar

3. Symposium, *supra* note 1; Tomlins & Comaroff, *supra* note 2, at 1040–41.

4. Catherine L. Fisk & Robert W. Gordon, Foreword, “Law As . . .”: *Theory and Method in Legal History*, 1 U.C. IRVINE L. REV. 519, 520 (2011) (citation omitted).

5. *Id.*

6. *Id.*

7. Tomlins & Comaroff, *supra* note 2, at 1041.

8. Symposium, “Law As . . .” II, *History As Interface for the Interdisciplinary Study of Law*, 4 U.C. IRVINE L. REV. 1 (2014).

room rather than a large auditorium. We discussed eighteen papers paired in nine sessions, each lasting ninety minutes.⁹ Each session began with a commissioned commentary. I know that I speak for all the participants in underlining here the immense contribution to the success of the event that our commentators made. As well as participating fully in the event as a whole, each of them—Malick Ghachem, Jon Goldberg-Hiller, Ariela Gross, Ron Levi, Bill Maurer, Aziz Rana, Norm Spaulding, Steven Wilf, and Constantin Fasolt—engaged intensively and at length with the papers they had been asked to discuss.

Whether invited back as commentators or once again asked to offer papers, there were, again intentionally, several “repeat players” from the 2010 symposium.¹⁰ Our objective, after all, is less to hold symposia for their own sake than to establish a movement with a core sense of continuity and lasting intellectual and personal kinship. But we also want to extend our circle to as many new participants as feasible. Of the sixteen articles included in this collection, fully three-quarters are by authors new to the “law as . . .” enterprise.

In the first collection, the dimensions of that enterprise were thoroughly traversed in two essays—a foreword and an afterword—in which the conveners of the opening symposium, Catherine Fisk and Christopher Tomlins, joined with two of the commentators, Robert Gordon and John Comaroff, to offer their thoughts on what “law as . . .” meant, what the first symposium had achieved, and what directions for future work the collection suggested. Fisk and Gordon concluded that the first symposium had shown law was woven so deeply into consciousness that, paradoxically, the first step for critical practice actually had to be to identify it “at work.”¹¹ Law was not outside life but “deep within it,” in no sense “external to suffering, privation, inequality, and oppression.”¹² For our part, Comaroff and I stressed that the shift to “law as . . .” was an opportunity to think outside the “long-familiar Weberian categories and trajectories” that have dominated both history and social science.¹³ Writing the afterword gave Comaroff and me the opportunity to have “the last word,” but we pointedly declined to be programmatic. To us, “law as . . .” was “neither a manifesto nor a prescriptive statement of intent.”¹⁴ Nor was it intended to become a paradigm.

9. Of the eighteen papers presented, sixteen appear in this collection. Two of the participants—Hilary Schor and Yishai Blank—were prevented by other professional and personal commitments from revising their papers for inclusion here.

10. Ariela Gross, Shai Lavi, Kunal Parker, Norm Spaulding, Christopher Tomlins, Mariana Valverde, and Steven Wilf were all on both programs in one or other capacity, although Steven Wilf was only a semi-repeat player, having been prevented from actually attending the first conference by the disruption to air travelers on the eastern seaboard between the fifteenth and twentieth of April 2010 caused by the eruption of the Icelandic volcano Eyjafjallajökull. Catherine Fisk, co-convenor of the first conference, was prevented by other commitments from co-convening or attending the second conference.

11. Fisk & Gordon, *supra* note 4, at 541.

12. *Id.*

13. Tomlins & Comaroff, *supra* note 2, at 1041.

14. *Id.*

Were it to pretend to any of these things, our best gift to the reader would be to declare it dead and done with. It is no more than “an eddy in the stream of becoming” that stands, at most, for an attempt to open up a perspective. It is also, as its ellipsis suggests, a perspective in progress, unfinished, incomplete, *becoming*—hopefully in both senses of the word[, its serial periods marking an ongoing process rather than a full stop].¹⁵

Our hope then was simply that the essays comprising that first collection would demonstrate at the very least that “law as . . .” was “not without its uses, its promises, its provocations.”¹⁶

In an important sense, this second collection serves to index whether the perspective we desired to open up in 2010 is likely to have any lasting effect on legal scholarship. Promise and provocation are best revealed by use, not by the windy claims of sponsors. That being the case, it is best to let the essays speak for themselves. I shall offer only a brief introduction here, referring those who seek more extended disquisition on the meaning of “law as . . .” to the foreword and afterword to the first collection.¹⁷

I. TEMPORALITIES

We begin with four essays that, to a greater extent than elsewhere in the collection, undertake an explicit interrogation of history, particularly legal history, as a critical practice. “Every Law Tells a Story: Orthodox Divorce in Jewish and Islamic Legal Histories,” Lena Salaymeh’s examination of divorce in Jewish and Islamic legal systems in the premodern era, offers a startlingly new account of women’s agency in seeking and acquiring divorce in both religious traditions. Arguing against the conventional grain of linear and incremental acquisition of rights over time, Salaymeh shows that Jewish and Muslim women in the late antique period (250–750 CE) had relatively more access to divorce than women in the medieval era (750–1450 CE). Her analysis stresses that, if formal legal systems are studied from “primarily internal perspectives,” the likely outcome will be the generation of accounts of their development that reinforce the narratives that orthodoxy tells about itself in order to justify itself. Salaymeh favors historicism and thick description—a radical contextualization of law that both establishes “that any statement of ‘what the law *is*’ is embedded within a complex historical narrative generated by jurists,”¹⁸ and simultaneously undermines that narrative. Salaymeh’s principal empirical finding is that the Jewish and Islamic legal systems

15. *Id.* at 1079 (citation omitted).

