

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

Christopher Tomlins\* and John Comaroff\*\*

I. From “Law and” to “Law as . . .” .....	1040
II. Normative Systems, Historical Descriptions .....	1045
III. Law, Metaphysics, Justice .....	1049
IV. Legal History With/Out Law? .....	1055
V. Law, Dis/Enchantment, Culture.....	1060
VI. The Law as Fetish, as Framework, as Grace .....	1067
VII. Terms of Argument, Realms of Discourse .....	1073
VIII. Conclusion.....	1078

Some twenty years ago, for another conference in which one of us had a hand, the political scientist and co-originator of the field of American Political Development, Karen Orren, wrote an essay entitled “Metaphysics and Reality in Late Nineteenth-Century Labor Adjudication.”<sup>1</sup> The essay rehearsed arguments Orren would elaborate in her book *Belated Feudalism*.<sup>2</sup>

The metaphysics in Orren’s title were those of the common law of master and servant, “based on custom and precedent . . . accreted and enforced in judicial holdings.” Undisturbed by democratic or industrial revolutions, the common law’s rules remained secreted in the interstices of the American Constitution, “detached from their original settings, placed in a framework of concepts, the reasonability of which was defined through a process of exposition by professionally trained intellects.”<sup>3</sup> The reality, by contrast, was the material reality of the workplace, which existed simultaneously in two moments: the ancient moment to which the rules of master and servant corresponded, and the moment of the late nineteenth

---

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

\*\* John Comaroff is Harold H. Swift Distinguished Service Professor of Anthropology and Social Sciences at the University of Chicago.

1. Karen Orren, *Metaphysics and Reality in Late Nineteenth-Century Labor Adjudication*, in *LABOR LAW IN AMERICA: HISTORICAL AND CRITICAL ESSAYS* 160 (Christopher L. Tomlins & Andrew J. King eds., 1992).

2. KAREN ORREN, *BELATED FEUDALISM: LABOR, THE LAW, AND LIBERAL DEVELOPMENT IN THE UNITED STATES* (1991).

3. Orren, *supra* note 1, at 160–61.

century, when those same rules encountered opposition—strikes, pickets, boycotts, industrial violence—which, for the first time, demonstrated “that the old principles no longer held.”<sup>4</sup>

Orren proceeded to connect that opposition to “broader cultural currents” at work in the epoch, specifically the currents of pragmatism.<sup>5</sup> Kunal Parker’s essay in this issue describes their impact.<sup>6</sup> The last three pages of Orren’s essay were a virtual honor roll of the “antimetaphysical” club—the intellectuals, public and private, whose so-called revolt against formalism marks the advent of early twentieth-century progressivism: William James, Charles Sanders Pierce, Oliver Wendell Holmes Jr., but also John Dewey, Herbert Croly, Walter Weyl, Walter Lippmann, Roscoe Pound, and many more.<sup>7</sup> Hand in hand, as it were, the labor movement and intellectuals fashioned a wholesale transformation of American politics and culture, a victory of latter-day materiality over antimodern metaphysics that would furnish the ideational bedrock for the liberal politics of the twentieth century, for its liberal legalism, and for their insistence that all knowledge was historical and social.

Twenty years after Orren’s essay and a century after the antimetaphysical revolution, “law as . . .” stands, modestly, for a distinct intellectual moment; not by any means another proclamation of a new currency over outworn forms, but something rather different, a moment of reconsideration, a pause to contemplate what the theory and practice of history might gain by rejoining metaphysics to materiality.

## I. FROM “LAW AND” TO “LAW AS . . .”

### *Of Genealogy and History*

“Law as . . .” identifies the early twentieth-century revolt as the moment of invention of “law and,” first mooted in Roscoe Pound’s turn-of-the-century distinction between “law in the books” and “law in action,” nurtured subsequently in the bosom of realism, and thoroughly popularized by the law and society movement.<sup>8</sup> “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.<sup>9</sup> Both the theory and the practice of contemporary legal history exemplify the

4. *Id.* at 161.

5. *Id.* at 171, 172–73.

6. 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 (2011).

7. Orren, *supra* note 1, at 172–75; see generally LOUIS MENAND, *THE METAPHYSICAL CLUB* (2001); MORTON WHITE, *SOCIAL THOUGHT IN AMERICA: THE REVOLT AGAINST FORMALISM* (Beacon Press 1957) (1949).

8. Christopher Tomlins, *How Autonomous Is Law?*, 3 ANN. REV. L. SOC. SCI. 45, 59–62 (2007).

9. *Id.* at 46–47, 61–65.

influence of “law and” in their resort to synchronic analyses of relational conjunction and disjunction, to which they add diachrony in order to reveal the effect of law, or to explain its reality, by assessing change in its relation to other phenomena over time. Unsurprisingly, the animating hypotheses of twentieth-century legal history embrace the same broad relational problematics that have preoccupied twentieth century “law and” theory: instrumentalism, relative autonomy, mutual constitutiveness, legal construction, autopoiesis, and indeterminacy.<sup>10</sup>

The shift to “law as . . .” suggests something else, something distinctive. Concretely, it suggests that explanations of law are not to be found, either necessarily or sufficiently, in its relations to other things. As Shai Lavi notes, with justification, the shift affords an opportunity to think beyond long-familiar Weberian categories and trajectories.<sup>11</sup> It is not determinedly programmatic, a route to the next big concept, but open-ended (hence the ellipsis). Yet it would be idle to pretend that “law as . . .” takes no position, that it is not historically situated. Blithely unaware of it at the outset, the conveners of the conference where the essays here were first presented have discovered that we are on a path that others are also following. We find ourselves riding a wave, one reverberating in both legal<sup>12</sup> and historical<sup>13</sup> scholarship.

The wave owes its existence to developments in both history and law. As to the latter, it has never been more of a “hypostatized construct” than at present.<sup>14</sup> We return to this observation below.<sup>15</sup> But what of the former? It, too, hypostatizes itself, though in a more limited sense, being a professional practice with less instrumental reach. Still, as a professional practice, contemporary history, like law, is full of talk of *itself*.

History’s talk is of what history has to offer the present.<sup>16</sup> One offering is the narrative history that has become something of a staple of literary nonfiction. Narrative history represents history as edifying stories of the past. As Gordon

---

10. *Id.* at 47–59. See generally Christopher Tomlins, *Law and History*, in THE OXFORD HANDBOOK OF LAW AND POLITICS 723 (Keith E. Whittington et al. eds., 2008); Christopher Tomlins, *What Would Langdell Have Thought? UC Irvine’s New Law School and the Question of History*, 1 U.C. IRVINE L. REV. 185, 242–45 (2011); Christopher Tomlins, *What Is Left of the Law & Society Paradigm After Critique? Revisiting Gordon’s “Critical Legal Histories,”* 37 LAW & SOC. INQUIRY (forthcoming 2012).