16. *Id.*

17. Several authors in this collection offer their own thoughts on the matter too. *See, e.g.*, Shai J. Lavi, *Humane Killing and the Ethics of the Secular: Regulating the Death Penalty, Euthanasia, and Animal Slaughter*, 4 U.C. IRVINE L. REV. 297, 323 (2014); Brook Thomas, *Reconstructing the Limits of Schmitt’s Theory of Sovereignty: A Case for Law As Rhetoric, Not As Political Theology*, 4 U.C. IRVINE L. REV. 239, 242 (2014).

18. Lena Salaymeh, *Every Law Tells a Story: Orthodox Divorce in Jewish and Islamic Legal Histories*, 4 U.C. IRVINE L. REV. 19, 21 (2014).

of antiquity and of the medieval period have a profoundly interwoven character. Her principal contribution to our collective project is, in effect, to reaffirm the salience of historicism as a potent antifoundational tool. It is worth remembering that where orthodoxies reign, contextualization can be powerful acid.

Renisa Mawani's "Law as Temporality: Colonial Politics and Indian Settlers" also turns to historical context to examine current scholarly engagement with the "Asian settler" question—that is, broadly, the question of whether Asian migrations within European empires (particularly the British Empire) should be considered commensurate in effect and intent to European colonialism. But conceptually, Mawani's essay is less dependent upon historical contextualization than upon the development of an argument for considering the "juridical-racial taxonomies" bred to organize and manage colonial populations rendered racially polyglot by serial migrations as "*temporal divisions* that fomented legal subjectivities ascribed with unequal degrees of worth and value, disparate rights to the land, and . . . distinct claims to the imperial polity."¹⁹ The quality of temporality that Mawani seeks to mobilize cannot, she argues, be captured by simple historicity, by placing law in historical context, for law produces and organizes time, and to that extent creates the historical contexts into which we would insert it. Mawani wants us instead to attend to what she terms the "doubling" of time: "the tensions between *law's creation of time*, including the legal production of colonial-legal subjectivities, and the challenges posed by British Indians whose claims as settlers were animated by their own *lived times* of colonialism—including migration and indenture—and which animated their claims to belonging."²⁰ Indeed, doubling is likely to prove but a way station on a road to discovering and charting a whole plurality of temporalities huddled beneath the overbearing incessant pendulum-swing of metropolitan legality.

In "Routine Exceptionality: The Plenary Power Doctrine, Immigrants, and the Indigenous Under U.S. Law," Susan Coutin, Justin Richland, and Véronique Fortin join Renisa Mawani in problematizing history (and law)'s assumptions of time. Indeed, as their subtitle suggests, Coutin, Richland, and Fortin are negotiating similar empirical terrain. Their particular concern is to confront the "always already"-ness of plenary power, the "annunciatory-yet-citational" quality of its creation as a form of self-evident authority whose very self-evidence confirms its prior instantiation simply by evidencing its necessity.²¹ As in Mawani's essay, the effects of this atemporal temporality of law are felt with particular sting by those whose own lived temporalities do not accord—or cannot be made to accord—with its regime, and who are thereby rendered routinely exceptional:

19. Renisa Mawani, *Law As Temporality: Colonial Politics and Indian Settlers*, 4 U.C. IRVINE L. REV. 65, 68 (2014).

20. *Id.* at 70.

21. Susan Bibler Coutin et al., *Routine Exceptionality: The Plenary Power Doctrine, Immigrants, and the Indigenous Under U.S. Law*, 4 U.C. IRVINE L. REV. 97, 100 (2014).

immigrants, the indigenous, and islanders.²² Coutin, Richland, and Fortin refer us to administrative activities as sites of routine excepting, which they describe powerfully as moments of irresolution, of back-and-forth movement “between rule and exception, law and the extralegal . . . promise and revocation,” movements that are for them the essence of plenary power.²³ In those same irresolute moments, we can also detect the overbearing swing of metropolitan legality’s pendulum, the interminable ticking that at once registers the relentless passage of a particular form of time and the oppressive endlessness of the wait for it to cease.

In the final essay in this initial group, “Repetition in History: Anglo-American Legal Debates and the Writings of Walter Bagehot,” Kunal Parker helps us see endlessness somewhat differently, potentially less oppressively. As Parker notes, repetition is a peculiarly difficult temporality for history to contemplate—or perhaps we should amend that to *some* histories, notably the progressive histories of occidental modernity. For, as Parker shows us, law’s own temporality, and thus its sense of history, has been variable. The early modern common law, for example, confronted its own immemoriality not with concern but indifference, or even with active aesthetic (not to say political) regard. It is the modern positivist state—the state bequeathed to the nineteenth century and beyond by the French Revolution—that becomes impatient with repetition, that seizes upon direction, and organizes time and history into periods, progress, and—of course—power, in the service of achieving directionality. In turn, directionality attracts its own skeptics, notably Oliver Wendell Holmes, Jr., who detects in time and history nothing but the corrosive historicism that we have already seen Lena Salaymeh apply to great effect in the first essay in this collection.²⁴ Holmes’s critique of directional history, however, leaves nothing in its place but a coldly pragmatic statism.²⁵ It is not Holmes in this instance, but

22. *Id.* at 115. See generally Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 TEX. L. REV. 1, 1–15 (2002); Christopher Tomlins, *The Supreme Sovereignty of the State: A Genealogy of Police in American Constitutional Law, from the Founding Era to Lochner*, in POLICE AND THE LIBERAL STATE 33, 33–53 (Markus D. Dubber & Mariana Valverde eds., 2008).

23. Coutin et al., *supra* note 21, at 101.

24. Salaymeh, *supra* note 18, at 21–22. On Holmes, see Kunal M. Parker, *Law “In” and “As” History: The Common Law in the American Polity, 1790–1900*, 1 U.C. IRVINE L. REV. 587, 588–91 (2011). See generally KUNAL M. PARKER, COMMON LAW, HISTORY, AND DEMOCRACY IN AMERICA, 1790–1900: LEGAL THOUGHT BEFORE MODERNISM 1–24, 219–78 (2011).