11. Shai J. Lavi, *Enchanting a Disenchanted Law: On Jewish Ritual and Secular History in Nineteenth-Century Germany*, 1 U.C. IRVINE L. REV. 813, 815 (2011).

12. See generally Yishai Blank, *The Reenchantment of Law*, 96 CORNELL L. REV. 633 (2011).

13. See generally Michael Saler, *Modernity and Enchantment: A Historiographic Review*, 111 AM. HIST. REV. 692 (2006).

14. PERRY ANDERSON, ARGUMENTS WITHIN ENGLISH MARXISM 200 (1980).

15. See *infra* text accompanying notes 143–53.

16. The following observations rely heavily on Christopher Tomlins, *History Lessons*, PERSP. ON HIST.: NEWSMAGAZINE AM. HIST. ASS’N, Dec. 2010, at 31, 31–33; see also Tomlins, *What Would Langdell Have Thought?*, *supra* note 10, at 210–15.

Wood describes it in a recent issue of *Perspectives on History*, narrative history attends to the exceptional: “individual personalities . . . unique public happenings.”<sup>17</sup> By their very nonrecurrent nature, the individual and the unique are easily sequestered in bygone times, from which they can be appropriated at will to offer homiletic advice to the present.

Narrative history conforms, broadly, to one of the three archetypes of which Friedrich Nietzsche wrote in 1874 in the second of his “untimely meditations”: the monumental.<sup>18</sup> Another conception, history as science—offered by Wood himself as antidote to the shortcomings of narrative—conforms to another Nietzschean archetype: the antiquarian.<sup>19</sup> As Wood characterizes it, scientific history is like a coral reef, based on the premise that “historical knowledge is accumulative and that the steady accretion of specialized monographs will eventually deepen and broaden our understanding of the past.”<sup>20</sup> Its domain is the social; its ideology, unsurprisingly, modernism; its spirit, objectivity—the capacity to know the past as it really was, and ever more completely.

The scientific writer of history . . . builds a classic temple: simple, severe, symmetrical in its lines, surrounded by the clear bright light of truth, pervaded by the spirit of moderation. Every historical fact is a stone hewn from the quarry of past records; it must be solid and square and even-hued—an ascertained fact . . . His design already exists, the events have actually occurred, the past has really been—his task is to approach as near to the design as he possibly can.<sup>21</sup>

This is the historian’s version of Holmes’s “nothing but history.”<sup>22</sup>

But because the phenomena studied by the scientific historian are recurrent—for example, human behavior—they are not so easily sequestered in the past. On the contrary, they lure the historian toward “presentism.” Some versions of scientific history accept the lure.<sup>23</sup> Others resist it. Those that resist do so by insisting on the absolute temporality of all phenomena—their watchword is “context”—from which follows a rigid distinction between then and now, a

17. Gordon S. Wood, *In Defense of Academic History Writing*, PERSP. ON HIST.: NEWSMAGAZINE AM. HIST. ASS’N, Apr. 2010, at 19, 19.

18. FRIEDRICH NIETZSCHE, *On the Uses and Disadvantages of History for Life*, in UNTIMELY MEDITATIONS 57, 67–72 (Daniel Breazeale ed., R.J. Hollingdale trans., 1997).

19. *Id.* at 72–75.

20. Wood, *supra* note 17, at 20.

21. PETER NOVICK, THAT NOBLE DREAM: THE “OBJECTIVITY QUESTION” AND THE AMERICAN HISTORICAL PROFESSION 56 (1988) (quoting Edward P. Cheyney).

22. Parker, *supra* note 6, at 589; see also KUNAL M. PARKER, COMMON LAW, HISTORY, AND DEMOCRACY IN AMERICA, 1790–1900, at 1–24, 259–78 (2011).

23. One example is orthodox historical materialism, on which see Christopher Tomlins, *Toward a Materialist Jurisprudence*, in 2 TRANSFORMATIONS IN AMERICAN LEGAL HISTORY: LAW, IDEOLOGY, AND METHODS: ESSAYS IN HONOR OF MORTON J. HORWITZ 196, 198–99 (Daniel W. Hamilton & Alfred L. Brophy eds., 2010).

cæsura that underscores the absolute difference of the past.<sup>24</sup> Parker notes Holmes' disgust at the past's insidious slide into the present: "It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past."<sup>25</sup>

Modernist scientific history describes a form of historical practice one can term "simple accumulation." It has spawned a critical response; call it "complex accumulation." Complex accumulation accepts the ineradicable difference of the past: its watchword, too, is "context." But unlike simple accumulation, it treats material life as radically underdetermined. Far from an assemblage of essentially similar phenomena, historical knowledge is deeply vulnerable to multiplicitous variation that constantly intrudes upon the historian's capacity to generalize. The difference between simple and complex accumulation is observable in the entirely contrasting meanings of "historicism" associated with each of them. Where simple accumulation aspires to predicability, complex accumulation repudiates causal explanation; this because it eschews the idea that consensus can be established on a means of disciplining evidence and, hence, of producing theory. For "historicism" as positivist science, complex accumulation substitutes "historicism" as contingency: a past composed of an infinity of utterly contextualized, utterly discrete, phenomena—that is, an entirely indeterminate past.<sup>26</sup>

Notwithstanding their differences, modernist ("simple accumulation") and postmodernist ("complex accumulation") historiography share a commitment to contextualizing their subjects; therein lies a significant commonality of purpose. For both, too, the cæsura that amputates past from present is the necessary condition of their practice, creating a distinct subject on which to reflect, with which to converse. For both, historical method begins by putting the past in its place.

To identify history as the contextualization of past acts and events is entirely understandable, but it does not exhaust the possibilities. Take for example Nietzsche's third archetype: the critical. Instead of appropriating the past to inspire the present, or merely preserving it, critical history interrogates, judges, and condemns the past in order to free the present from its grasp. In this way, critical history serves life. Its enemy is scholasticism: "knowledge not attended by action . . . history as a costly superfluity and luxury."<sup>27</sup>

24. See Christopher Tomlins, *The Strait Gate: The Past, History, and Legal Scholarship*, 5 L. CULTURE & HUMAN. 11, 21–22 (2009).

25. Parker, *supra* note 6, at 589 (quoting 3 OLIVER WENDELL HOLMES, *The Path of the Law*, in THE COLLECTED WORKS OF JUSTICE HOLMES 391, 399 (Sheldon Novick ed., 1995) (1897)).