25. See Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 457 (1897) (“When we study law we are not studying a mystery but a well known profession. We are studying what we shall want in order to appear before judges, or to advise people in such a way as to keep them out of court. The reason why it is a profession, why people will pay lawyers to argue for them or to advise them, is that in societies like ours the command of the public force is intrusted to the judges in certain cases, and the whole power of the state will be put forth, if necessary, to carry out their judgments and decrees. People want to know under what circumstances and how far they will run the risk of coming against what is so much stronger than themselves, and hence it becomes a business to

another critic, Walter Bagehot, who fascinates Parker with his apparent commitment to contradictory philosophies of history—on the one hand, teleological directionality, on the other, “showing that we can never escape custom, repetition, and imitation.”²⁶ Parker finds irony in Bagehot’s embrace of these incommensurables, while also noting that Bagehot’s very ability to straddle both direction and repetition serves as a lesson in the limits of what current historians so often announce as their “default” model, change over time.

II. FUGACITIES

Essays in the collection’s second group share two characteristics. First, they are all concerned in one form or another with the phenomenon of human property, notably slavery. Second, they all attempt to catch fleeting glimpses of law in unanticipated historical association with that property.

We begin with Michelle McKinley’s “Standing on Shaky Ground: Criminal Jurisdiction and Ecclesiastical Immunity in Seventeenth-Century Lima, 1600–1700.” An accomplished archival ethnographer, McKinley charts the lives of Lima’s slaves as revealed in a major collection of ecclesiastical immunity (sanctuary) proceedings, which are in effect also criminal procedure cases, complete with multiple records of confession under torture. The records grant her access to the criminal lives and networks of the urban poor, among whom Lima’s slaves lived and worked. They “reveal the perennial struggle in consolidating states between, on the one hand, ecclesiastical ideals of clemency and intercession, and, on the other, secular imperatives of punishment and deterrence” upon which, in Lima’s case, “the colonial racial grammar of the criminal depravity of black and mulatto men” is a constant overlay.²⁷ But there is more besides. We are familiar with the slave who is the helpless subject of criminal law’s “naked disciplinary power.”²⁸ What of the slave of McKinley’s ecclesiastical records—“simultaneously Catholic and potentially treacherous”²⁹—or of her notarial sources (analyzed elsewhere³⁰), in which slaves appear “industrious, enterprising, and beatific”³¹? These contrasting glimpses lead McKinley to take on the challenge of reexamining Orlando Patterson’s famous conclusion that slavery means social death.³²

find out when this danger is to be feared. The object of our study, then, is prediction, the prediction of the incidence of the public force through the instrumentality of the courts.”)

26. Kunal M. Parker, *Repetition in History: Anglo-American Legal Debates and the Writings of Walter Bagehot*, 4 U.C. IRVINE L. REV. 121, 137 (2014).

27. Michelle A. McKinley, *Standing on Shaky Ground: Criminal Jurisdiction and Ecclesiastical Immunity in Seventeenth-Century Lima, 1600–1700*, 4 U.C. IRVINE L. REV. 141, 143 (2014).

28. *Id.* at 151.

29. *Id.* at 152.

30. Michelle A. McKinley, *Till Death Do Us Part: Testamentary Manumission in Seventeenth-Century Lima, Peru*, 33 SLAVERY & ABOLITION 381, 381–96 (2012).

31. McKinley, *supra* note 27, at 151.

32. See ORLANDO PATTERSON, *SLAVERY AND SOCIAL DEATH: A COMPARATIVE STUDY* 38–45 (1982).

McKinley will not go so far as to accord the slave agency.³³ But she does argue that the slave can be treated as a “protagonist,”³⁴ which is in effect to recognize that the slave was a participant in the living of a life. Slave protagonism is to be found in the sanctuary cases in the limited protective spaces opened by the competition of ecclesiastical with secular criminal sovereignties. But McKinley refuses to exaggerate protagonism’s extent. Slaves might have situated themselves in the spaces opened, but they remained slaves, utterly dependent upon the actions of others for their protagonism to bear fruit.

Where McKinley’s glimpses of law’s multiple intersections with slavery are culled from an extensive record collection, mine (Christopher Tomlins, “Demonic Ambiguities: Enchantment and Disenchantment in Nat Turner’s Virginia”) are produced by an intertextual reading of a single document, one of the best known in the history of American slavery, Thomas Ruffin Gray’s 1831 pamphlet entitled *The Confessions of Nat Turner*.³⁵ By conjoining Gray’s *Confessions* with Walter Benjamin’s “Capitalism as Religion”³⁶ and Max Weber’s “Science as a Vocation,”³⁷ I attempt to create successive original standpoints, or optics, from which or through which one may catch novel glimpses of Turner’s rebellion, and of Turner himself. Both Benjamin and Weber also furnish optics on law, particularly on the meaning of the “full faith and credit”³⁸ that the Southampton County Court demanded for its decision to hang Turner for his attempted rebellion. Like the “demonic ambiguity”³⁹ inherent in the duality of debt and guilt that, for Benjamin, confirms the existence of a religious (specifically a Christian) structure in capitalism, the conjunction of faith and credit has its own demonic ambiguity, simultaneously sacralizing and secularizing legal authority. In the maelstrom of the Turner Rebellion, as indeed in the capitalism it threatened, one encounters these demonic ambiguities (guilt and debt, faith and credit) collapsing into one another, fusing in an overwhelming and atemporal simultaneity that is at once economic and juridical, moral and psychological, profane and sacral. This simultaneity—and Turner’s momentary disruption of it—is my essay’s chief concern.