26. For the distinct meanings of historicism, compare Wood, *supra* note 17, at 19–20, with Robert W. Gordon, *Historicism in Legal Scholarship*, 90 YALE L.J. 1017, 1017 (1981). See also NOVICK, *supra* note 21, at 7, 143, 157; Tomlins, *supra* note 24, at 11–31.

27. NIETZSCHE, *supra* note 18, at 59, 75–77.

One might properly embrace critique as the purpose of history. Many have. To do so, however, requires that one take a position on the past. Nietzsche's ultimate objective was to overcome the past. In contrast, the objective of "law as . . ." is to use it to confront the present. To do so, "law as . . ." rejects the sequestration of the past and the various histories that result from it. "Law as . . ." dwells instead on the conditions of possibility for a critical knowledge of the here-and-now: the moment, it might be said, when the origins of the present "jut manifestly and fearsomely into existence,"<sup>28</sup> spirit into experience, metaphysics into materiality:

Origin [*Ursprung*], although an entirely historical category, has, nevertheless, nothing to do with genesis [*Entstehung*]. The term origin is not intended to describe the process by which the existent came into being, but rather to describe that which emerges from the process of becoming and disappearance. Origin is an eddy in the stream of becoming, and in its current it swallows the material involved in the process of genesis. That which is original is never manifest in the naked and manifest existence of the factual; its rhythm is apparent only to a dual insight. On the one hand it needs to be recognized as a process of restoration and reestablishment, but on the other hand, and precisely because of this, as something imperfect and incomplete. There takes place in every original phenomenon a determination of the form in which an idea will constantly confront the historical world, until it is revealed fulfilled, in the totality of its history.<sup>29</sup>

If this is "law as . . ."—or, at least, one rendition of it—how do the essays that appear here under its imprint measure up? Is this a club to which their authors would wish to belong?

28. 1 WALTER BENJAMIN, *Critique of Violence*, in SELECTED WRITINGS, 1913–1928, at 236, 242 (Marcus Bullock & Michael W. Jennings eds., 1996).

29. WALTER BENJAMIN, THE ORIGIN OF GERMAN TRAGIC DRAMA 45–46 (John Osborne trans., Verso Books 2003) (1963). A somewhat distinct translation of (most of) the same passage can be found in SAMUEL WEBER, BENJAMIN'S ABILITIES 88–89 (2008). Commenting on the passage, Weber adds,

The concept of origin that Benjamin articulates in this passage contrasts sharply with the *creatio ex nihilo*—or more precisely, creation out of formlessness—that informs the biblical text of Genesis. Instead, the notion of *origin*—and hence the notion of the *original*—is construed not as an absolute beginning, nor as the passage from formlessness to form, nor as the result of anything like the intervention of a divine logos. It is also not conceived as a function of *becoming* (*Werden*) or of its dialectical counterpart, passing away (*Vergehen*). . . . An "origin" is historical in that it seeks to repeat, restore, reinstate something anterior to it. In so doing, however, it never succeeds and therefore remains "incomplete, unfinished." Yet it is precisely such *incompleteness* that renders origin *historical*. Its historicity resides not in its ability to give rise to a progressive, teleological movement, but rather in its power to return incessantly to the past and through the rhythm of its ever-changing repetitions set the pace for the future.

*Id.* at 89.

## II. NORMATIVE SYSTEMS, HISTORICAL DESCRIPTIONS

*Of Texts and Explanations*

Steven Wilf has one foot, his Chancellor's foot, the normative foot of the legal scholar, inside the door. His historian's foot remains outside, in the mid-air of complex temporality and relationality, of radically situated subjects, layered strata, and paths not taken, of alternative worlds and countergenealogies, "out of the cradle, endlessly orbiting."<sup>30</sup> The straddle is as it should be, for Wilf's is an image of legal history poised between technicality and time, "mixing overly mutable texts with overly rigid forms of reading."<sup>31</sup> He recommends reading texts schizophrenically, which is to say in a manner that resists the dominant traits of each of the discipline's lobes: history's positivist descriptivism, which incessantly produces narratives of how things really were; and law's linear instrumentalism, which not only denies the existence of any alternative but pointedly ignores its own utopic idealism. The resistances (contingency and possibility) are as complementary, of course, as the dominant traits (positivism and instrumentalism). Their amalgamation produces a new personality, beset by a corrosive though constructive uncertainty. Wilf has created "a roguish thing,"<sup>32</sup> the first of many specters from the looking-glass world of "law as . . ." that will wreak havoc with the law of which we are certain, for which "we have a measure, know what to trust to"—and also with the history that "make[s] the standard for the measure."<sup>33</sup>

Wilf offers serial means, allegorical devices, to inspect the thickly clustered normative systems beyond law's linear limits and history's descriptions, none more evocative than Blake's telescope and Galileo's observatory.<sup>34</sup> Together they remind us of a third optical allusion perched, temporally, more or less midway between them: William Hogarth's 1724 engraving of "Some of the Principal Inhabitants of y<sup>e</sup> Moon, as they Were Perfectly Discover'd by a Telescope brought to y<sup>e</sup> Greatest Perfection," also known, curtly, as "Royalty, Episcopacy and Law."<sup>35</sup> The engraving is entirely emblematic. Royalty's face is the coin of the realm. Around its neck is a string of bubbles. Cloven-hoofed episcopacy works a money pump. Law is a hammer in a periwig. Like Blake's telescope, Hogarth's has

30. Arthur C. Clarke, *Out of the Cradle, Endlessly Orbiting . . .* (1959), reprinted in *THE COLLECTED STORIES OF ARTHUR C. CLARKE* 697 (2000).

31. Steven Wilf, *Law/Text/Past*, 1 U.C. IRVINE L. REV. 543, 564 (2011).

32. JOHN SELDEN, *THE TABLE TALK OF JOHN SELDEN* 61 (photo. reprint 1979) (Samuel Harvey Reynolds ed., 1892).

33. *Id.*

34. Wilf, *supra* note 31, at 562–64.

35. See WILLIAM HOGARTH, *ROYALTY, EPISCOPACY AND LAW* (1724), available at <http://exhibits.library.northwestern.edu/spec/hogarth/politics3.html>. Hogarth's engraving satirizes Sir James Thornhill's paintings of William and Mary and their royal court, which adorn the Painted Hall of the Old Royal Naval College, Greenwich.

magnified its objects. It has not touched them. But it need not do so. Merely magnifying their surfaces shows them, in their singularities and intimacy, as they are. Observation is indeed the beginning of heresy. As readers and writers of texts, interpreters of objects and tellers of tales about them, we can learn a lot from the engraver's eye—particularly this one, who was so great an observer and, with it, a great theorist of observation.<sup>36</sup>

Laura Edwards provides us with a concrete instance of what Wilf advocates, a new reading of a legal archive that produces a new text-in-context: the “formulaic phrasing” (boilerplate) of “the peace,” translated into a novel way of understanding the thickly normative order of the Anglo-American community—“the ideal order of the metaphorical public body.”<sup>37</sup> So completely does the peace entwine law and society that law in society became law as society, “literally located . . . in actual social relations.”<sup>38</sup> In Edwards's essay, locality is both a place and a state of mind. Law and society blur together; inhabitants imagine justice as the restoration of a particular social order, as the resolution of conflict, as the repair of strains in hierarchy, as the recreation of habitual practice, and as the reproduction of the status quo. The logic of the peace is reiteration, repetition.

Edwards does not deny that law and society can be seen as distinct. Indeed, she notes that a self-consciously discrete legal system came into being after the American Revolution. Invented by post-Revolutionary leaders committed to establishing clearly defined governing institutions and laws at national and state level, it was characterized by a distinctive repertoire of concepts (rights, democracy) and by particular textual and institutional practices (statutes, cases). But that legal system was not the sum of law, although it has been treated almost invariably as if it were. By peeling away state law Edwards uncovers localized law, bringing a far wider geography into legal history and, with it, in the American case, a new understanding of rights and democracy. Observing the emergence of rights as the signal means to configure people's relationship to law becomes less an exercise in documenting the progressive extension of those rights to previously excluded groups than in disinterring the genesis of a framework that exacerbated existing inequalities by using the principle of equality to sort subjects into those with access and those without. “A system based in individual rights made subordinate people without rights even more vulnerable than they already were by cutting off all access to the legal system.”<sup>39</sup> Where local legalities had granted highly unequal participation to all, state legality created exclusive modes of access

---

36. See WILLIAM HOGARTH, *THE ANALYSIS OF BEAUTY. WRITTEN WITH A VIEW OF FIXING THE FLUCTUATING IDEAS OF TASTE* (1753); see generally JACK LINDSAY, *HOGARTH: HIS ART AND HIS WORLD* (1977).

37. Laura Edwards, *The Peace: The Meaning and Production of Law in the Post-Revolutionary United States*, 1 U.C. IRVINE L. REV. 565 (2011).

38. *Id.* at 566.

39. *Id.* at 575.

by constituting white males as freemen “through their rights *over* those without rights.”<sup>40</sup> Rather than progress, in other words, history charts a movement over time from a plurality of local legal orders to sameness—although we should note that those local orders were themselves dedicated to the reproduction of the same.

Legal history has tied itself to a conception of law as a phenomenon separable from society. Edwards argues that this is deeply problematic. She draws attention to the simultaneous existence of legalities in markedly distinct forms, at different levels and places, with different participants, all of which should enter the legal historian’s field of vision. Indeed they must, she argues, if legal history is to survive as a field of study. Like Wilf, Edwards’ predominant tone is one of caution in appraising the field’s prospects, but her solution points us in a different direction, toward history rather than to a thickened normativity. Legal history ought to pay more attention to history in general, lest it become an outlier, difficult to penetrate, preoccupied with arcane issues outside the mainstream. Historians at large are finding legal *texts* increasingly useful, but not the scholarship that purports to explain them. Even as the stuff of its imagination grows more central, the field courts marginality: “We need new frameworks to widen the scope of the field, lest we lose control over it.”<sup>41</sup>

Kunal Parker tells us, in a nutshell, what the existing framework is.<sup>42</sup> It locates law “in” history, localized to time and place, contextualized, its internalities externalized. By historicizing law, by rendering it contingent, this framework seems to undermine the pretense of separation that disturbs Edwards. Why, then, should she be disturbed? Perhaps because no amount of contextualization can conceal that the initial move to contextualize necessarily arises from an initial relational assumption: to imagine law “in” context—or “in” history—requires that one be able to imagine it apart from that context in order to know the difference.

Once introduced, Parker confirms, relationality is infinite, like mirrors set opposite each other. “As scholarship relentlessly historicizing law pours out, offering us endlessly complex pictures of law’s past and pointing to the plurality of missed opportunities in the past (all of which are supposed to mirror the open possibilities of the future), one cannot help but experience a sense of intellectual exhaustion.”<sup>43</sup> Why exhaustion? Because, having entered its way of thinking, there is literally no means to avoid being overwhelmed by the endlessness of historicism, by its world “after” metaphysics—the world of nothing-but-history that has become ever provisional, ever provincial.<sup>44</sup> The loss of self-control that Edwards warns against is actually a corollary of the turn of legal history *toward* the vertiginous historicism that is the chief component of the “new frameworks” she

---

40. *Id.* at 583.

41. *Id.* at 585.

42. Parker, *supra* note 6, at 594, 607.

43. *Id.* at 593; *see also* MARILYN STRATHERN, PARTIAL CONNECTIONS 119 (1991).

44. Steven Wilf offers variations on the same theme. *See* Wilf, *supra* note 31.

seeks.

Parker points us in a different direction, away from antifoundational history and back toward law. Specifically, he points us toward the common law during the long nineteenth century, invoked by Kent early on as the water of life, determinedly evaporated eighty years later by the reigning disenchanter of the American legal tradition, Oliver Wendell Holmes Jr. Holmes, who, recall, dissolved both life and law in the acid bath of “nothing but history” that was to be the enduring fate of the twentieth century. Parker describes an America quite distinct from the postfoundational world with which we are familiar, “in which the notion of *given* constraints was very real indeed.”<sup>45</sup> In that America, political democracy shared authority with the common law as a “non-self-chosen” instrument of constraint, committed to upholding precedent and repeating the past.<sup>46</sup> The common law was nonchosen because it was immemorial—unfolding outside historical time, changing “insensibly,” always adjusting the needs of the present to the claims of the past and the future.<sup>47</sup>

Eventually, the common law would be sucked dry by intellectuals insistent on draining nineteenth-century life of its phantasmagoria, the void filled by the incessant hubbub of their own reflective intellection. Progressive Era thinkers followed Holmes in assailing the law’s immemoriality.<sup>48</sup> It was to be reduced to politics, made in the present from the knowledge of expert nonlawyers, endlessly revisable. Parker’s invocation of the common law is elegiac in the full sense of the word. He mourns that which is irreversibly dead, but does not yearn romantically for its revival. By paying attention to their antecedents he shows how two of the most relentlessly positivist of scholarly discourses—modern American history and modern American law—stand revealed as settled knowledges. Simultaneously he makes it plain that reference to those very antecedents reinfuses both history and law with the capacity for a certain mystery, animating their capacity to unsettle “settled knowledge” but without paying the exorbitant price demanded by what we have come to call postmodernism, which is that knowledge shall never, ever, settle again. What was science the first time around, in other words, can do a second lap as metaphysics. Do we not, he asks, even in our postfoundational world, continue to think foundationally about democracy itself as a mystic

---

45. Parker, *supra* note 6, at 596.

46. *Id.* at 603. Here Parker is in harmony with Laura Edwards’s emphasis on the dedication of “the peace” to reiteration—the restoration and repetition of given constraints. See Edwards, *supra* note 37, at 565–66.