Something of the same attention to fusion and collapse is to be found in Brenna Bhandar’s “Property, Law, and Race: Modes of Abstraction,” the third essay in this group. It has long been observed that abstraction is the means by

33. McKinley, *supra* note 27, at 153.

34. *Id.*

35. THOMAS R. GRAY, *THE CONFESSIONS OF NAT TURNER, THE LEADER OF THE LATE INSURRECTION IN SOUTHAMPTON, VA*, reprinted as *THE ORIGINAL CONFESSIONS OF NAT TURNER* 1 (1967).

36. 1 WALTER BENJAMIN, *Capitalism as Religion*, in *WALTER BENJAMIN: SELECTED WRITINGS, 1913–1926*, at 288, 288–91 (Marcus Bullock & Michael W. Jennings eds., 1996).

37. MAX WEBER, *Science as a Vocation*, in *FROM MAX WEBER: ESSAYS IN SOCIOLOGY* 129, 129–56 (H.H. Gerth & C. Wright Mills eds. & trans., 1946).

38. *THE CONFESSIONS OF NAT TURNER AND RELATED DOCUMENTS* 42–43 (Kenneth S. Greenberg ed., 1996).

39. 1 BENJAMIN, *supra* note 36, at 289.

which law produces its universals, just as it is the means to resolve the daily confrontation in the moment of judgment between universal norms and particular claims. Here, however, Bhandar considers abstraction not in its relation to universality, but as the very basis of the modern legal form of property that emerged in the late seventeenth century to mark the commodification of land, and of the near-simultaneous appearance of a modern discourse of race. In the case of property, ownership of land hitherto conceived concretely in terms of hereditary title and inheritance (birthright) was reconceived by John Locke as the expression of abstract labor. In the eighteenth century, Jeremy Bentham further separated ownership from physical possession, occupation, or even use, by expressing ownership as a relation based on the *expectation* that one would be able to use the property as one wished. In both cases (particularly the latter), the abstraction is both realized and confirmed by law, which secures the property relation, or guards and protects the expectation. Though actual possession and occupation precede the shift to abstraction, the shift itself denies the possibility that they could provide justification or a basis for ownership. Yet possession remains central to the lifeworld of property; notions of privilege and entitlement—the possession of particular qualities and characteristics that constitute the prerequisites of one’s ability to own—shape one’s property consciousness. It is here we catch our glimpse of slavery and, in particular, of the emergence of race. First, Bhandar underlines the decisive significance of race to the very reconceptualization of property as abstraction. Locke’s propertization of land as abstract labor is, famously, a simultaneous denial of property to the concrete North American indigenous possessor/occupier—the “wild Indian”;⁴⁰ simultaneously, abstract race (“whiteness”) becomes property. Private property and the racial are, she argues, co-emergent.⁴¹ Second, as Stephen Best and Ian Baucom—among others—have shown, slavery and the figure of the slave are central to the eighteenth century’s emergent forms of abstract property, just as they are to the system of credit and debt that enabled finance capital decisively to collapse real and intangible forms of value in the body of the slave.⁴² Focusing in particular on Baucom, Bhandar asks whether accounts such as his can (or should) also explain how abstraction operated in the construction of a particular discourse of the racial. Her essay requires us to ask how the racial—as a political-economic relation, as embodied quality, as metaphysical attribute—might be more cogently addressed in current theorizations of abstraction and property ownership.

The final essay in this group is Michael Meranze’s “Hargrave’s Nightmare

40. JOHN LOCKE, *SECOND TREATISE OF GOVERNMENT* 19, 21–30 (C.B. Macpherson ed., Hackett Publ’g Co. 1980) (1690).

41. Brenna Bhandar, *Property, Law, and Race: Modes of Abstraction*, 4 U.C. IRVINE L. REV. 203, 204 (2014).

42. IAN BAUCOM, *SPECTERS OF THE ATLANTIC: FINANCE CAPITAL, SLAVERY, AND THE PHILOSOPHY OF HISTORY* 11–14 (2005); STEPHEN M. BEST, *THE FUGITIVE’S PROPERTIES: LAW AND THE POETICS OF POSSESSION* 1–13 (2004).

and Taney's Dream." Following up on a near-revolution in historical scholarship on the founding era, which has eviscerated the long-ascendant "ideological" account of the making of the American Republic and irreducibly established the centrality of slavery in "the actual political and legal accommodations made to create and expand the Republic,"⁴³ Meranze draws to our attention a logical but so far unasked corollary question—accepting that slavery was central to the U.S. Constitution, why was it so? In other words, what did the Constitution do for slavery? The short answer is that it enabled a transition "from imagined weakness to consolidated strength,"⁴⁴ meaning, in turn, that the subsequent preeminence of slavery in the history of the United States was "an effect of the Constitution."⁴⁵ Meranze makes the point by tracking the legal and political history of slavery from the early 1770s until the Founding Era, with a coda that reaches forward to *Dred Scott v. Sandford*.⁴⁶ Lord Mansfield's decision in *Somerset's case*,⁴⁷ restricted though it was, weakened slavery's metropolitan foundations; more or less simultaneously, William Blackstone rendered it a merely local institution, vulnerable to parliamentary determination.⁴⁸ Such transatlantic threats, however indirect, meant that the survival of American slavery became dependent on the support of its own state. The construction of that state in the aftermath of the American Revolution is Meranze's substantive subject, but we must be sure not to miss his larger point, that the constitutional order constructed *for* slavery was one that in a legal-political sense subordinated all *to* slavery. The nightmare (and dream) of Meranze's title is that of slavery uncontained, the entire complex of American law reduced to a symptom of a given racial order. Meranze here joins Bhandar in providing us a glimpse of the profoundly unsettling foundation of nineteenth-century American legalities, and, by extension, of our own.