47. Parker, *supra* note 6, at 601. Compare *id.*, with Roger Berkowitz, *From Justice to Justification: An Alternative Genealogy of Positive Law*, 1 U.C. IRVINE L. REV. 611, 618–19 (2011) (discussing the metaphysical heart of Leibniz’s legal science).

48. Parker notes that for Holmes, law was experience rather than logic—the product of nothing but history—but that experience alone could not justify law. Experience (history) as repetition did not count. Law as “mere ‘blind imitation of the past’ would not do.” If law was to repeat the past it must be with self-conscious (present-minded) purpose. Parker, *supra* note 6, at 589 (quoting HOLMES, *supra* note 25, at 469).

teleology of ever-expanding rights, freedoms, and equalities?<sup>49</sup>

### III. LAW, METAPHYSICS, JUSTICE

#### *Of Connection, Disconnection, Reconnection, (In)completion*

Roger Berkowitz also examines the historical detachment of law from metaphysics—and the possibility of their reconnection.<sup>50</sup> The essence of legal positivism, he argues, lies not in its acknowledgment of human will in lawmaking, but in its attempt to justify laws that have lost their natural authority: their claim to justice, that is, located in divine rationality. In support, Berkowitz offers a genealogy that traces contemporary positivism to the serial efforts of German legal science to find justification for law. His point of departure is Leibniz, for whom science, the authority of objective truth, was the specifically modern way both to justify law and to repair its connection to justice.

Importantly, at the core of Leibniz’s scientific method lay a metaphysical conception of the origin of substance. “A true beginning . . . must be something from which nothing temporal, spatial, or causal can be removed.”<sup>51</sup> We encounter here a distinct but recognizable statement of immemoriality—origin that was nonphysical and nonhistorical. Immemoriality was, of itself, enough of an explanation of genesis for the common law’s adherents. In their genealogy, the detachment of law from the divine was incomplete.<sup>52</sup> Leibniz, however, took a further step in the construction of a metaphysics of origin by applying his first principle of science, the principle of sufficient reason: nothing *is* without a reason. The subordination of law to its reason for being made it the expression of a first principle—universal well-willing, the entirely rational expression of God’s judicious wisdom—transforming it “from an authoritative statement of a practice into a *forceful* product of the scientific knowing of justice . . . [a] scientifically decipherable rationality . . . .”<sup>53</sup>

Leibniz reached Anglo-American common law, Berkowitz argues, by way of the nineteenth-century legal science of Savigny and Jhering. The transmission was hardly perfect. In place of Leibniz’s rationalist ontology, Savigny located the origin of law in the life of the *Volksgeist*, the common spirit and consciousness of the people/nation. No longer knowable spontaneously by “insight,” law’s essence could still be discovered by means of a *geschichtliche Rechtswissenschaft* (historical legal science) whose object of inquiry was the “organic principle, by which what is still living will automatically separate itself from what is dead and belongs only to

49. Parker, *supra* note 6.

50. Berkowitz, *supra* note 47.

51. *Id.* at 617.

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

53. Berkowitz, *supra* note 47, at 619.

history.”<sup>54</sup> Here was no philosophical disquisition upon universal and rational legal principles. Here, rather, was an attempt to separate the living-on—“historically grounded legal principles active in the national consciousness . . . the ‘living unity that binds the present to the past’”—from all that had passed irretrievably away, so that law’s restatement in the form of technical “concepts and formulas” (*Begriffsjurisprudenz*) remained “shot through with life-inspired insight.”<sup>55</sup>

If Savigny’s legal science shared its emphasis on life-and-becoming with aspects of the nineteenth-century common law thought described by Parker, Jhering’s critique of that science corresponds to Progressive Era thinkers’ antifoundationalist reaction to the immemoriality of the common law. Like them, Jhering counterposed human intention to what looked like an entirely historical determination of outcomes. Law was a human product, a formal system of rules that served ends discoverable by the social sciences.<sup>56</sup> Neither its origins nor its ends were to be found in any metaphysical realm of “transcendent unity,” whether conceived philosophically (Leibniz) or historically (Savigny). By thus subordinating “a merely technical law” to other-determined ends, Berkowitz argues, Jhering fulfilled “Leibniz’s original insight that positive law must be subordinated to reasons” while simultaneously sundering the attempt made by both Leibniz and Savigny to make science the bond of law to justice.<sup>57</sup> Twentieth-century law remains dependent on science for justification, but no science of law has succeeded in establishing itself as a science of justice. “Instead, science has transformed law into a technical means for governments to pursue political, social and economic ends.”<sup>58</sup> Even so, the ideal of justice remains alive. Perhaps, says Berkowitz, simply knowing that law is divorced from justice is the first step to bridging the gap.

Marianne Constable, too, addresses the gap between law and justice, reconnecting them, aspirationally, with rhetoric.<sup>59</sup> The task is executed in two steps. The first is to understand law as contextualized practice or “speech act,” thus to collapse the realist separation of “law on the books” from “law in action” into “law as claim,” specifically the claim of authority. This directs our attention away from the twentieth century’s stress on social outcomes as the only worthwhile empirical, and implicitly normative, determinant of law; we return to law not as instrumental means to an end but as the embodiment of a species of

---

54. *Id.* at 621.

55. *Id.* at 622–23.

56. *See, e.g.*, Roscoe Pound, *Law in Books and Law in Action*, 44 AM. L. REV. 12 (1910). For Jhering’s influence on Progressive Era legal thought, see MICHAEL WILLRICH, *CITY OF COURTS: SOCIALIZING JUSTICE IN PROGRESSIVE ERA CHICAGO* 96–115 (2003).

57. Berkowitz, *supra* note 47, at 627.

58. *Id.* at 629.

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

action, one that “tells us what to do.”<sup>60</sup> The second step is to note that, in telling us what to do, the utterances that stake the claim of law to authority bind it, whether willingly or despite itself, to issues of justice. “Claims on behalf of and within the ‘system,’ as well as claims made against it, appeal however silently, however strategically, however hypocritically, to justice.”<sup>61</sup> Even speech that denies the connection cannot avoid the issue. “It is not the province of the court to decide upon the justice or injustice . . . of [the law] . . . but to administer it as we find it.”<sup>62</sup> Here our attention is drawn to the speaker’s disclaimer and so to the very question s/he refuses to entertain. “Neither a God nor a higher law, but the claiming that goes on in legal speech acts, binds us to issues of justice.”<sup>63</sup>

In our disenchantment we have learned, as Roger Berkowitz shows, to see justice as evanescent, residual, drowned out by the sociolegal positivism that, in Constable’s book, *Just Silences*, is the acme of contemporary law: the law of “law and” that “relegates connections between law and justice, if any, to empirically contingent social realities.”<sup>64</sup> Here, legal history fashions a place for itself alongside rhetoric as a means to recover those connections by disclosing instances from the past in which “law has mattered as a name and as an act that was linked . . . to issues of justice . . . .”<sup>65</sup> In so doing, Constable argues, legal history reveals itself to be an enterprise appropriately distinct from other practices of history, not one that should seek greater companionship with them; it is a purposive enterprise inhabited by the “thick normativity” Wilf recommends. “How acts or events or claims or utterances ‘in the name of the law’ *have* mattered is the peculiar contribution of history to legal scholarship.”<sup>66</sup>

Christopher Schmidt begins precisely with a speech act, a claim about law and its connection to justice made by student leaders of the 1960 American sit-in movement, a movement whose activism stood in vivid contrast to the legalism of the NAACP. The student claim was that law is too slow in its response to injustice, that resort to action in the world outside law—“society”—is the only way to achieve justice.<sup>67</sup>

The cleavage between law and society that Schmidt detects in student rhetoric conforms to the positivist distinction of means from ends noted by Berkowitz. Sociolegal scholars and legal historians who stress law’s constitutive capacities in social processes might question the tendency to separate the two. But

60. *Id.* at 636.

61. *Id.*

62. *Dred Scott v. Sandford*, 60 U.S. 393, 405 (1857).

63. Constable, *supra* note 59, at 636.

64. MARIANNE CONSTABLE, *JUST SILENCES: THE LIMITS AND POSSIBILITIES OF MODERN LAW* 10 (2005).

65. Constable, *supra* note 59, at 640.

66. *Id.*

67. Christopher W. Schmidt, *Conceptions of Law in the Civil Rights Movement*, 1 U.C. IRVINE L. REV. 641, 641–42 (2011)

“the subjects of . . . historical inquiry can often be quite insistent” in seeing law and society as distinct.<sup>68</sup> Nor were the students alone. Segregationists defended the norms and customs of their communities from federal law that impinged on them from “outside.” Racial liberals as insistently advocated federal intervention, regarding “outside” law precisely as a means to transform local social practice. “In each of these instances, the essential characteristic of law was its perceived separateness from something else.”<sup>69</sup> There were contrary views, however. In intellectually different ways, Schmidt argues, Alexander Bickel and Martin Luther King Jr. each embraced a definition of law that “recognize[d] processes of cultural change, social disorder, and political agitation as integral to the legal process” rather than located outside it.<sup>70</sup>

One might argue, of course, that what each of the protagonists represented as the separation of law and society was in fact a separation between preferred conceptions of legality. Defenders of Jim Crow did not portray established social customs as extralegal. They took them to be the appropriate source of legal norms. Their folkways were their stateways. In Edwards’ terms, their point of reference was local law—law as (local) society—rather than national law. Racial liberals derived their norms from supralocal sources and turned to supralocal authority to realize them. In the students’ case, antilegalism bespoke antagonism to a particular representation of legality, namely, the institutional and professional realm inhabited by the NAACP, in which law was the “completion” and therefore the end of action. Nevertheless, their own strategy—the continuous enactment of “alternative social practice,” continuous engagement in “the performance of right”—itself created its own legality in the form of a persistent, thickly normative claim to justice.<sup>71</sup>

Indisputably, in each case the protagonists’ specific conception of law—as force, capacity, mode of action, or claim—was profoundly important to the way they mobilized for or against its use. Likewise, Bickel and King conjured with law in a fashion that suited their strategies for its deployment. Alike in their understanding of law as “an unfolding social process” inseparable from the struggles that gave it social and political presence, both blurred the positivist distinction between law and society that, according to Schmidt, animated others.<sup>72</sup> That said, the implications of their positions were opposed. Bickel stressed the dialogic quality of law. The impossibility of maintaining as “law” any mode of legality distinct from existing customs and traditions led him to argue that “legal reformers, particularly the courts, [ought] to defer to social norms.”<sup>73</sup> King, in

---

68. *Id.* at 643.

69. *Id.*

70. *Id.*

71. *Id.* at 653.

72. *Id.* at 658.

73. *Id.* at 661.

contrast, focused on what was required to give basic legal principles real social standing. “For King, the recognition of the process of law in society was a call to action.”<sup>74</sup> Unlike the students, he did not reject legal process. But his conception of the relation of action to law was one that, like theirs, regarded law as claim to justice.

In a clever historiographical coda, Schmidt demonstrates that historical accounts of the civil rights movement have themselves participated in the debate over the relationship of law to society in a manner that echoes the arguments of the protagonists themselves. As a methodology for understanding the movement, he concludes, “challenging the conception of law as a bounded, exogenous locus of power and influence seems a useful starting point.” From this perspective, law functions constitutively within society rather than causally on society. At the same time, it is necessary to recognize that drawing a distinction between law and society was implicated in the way in which “historical actors understood their world and the role of law in that world”; it had a decided influence on their various strategies.<sup>75</sup> Whether or not it is of analytic use, in other words, the distinction itself is an essential object of historical inquiry.

To unravel law from society is to hold out the hope of escape from law, to resist its ubiquity, and thus to refuse the completion it brings. In Norman Spaulding’s essay, human awareness lies precisely in the possibility of refusal—refusal to be bound, to be completed, to be ended or contained, whether by law, psychoanalysis, sociology, or history—and, in holding the moment of refusal indefinitely open, of engagement in the dream work (displacement, confusion, doubt) that seeks a distinct form of consciousness.<sup>76</sup> One is reminded of Bertolt Brecht’s destitute cripple, George Fewkoombey, who dreams of a Day of Judgment, “the greatest arraignment of all times . . . the only really essential, comprehensive and just tribunal that has ever existed,” which would judge “the living . . . the dead . . . all who had in any way wronged the poor and defenceless” in proceedings that would last hundreds of years.<sup>77</sup> To resist completion is to lay an eternal claim to justice.<sup>78</sup>

Resistance to completion, however, is itself resisted. “We *want* self-

74. *Id.* at 662.

75. *Id.* at 676.