III. INNOVATIONS

Each of the essays in the collection's third group engages in, or examines, innovation—literally, the alteration of what is established (a conventional wisdom, an accepted concept, an intellectual strategy or theory) by the introduction of new elements or forms. In "Reconstructing the Limits of Schmitt's Theory of Sovereignty: A Case for Law As Rhetoric, Not as Political Theology," Brook

43. GEORGE WILLIAM VAN CLEVE, A SLAVEHOLDERS' UNION: SLAVERY, POLITICS, AND THE CONSTITUTION IN THE EARLY AMERICAN REPUBLIC 5 (2010); *see also* ROBIN L. EINHORN, AMERICAN TAXATION, AMERICAN SLAVERY 1–9 (2006); MARK A. GRABER, DRED SCOTT AND THE PROBLEM OF CONSTITUTIONAL EVIL 91–96 (2006); DAVID WALDSTREICHER, SLAVERY'S CONSTITUTION: FROM REVOLUTION TO RATIFICATION 3–10 (2009).

44. Michael Meranze, *Hargrave's Nightmare and Taney's Dream*, 4 U.C. IRVINE L. REV. 219, 221 (2014).

45. *Id.*

46. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

47. *Somerset v. Stewart*, (1772) 98 Eng. Rep. 499 (K.B.).

48. 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 105 (Univ. of Chi. Press 1979) (1765).

Thomas examines the phenomenon of Weimar (and later Nazi) jurist Carl Schmitt's remarkable following in current legal and political theory. Thomas investigates the origins of Schmitt's own thinking, drawing to our attention the significant influence of Civil War and Reconstruction-era events on Schmitt's formulation of a theory of "sovereignty" refracted in the prism of "exception";⁴⁹ and he places Schmitt in transatlantic dialogue with, in particular, the largely forgotten American political scientist John W. Burgess, whose own work on sovereignty was also deeply influenced by the Civil War and Reconstruction. Burgess defined a sovereign state as any "portion of mankind"⁵⁰ organized into an undivided political unit exercising "original, innate, and legally unlimited power to command and enforce obedience by the infliction of penalties for disobedience."⁵¹ State and government are not coterminous. Government may be limited. "But the unlimited power of the state limits governments. [T]he government is not the sovereign organization of the state. Back of the government lies the constitution; and back of the constitution the original sovereign state, which ordains the constitution both of government and of liberty."⁵² Thus in Burgess's formulation, the sovereign is "that which imposes the limitation."⁵³ Such is the nature of sovereignty; in moments of emergency, the state might overturn its own limits, concentrating the whole of its capacity, unrestrained, on saving its own life. But although this seems similar to Schmitt's "exception," Thomas argues, it is founded in political science, not political theology—on a claim to reason grounded empirically in space and time (the space and time of the state) rather than on a secular equivalence to the action of an unbound God. Thomas nevertheless faults both Schmitt and Burgess, from which follows the second of his moves: the likening of law to rhetoric rather than science *or* theology. Still, Burgess's political science seems more amenable to debate—and thus an opening to rhetoric—than Schmitt's political theology. Hence, Thomas hopes, "the relentless hermeneutics of suspicion that has characterized much recent critical legal history" will be alleviated by the provision of his alternative.⁵⁴

In the second essay in this group, "Mannheim's Pendulum: Refiguring Legal Cosmopolitanism," Thomas Kemple continues our discussion of sovereignty while engaging in a double dose of innovation, both analytic and scopic. Kemple's essay examines the concept of "legal cosmopolitanism" as a component of a discourse of cosmopolitanism emerging in the long aftermath of World War II. Public intellectual commentary on the cosmopolitan perspective treats it as a fundamental inversion of the legacy of Westphalian state sovereignty, in that it

49. CARL SCHMITT, *POLITICAL THEOLOGY: FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY* 16–17, 36–37 (George Schwab trans., Univ. of Chi. Press 2005) (1922).

50. 1 JOHN W. BURGESS, *POLITICAL SCIENCE AND COMPARATIVE CONSTITUTIONAL LAW* 50 (N.Y., Baker & Taylor Co. 1890).

51. JOHN W. BURGESS, *RECONSTRUCTION AND THE CONSTITUTION* 1 (1902).

52. Thomas, *supra* note 17, at 251 (quoting 1 BURGESS, *supra* note 50, at 57).

53. 1 BURGESS, *supra* note 50, at 53.

54. Thomas, *supra* note 17, at 242.

renders human or even natural rights ontologically prior to the system of international law that privileges “the historico-political and geocultural framework of the occidental nation-state and its ‘European experimental protocol.’”⁵⁵ The marker of inversion is taken to be the Universal Declaration of Human Rights of 1948 and its “pledge to protect fundamental freedoms and promote personal dignity independently of and ultimately beyond the borders of the nation-state,”⁵⁶ superseding, or at least supplementing, the individual civic rights associated with nation-state sovereignty. Examining legal cosmopolitanism from the perspective of the sociology of knowledge, Kemple compares and contrasts three distinct ways in which the concept can be and has been configured to convey credible ideas and valued beliefs in social, cultural, and natural domains: as an expanding sphere of influence radiating outward concentrically from a metropolitan core, which he terms a Stoic vision and associates with the work of Martha Nussbaum; as a process of social intelligence constantly oscillating or vacillating back and forth between poles of *ideology* (“the thought-form that present reality invalidates as outdated”⁵⁷) and *utopia* (“the thought-form that present reality invalidates as being premature”⁵⁸), which he terms the vision projected by modern liberalism; and as displaced patterns of thought within intersecting social circles, “the standpoint of the exile and stranger who does not just wander aimlessly through the city like the traveler, the pilgrim, or the trader,” but moves purposefully “inside, outside, and along the edges of multiple social circles” locating thought “in expanding and intersecting spheres of interaction and influence,”⁵⁹ which he analogizes to the standpoint of the ancient Cynics. Arrestingly, Kemple maps each representation of cosmopolitan consciousness figuratively to produce their distinct socialities in spatial form. This figurational approach to legal-intellectual history attempts to demonstrate graphically what is novel about the inner conceptual structure and political implications of the resurgence of “legal cosmopolitanism” in contemporary intellectual debate.

The third essay in this group also undertakes a study of emergence, in this case “of a new regulation of death and dying.”⁶⁰ In “Humane Killing and the Ethics of the Secular: Regulating the Death Penalty, Euthanasia, and Animal Slaughter,” Shai Lavi examines the production over time, through regulation, of three new ways of death, each a case of “humane” killing—death without suffering, an aesthetically commodious death—and, as a result, their convergence. Lavi asks,

First, since when has it become possible to consider the death penalty,

55. Thomas Kemple, *Mannheim's Pendulum: Refiguring Legal Cosmopolitanism*, 4 U.C. IRVINE L. REV. 273, 274 (2014).

56. *Id.* at 273.

57. *Id.* at 279.

58. *Id.*

59. *Id.* at 293.

60. Lavi, *supra* note 17, at 299.

ethanasia for the terminally ill, and animal killing within the same ethical and legal grid and to apply similar modes of execution to these radically different bodies? Second, how has it come about that in all three cases our laws and ethics separate the question of the legitimacy of *killing* from the legitimacy of *methods* of killing, shifting their focus from the former to the latter?⁶¹

Lavi's responses stress the range of meanings that can be found in humane killing. Secularization—Weber's demise of the sacred⁶²—is one explanation, but it is challenged by René Girard's claims for the continuance of the sacred⁶³ and by Schmitt's recuperation of it.⁶⁴ Foucauldian biopower offers a second and distinct response.⁶⁵ Norbert Elias's civilizing process is a third.⁶⁶ Lavi's own conclusion is to accept the secular, but in its own right rather than as a refusal of the religious; as a cosmology, that is, that can support an ethics of the humane. His point—one he has explored in earlier writing⁶⁷—is that we should not take the accepted sense of “secular” at face value. To do so is to place the secular in binary (zero-sum) relations with the sacred, disenchantment with enchantment, and thereby distort both the conditions and the meaning of its emergence.

Mariana Valverde's “The Rescaling of Feminist Analyses of Law and State Power: From (Domestic) Subjectivity to (Transnational) Governance Networks,” the final essay in this group, charts innovation in a distinct form—theoretical innovation in feminist legal studies that, over a thirty-year period of development, entailed a certain transformative loss of a specific kind of critical purchase. A fascinating intellectual history of thirty years of feminist legal theory, Valverde calls to our attention a twofold transformation: a change in “the locale privileged by theory,” from the local to the transnational;⁶⁸ and a change in the object of theoretical attention, from “the everyday subjectivity or consciousness of ordinary metropolitan folk” to the nonsubjective and nonhuman—“flows, networks, governance assemblages, and so forth.”⁶⁹ Together, the two components add up to a “scale shift” with real consequences for feminist legal studies: an abandonment of “the gendered troubles of ordinary white American women” as the object of attention in favor of “exotic locations in which women can be easily

61. *Id.* at 303.

62. *See* WEBER, *supra* note 37, at 302.

63. *See* RENÉ GIRARD, *VIOLENCE AND THE SACRED* 20–27 (Patrick Gregory trans., The Johns Hopkins Univ. Press 1977) (1972).

64. *See* SCHMITT, *supra* note 49, at xv–xix.

65. 1 MICHEL FOUCAULT, *THE HISTORY OF SEXUALITY* 140 (Robert Hurley trans., Vintage Books ed. 1990) (1976).

66. NORBERT ELIAS, *THE CIVILIZING PROCESS: SOCIOGENETIC AND PSYCHOGENETIC INVESTIGATIONS* (Eric Dunning et al. eds., Edmund Jephcott trans., Blackwell 1994) (1939).

67. Shai J. Lavi, *Enchanting a Disenchanted Law: On Jewish Ritual and Secular History in Nineteenth-Century Germany*, 1 U.C. IRVINE L. REV. 813, 818–24 (2011).

68. Mariana Valverde, *The Rescaling of Feminist Analyses of Law and State Power: From (Domestic) Subjectivity to (Transnational) Governance Networks*, 4 U.C. IRVINE L. REV. 325, 326 (2014).

69. *Id.* at 326–27.

imagined, by Western feminists, as essentially and inherently victimized merely by virtue of being women”;⁷⁰ and an abandonment of “gendered subjectivity” or consciousness as the object of critical feminist theorizing in favor of the array of queries emanating from legal geography, actor-network theory, and the sociology of networks: “spaces, flows, and networks.”⁷¹ Neither component of Valverde’s scale shift is a phenomenon particular to feminist legal studies; each permeates the entire socio-legal field, and indeed beyond. Nor does Valverde lament the shift. But she strongly recommends that we register what was lost: “analyses of the everyday subjectivity of ordinary women that gave us the critique not only of marriage but also of contractualism and the critique of unpaid housewifely labor.”⁷²

IV. POSSIBILITIES

The essays in our final group engage, to a greater extent than elsewhere in this collection, with the constellations that history can create between past (both recent and remote) and present. Thereby, each addresses the possibilities (and liabilities) of the perspectives emerging from the “law as . . .” enterprise for a knowledge that is both practical and critical of the here and now: “[T]he moment, it might be said, when the origins of the present ‘jut manifestly and fearsomely into existence,’ spirit into experience, metaphysics into materiality.”⁷³

The first essay in this group, Prabha Kotiswaran’s “Beyond Sexual Humanitarianism: A Postcolonial Approach to Anti-Trafficking Law,” can be read as a response to the last essay of the previous group, Mariana Valverde’s “Rescaling,” in that it confirms the scale shift that Valverde describes and simultaneously proposes to rescue feminist legal studies from the shift’s most negative effects by reintroducing—in theory’s new locale of the transnational—precisely that attention to local subjectivity/consciousness that Valverde shows got lost in theory’s scale shift. Kotiswaran’s essay addresses a crucial subject of contemporary feminist attention, trafficking, but from a perspective quite distinct from the occidental/metropolitan standpoint that has essentialized Africa and Asia, as Valverde put it, as “sites of extreme gender oppression.”⁷⁴ Carefully and empirically, Kotiswaran engages in a research exercise designed to “de-exceptionalize”⁷⁵ trafficking and sex work by locating them, respectively, as instances of larger processes of migration and work, subject to the same patterns of coercion, consent, and exploitation. In particular, Kotiswaran deploys both experience and ethnography to examine the local activities of sex workers in

70. *Id.* at 333, 342.