76. Norman W. Spaulding, *The Historical Consciousness of the Resistant Subject*, 1 U.C. IRVINE L. REV. 677 (2011).

77. BERTOLT BRECHT, *THREEPENNY NOVEL* 384–85 (Desmond I. Vesey trans., 1958); see also Christopher Tomlins, *The Threepenny Constitution (and the Question of Justice)*, 58 ALA. L. REV. 979, 1001–03 (2007).

78. See 2 WALTER BENJAMIN, *Karl Kraus (Fragment)*, in *SELECTED WRITINGS, 1927–1934*, at 194 (Michael W. Jennings et al. eds., Rodney Livingstone et al. trans., 1999); 2 WALTER BENJAMIN, *Karl Kraus (Dedicated to Gustav Glück)*, in *SELECTED WRITINGS, 1927–1934*, *supra*, at 433, 443–44, 447–48, 456–57; Tomlins, *supra* note 23, at 205–06.

mastery.”<sup>79</sup> The desire for completion is understandable: an uncontained awareness is as ontologically terrifying as the finality of death. And so we end our resistance through forms of avoidance, notably forgetting.<sup>80</sup> We displace, trim, contain—or we are contained. We complete our resistance, or have it completed on our behalf by structures of law, politics, and history that fashion the subject as compliant—a consenting legal subject possessed of a settled knowledge. Even theories of politics and law that *begin* from the position of the resistant subject almost always transcend resistance by turning it into something else, whether fulfillment (resistance as liberation) or futility (resistance as oppression). “Revolution and resistance are reduced to exceptional events—aberrations verging on the ahistorical and nearly always charged with the terror of anarchy.”<sup>81</sup> Constitutions replace revolutions, citizens replace resistant subjects, the rule of law creates boundaries to replace boundlessness. Fewkoombey awakens from his dream of justice to find that he is himself the condemned.<sup>82</sup>

It seems that society has the last word by hanging Fewkoombey. Yet Brecht tells us that, in his waking moment, he “has understood how ancient is the crime to which he and his kind fall victim.”<sup>83</sup> The question that remains, in other words, is what knowledge one possesses at the moment of awakening, what memory the resistant subject brings to bear on the materiality that presents itself when she wakes up.

History can answer that question, Spaulding suggests, by avoiding completion, taking memory seriously. But history, particularly legal history, more often inspects its protagonists’ recollections through the telescope of law than through their own psychic instruments. For history needs an identifiable legal subject, as Hayden White has it, that can “serve as the agent, agency, and subject of historical narrative,” a narrative overwhelmingly of identities understood as jurally constituted.<sup>84</sup> History as activity, in short, presupposes law and thus sustains it. To resist the presupposition, Spaulding turns to Foucauldian “counterhistory” and its idea of revolution “revealing origins marked by conflict running time out of mind.”<sup>85</sup> This turn supports a profound critique of American legal history, whose attachment to the rule of law either reduces resistance to lawlessness or completes it in narratives of legal reform—the always-desired achievement of lawfulness—and represents resistance either as heroic or as tragic.

79. Spaulding, *supra* note 76, at 681.

80. See Norman W. Spaulding, *Constitution as Countermonument: Federalism, Reconstruction, and the Problem of Collective Memory*, 103 COLUM. L. REV. 1992 (2003); see also Tomlins, *supra* note 24, at 32–35.

81. Spaulding, *supra* note 76, at 682.

82. Tomlins, *supra* note 77, *passim*; BRECHT, *supra* note 77, at 396.

83. 3 WALTER BENJAMIN, *Brecht's Threepenny Novel*, in *SELECTED WRITINGS, 1935–1938*, *supra* note 78, at 6.

84. Spaulding, *supra* note 76, at 685; HAYDEN WHITE, *THE CONTENT OF THE FORM: NARRATIVE DISCOURSE AND HISTORICAL REPRESENTATION* 13, 12–14 (1987).

85. Spaulding, *supra* note 76, at 691.

“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.”<sup>86</sup>

#### IV. LEGAL HISTORY WITH/OUT LAW?

##### *Of Counterhistory, Resistant Subjects, Representation, and the Spectacular*

If we are to avoid dissolving history into law, we must attempt to write legal history without assuming law, or at the very least imagine how to write of its beginning and end. But is this not to dissolve law into “nothing but history” and hence just another form of completion? Unless one is to hold history up as the one permissible universal solvent that completes everything, therefore, one must know how to write of history’s beginning and end, too. This is, of course, to push modern history away from its humanist origins, and its antifoundationalist present, toward metaphysics.<sup>87</sup> But here is no problem. Resistance in Spaulding’s sense is, precisely, the refusal of completion, the act of holding fissures open rather than closing them. Such resistance properly belongs to the domain of metaphysics. After all, the counterhistory that Spaulding invokes, of which Foucault speaks—the counterhistory to that which “pacifies society, justifies power, and founds the order . . . that constitutes the social body”—shows “that laws deceive, that kings wear masks, that power creates illusions, and that historians tell lies.”<sup>88</sup> This counterhistory, the only resource of the subject resisting her completion, *necessarily* dwells in the realm of the metaphysical. For it relies on outwitting the trick, on revealing the secret, on deciphering sealed truths, on detaching humans from their given historic-juridical consciousness.<sup>89</sup> It is a form of history that can only be dreamed of before it can ever be known.

If it is necessarily metaphysical, how do we *portray* “counterhistory”—particularly in the realm of legal history, whose texts are so imbued by the grounded orderliness of law, its linear instrumentalism, its functionality, its hunger for power? How do we determine whether its adversarial institutions might indeed act as “structures of resistance,” as Spaulding says, given that it is so easy to “fail to recognize” resistance at work?<sup>90</sup> The answer that Barbara Welke offers is to turn to a new optic: from lines of text to lines of sight.

Welke’s “Owning Hazard” is a terrifyingly graphic illustration of law *and*

86. *Id.* at 691.

87. See 4 WALTER BENJAMIN, *On the Concept of History*, in *SELECTED WRITINGS, 1938–1940*, *supra* note 78, at 389.

88. MICHEL FOUCAULT, “SOCIETY MUST BE DEFENDED”: LECTURES AT THE COLLÈGE DE FRANCE, 1975–1976, at 72, 73 (David Macey trans., 2003).

89. *Id.* at 72.