71. *Id.* at 342.

72. *Id.* at 351 (footnote omitted).

73. Tomlins & Comaroff, *supra* note 2, at 1044 (quoting 1 BENJAMIN, *supra* note 36, at 242).

74. Valverde, *supra* note 68, at 347.

75. Prabha Kotiswaran, *Beyond Sexual Humanitarianism: A Postcolonial Approach to Anti-Trafficking Law*, 4 U.C. IRVINE L. REV. 353, 363, 379–80 (2014).

counteracting trafficking through self-regulation. Her conclusion is that antitrafficking law has possibilities, but only if assimilated to transnational regulation of labor markets, on the one hand, and local labor market self-regulation, on the other. “Ultimately, the recognition of the varied stakes that developing and developed countries have in anti-trafficking law, and the reorientation of anti- trafficking law away from a criminalization model to a labor model, may indeed prove to be a crucial axis around which the success of the U.N. Protocol hinges.”⁷⁶

The second essay in this group, by Nomi Stolzenberg, also returns us to a subject already traversed earlier in this collection, in her case in the essays by Brook Thomas and (to a lesser extent) Shai Lavi. Like Thomas, Stolzenberg addresses the legal academy’s current fascination with political theology; unlike him she sees possibilities in political theology, but only if political theology is first transformed by purging its illiberal associations. Her “Political Theology with a Difference” is an exploration of the possibility that the discourse of political theology can indeed be sustained but its connections to Carl Schmitt severed. It proposes “a liberal conception of political theology, one that has at its core a principle of accommodation to human differences—to differences in historical and cultural circumstances and to differences in individual and group practices and beliefs.”⁷⁷ The foundation for this liberal conception is the doctrine of divine accommodation, an idea enshrined, true enough, in millennia of Christian and Jewish theology, but derived from more remote traditions of classical rhetoric that identified accommodation as a principle of textual exegesis. By reconstructing the genealogy of the idea of accommodation, Stolzenberg exposes its expansionist quality.⁷⁸ Equally important, she shows that its hermeneutic applications render religious notions of accommodation essentially secular in outlook, in that “divine accommodation” means an accommodation of God to human capacities, limitations, and institutions. In a nutshell, the “unavoidable gap between human knowledge and the divine law and the consequent necessity for man to establish and follow secular authorities and law” meant on the one hand “that secular government and law are divinely ordained,” and on the other “that the state and its law *must* be secular—secular in the very specific sense that they cannot be based upon or reflective of divine law.”⁷⁹ Strikingly, this means “[a]ll secular law, on this (theological) account, is emergency law. All states are emergency states. . . . What looks from one point of view like the state of exception, a state of pure power unbounded by law, is, from another point of view, nothing more or less than ordinary law[,] . . . secular law[;]” that is “man-made law that reflects God’s accommodation to human beings’ needs and imperfections,” which “make it

76. *Id.* at 405.

77. Nomi Maya Stolzenberg, *Political Theology with a Difference*, 4 U.C. IRVINE L. REV. 407, 411 (2014).

78. *Id.* at 418–30.

79. *Id.* at 426 (emphasis added).

impossible for them to follow, enforce, or even recognize the content of the divine law.”⁸⁰ Stolzenberg’s intriguing argument places her alongside Thomas and his appeal to rhetoric, and Lavi and his emphasis on the apposition (not opposition) of the secular and the sacred. Notably, in addition, it creates an innovative genealogy not only for political theology but also for liberalism.

The third and fourth essays in this group draw the collection as a whole to a close, and together furnish it with something of a conclusion. In a project canvassing the potential for history to serve as an interface for the interdisciplinary study of law, it is appropriate to note that each of the two final essays explicitly embraces history as practice and/or arena. Yet it is also noteworthy that the terrain each principally occupies is the terrain of jurisprudence.

In “How to Speak Well of the State: A Rhetoric of Civil Prudence,” Jeffrey Minson offers us a considered argument for a secular ethic of the state. Civil prudence, Minson states, comprises “a jurisprudential ethic for a sovereign state defined by two responsibilities: protecting its citizenry from external or internal evils, and fostering sociability.”⁸¹ Its genre is rhetorical and dispassionately historical—historical, that is, in the particular form of the contextual history that “emerged in Western Christendom as a competitor to sacred philosophical history,”⁸² that is, *Heilsgeschichte*. We have here, seemingly, a grounded reiteration of Stolzenberg’s arguments for the nature of the state and the genealogy of liberalism. But, we should note, it is not an argument for liberalism. First, the civil prudential state is “explicit in respect to police powers”; second, “it binds itself”; third, as an arena of action it is “immanent.”⁸³ Minson’s argument for the civil prudential state is cold, even bleak. He appraises moral “disgust”⁸⁴ with the sovereign state and answers it with pragmatism: “Civil prudence strives to take account of what actually lies within the capabilities of modern states to problematize, correct, cope with, and improve.”⁸⁵ We may take this as a warning against too enthusiastic an embrace of the rehabilitation of metaphysics that “law as . . .” has manifested.⁸⁶

We end with Shaun McVeigh’s elegiac invocation of the responsibilities of jurisprudence and the jurist. McVeigh’s “Law As (More or Less) Itself: On Some Not Very Reflective Elements of Law” is a commentary on the present state of our sense of lawfulness that is also, like Jeffrey Minson’s essay, remarkably clear-eyed in its assessment of what can actually be expected of law, and of history, in the current conjuncture. Substantively concerned with the treatment of

80. *Id.* at 427–28.

81. Jeffrey Minson, *How to Speak Well of the State: A Rhetoric of Civil Prudence*, 4 U.C. IRVINE L. REV. 437, 440 (2014).

82. *Id.* at 444.

83. *Id.* at 458, 460, 465.

84. *Id.* at 437–38.

85. *Id.* at 465.

86. See Tomlins & Comaroff, *supra* note 2, at 1039–44.

indigenous bodies stolen from (in this case) Australian homelands and transported to the museums and hospitals of the colonizing metropolis, McVeigh's essay considers the possibility wherein the repatriation of indigenous remains might become a site of meeting and engagement—between indigenous and nonindigenous people, and between indigenous and nonindigenous law. McVeigh is overwhelmingly concerned with law as a mode of conduct, as a means to express relations of acknowledgment, respect, and honor. He considers both the capacity for law and laws to manifest such relations and the foreclosure of that capacity on the jurisdictional terrains of settlement, so carefully constructed to deny concomitance to indigenous people and law. The account is, as he says, “in many respects, unhappy.”⁸⁷ What saves it from hopelessness is, first, the possibility that the jurispudent will become, and remain, alive to the responsibilities of lawful conduct; and second, the undercurrent of McVeigh's own respect for the potential of the common law to recognize the laws of others, to acknowledge intersubjectivity. This may strike some as odd at the end of a century (and in a country—the United States) in which the common law mentality has been so thoroughly rinsed out of our sense of legality by legislative (and socio-legal) positivism that only a few traces of it are left.⁸⁸ All the more reason, then, to be reminded that “the jurisprudences of jurisdiction have contributed to the creation of a meeting of laws in a lawful rather than a lawless way,” of the possibility that in the common law tradition lies a trace of such a jurisprudence, and hence, concomitantly, of the particular responsibility adhering to “those who live their lives through the common law tradition . . . to give place to the dead.”⁸⁹

CONCLUSION

To the extent it is an identifiable intellectual tendency in legal studies, “law as . . .” is barely three years old. As a label, it has been applied only to the two symposia held at the University of California, Irvine School of Law in 2010 and 2012, and to the resulting collections of essays published in the *UC Irvine Law Review*. Nor might the authors of many of those essays feel it seemly to have their work appropriated to the banner of some upstart intellectual tendency. Scholarship being what it is, most of the essays published in these two collections were maturing long before anyone thought of the “law as . . .” marquee. They are the fruit of years (if not decades) of individual thought and research, not of a sudden flash of inspiration brought on by a *samizdat* circulated “call for papers.”

Yet for all that, and for all the initial desire to avoid conclusory foreclosure,⁹⁰ it is a responsibility of sponsors to attempt some provisional assessment of what

87. Shaun McVeigh, *Law As (More or Less) Itself: On Some Not Very Reflective Elements of Law*, 4 U.C. IRVINE L. REV. 471, 489 (2014).

88. See MARIANNE CONSTABLE, JUST SILENCES: THE LIMITS AND POSSIBILITIES OF MODERN LAW 28–34; PARKER, *supra* note 24, at 279–92.

89. McVeigh, *supra* note 87, at 491.

90. See Tomlins & Comaroff, *supra* note 2, at 1041, 1079.

the “becoming” of “law as . . .” may turn out to be. It seems to be a combination of two elements, one underlined in the first collection, the other present there but emerging more strongly in this second collection. The first element, unsurprisingly, is history. The task of history is to attempt in its myriad ways to identify that which conceals in order to open up to discovery that which is concealed. Nothing is more concealing than legality, the magical power that makes so much—including itself—disappear.⁹¹

But if our practice is indispensably historical, does this mean that we have after all done nothing more than sign on once again for another dose of Holmesian antifoundationalism, another dip in the acid bath that dissolves everything into nothing?⁹² Are we simply repeating ourselves—the fate of the modern?⁹³ I think not, for three reasons—all present, if somewhat latently, in the first collection, and all more clearly evident in this collection, comprising together the second element of what “law as . . .” is becoming. First, historical dissolution is never complete. It always leaves residues, both material and ideal. These are the “concealed” substrate traces that are opened for discovery.⁹⁴ Second, our historical practice is not definitionally antifoundational; it has more strings to play on than historicism and its determined temporal contextualizations.⁹⁵ It is alert to multiple temporalities, not least that of duration. It is alert to metaphysics, precisely because it understands the “now” of the present to be one of the most critical interpellators of what is past.⁹⁶ Finally, our practice is more than simply that of history. Perhaps the most important lesson of this collection is that “law as . . .” can become a jurisprudence.⁹⁷

What kind of jurisprudence it can become is not yet clear. I have my own ideas,⁹⁸ but so—no doubt—do others. We must be content to wait and see what possibilities “law as . . .” will produce, promise, and provoke.

91. *Id.*; Fisk & Gordon, *supra* note 4, at 538.

92. *See* PARKER, *supra* note 24, at 7.

93. *See id.*; WALTER BENJAMIN, THE ARCADES PROJECT 25–26 (Howard Eiland & Kevin McLaughlin trans., 1999).

94. Tomlins & Comaroff, *supra* note 2, at 1078.

95. This is not to deny the power of historicism, for which see, for example, Salaymeh, *supra* note 18. It is simply to deny its sufficiency.

96. *See* BENJAMIN, *supra* note 93, at 391–92.

97. *See, e.g.*, McVeigh, *supra* note 87, at 490–91; Minson, *supra* note 81, at 438.

98. Christopher Tomlins, *Toward a Materialist Jurisprudence*, in 2 TRANSFORMATIONS IN AMERICAN LEGAL HISTORY 196 (Daniel W. Hamilton & Alfred L. Brophy eds., 2010).