90. Spaulding, *supra* note 76, at 691.

history hard at work together on resistant subjects, the burned bodies of children.<sup>91</sup> It is a literal representation of the will of law to complete what cannot be completed—injury compensated, legislation passed, consumers disciplined, “safety purchased through loss”<sup>92</sup>—and of history to be the story of completion, the narration of a puzzle solved, of “closure” negotiated (trans-acted), of the ownership of death and suffering passed on from victim to agent. Although completion is what we most desire from our inspection of the body in its agony and death, Welke enjoins us to resist it. The promise of completion is proven a lie, over and over again, by the burned body’s incessant reiteration. Loss never purchases safety. The hazard must be owned, and ownership never ceases. The requirement is repeated again and again.<sup>93</sup> Welke gives us the counterhistory to completion not by discovering an alternate possibility, an untaken path, in the materials she presents—counterhistory is *not* pluralistic counternarrative—but by an act of exposure that dismantles the process of production of history from texts. Her exposure tears gaping holes in narrative’s effortless assemblage of the *mise-en-scène*, through which an audience can clamber to finger the burnt cloth, hear the screaming child, peer at the dictated memoranda of account, and judge for itself. “Owning Hazard” is at once profoundly Rankean—what really happened, again and again and again—and profoundly anti-Rankean, “tak[ing] apart evidence that in the scholarly endeavor becomes reduced to a seamless narrative, to restore to the reader/viewer a role in the interpretive process.”<sup>94</sup> But in order to be this kind of history, “Owning Hazard” is first theater, epic theater, which is to say “the representation of conditions.”<sup>95</sup> In the simple act of putting on a show, “Owning Hazard” creates a dialectical image of law as a “condition[ ] of life”<sup>96</sup> that is at once searingly real and endlessly open for inspection.

If Barbara Welke shows us modern law as dialectical image, theater, spectacle, Peter Goodrich offers us a deep analysis of the potency of that representation.<sup>97</sup> His point of departure is the studied absence of attention given to the legal spectacle heretofore. “The law depends upon, is supported by, exists through an array of background techniques, apparatuses of appearance, a theatrical machinery of solemnization and approbation that is largely pre-conscious . . . [T]hey are the apparatuses that make the law appear but, for it to be law, the machinery of theatre of its manifestation has to be seen through, which is

---

91. Barbara Young Welke, *Owning Hazard: A Tragedy*, 1 U.C. IRVINE L. REV. 693 (2011).

92. *Id.* at 761.

93. *Id.*

94. *Id.* at 695. On Leopold von Ranke and on “Rankean” history, see NOVICK, *supra* note 21, at 27–28, 29–31.

95. Walter Benjamin, *What Is Epic Theater*, in ILLUMINATIONS: ESSAYS AND REFLECTIONS 147, 150 (Hannah Arendt ed., 1968).

96. *Id.*

97. Goodrich, *supra* note 52.

to say overlooked, penetrated, passed unwittingly by.”<sup>98</sup> Thus the history of the legal spectacle remains *unwritten*, “the juristic use of images and performances” ignored.<sup>99</sup>

The question, patently, is *why*? Why has the history of the legal spectacle remained so determinedly unwritten? Goodrich offers three reasons. First, law denigrates sight. Its practitioners are not trained to see, but rather to inscribe and file, to look *downward* at “their warrants and proofs, pleadings, tables and rolls.”<sup>100</sup> But *why* does law denigrate sight? Because, second reason, its need to dissimulate is greater than its need for spectacle. “Images give law its power and glory, its aura and effect. *Images, however, reference what cannot be heard or seen directly* and it is precisely this vanishing quality to legal images that gives them their effect, their quality as phantasms, apparitions, manifestations of power.”<sup>101</sup> Again, why? What do those images reference that is so disturbing, that requires them to vanish at the moment of their apprehension? The answer is theology: the spectacle of the law is the spectacle of the divine. “[T]he symbols and synecdoches that made up the spectacle, the ritual performances and plastic presences of legality had been inherited from another jurisdiction and a longer established tradition.”<sup>102</sup> Legal texts must be shorn of that spectacle because “it would be most dangerous to address in law what precedes and instantiates legality.”<sup>103</sup> Hence “the apparatus of appearance and machinery of visibility, was precisely to be precluded from view.”<sup>104</sup>

The third and most profound reason lies in a further dissimulation; or, at least, a displacement. Law, Goodrich tells us, is sovereign and transcendent. It belongs, although silently, to theology, existing in hierocratic opposition to oeconomy, to the executive and the administrative, the realm of mere government.

It is this double form that modern law inherits from theology in the distinction between legislative power and executive action, substance and relation, norm and decision. Sovereign power rules as a transcendent form, as a universal expression and carrier of the image of the absolute, but it is the executive and the administration that govern, that execute the details and determine right and wrong in action.<sup>105</sup>

In this system,

[g]overnance is what happens. Rule is what appears to happen. The image, which shuttles between the two, is a legal devise that hides the absence of law in the *oeconomic* order, in an administrative realm where it

---

98. *Id.* at 811.

99. *Id.* at 774.

100. *Id.* at 783.

101. *Id.* at 790 (emphasis added).

102. *Id.* at 792.

103. *Id.*

104. *Id.*

105. *Id.* at 794.

is not sovereign dictate but pragmatism, the quotidian of institutions that continues in its everyday order, its networks and decisions.<sup>106</sup>

In the upshot, the spectacle, and its “affective effect . . . is preserved in silence.”<sup>107</sup>

Goodrich’s unwritten history evokes a more general dialectic, one that recalls structural functionalist anthropology—which *has* paid purposeful attention to the theatricality of law.<sup>108</sup> Since any social universe is predicated on a metaphysic of order, quotidian enactments of legality are as much about constituting and representing that order as they are about managing its breach; this is society worshiping its normative self, reproducing its transcendence as a living abstraction. But also, and here is the dialectic, law is a metapragmatic means, a cosmic tautology, by which the obligatory is rendered desirable, the desirable obligatory. For structural functionalist anthropologists, these were universal truths. Goodrich’s conjuncture of legality and sacral imagery, by contrast, inhabits *both* the historical and the suprahistorical. It is embedded in the empirical murk of time and place, but also appears as a general theory of legal spectacle. As such, it raises the question not of unwritten history, but of how we should write history with attention to theory.

Take, for example, Goodrich’s claim (aphoristically restated) “no law without hierarchy, no hierarchy without law.”<sup>109</sup> Empirically, one may counter with examples drawn from acephalous African societies, peoples like the Nuer of the Sudan. Speaking of their law, Edward Evans-Pritchard once said that, *sensu stricto*, they have none, only to go on to write about it in exquisite detail,<sup>110</sup> as did Howell in his *Manual of Nuer Law*.<sup>111</sup> At the other end of the spectrum, the modern Western end, what of the operations of international law and arbitration?<sup>112</sup> Again in a suprahistorical vein, Goodrich argues in his commentary on *McPherson*<sup>113</sup> that law *everywhere* requires publicity and theatricality. Here, too, it is not difficult to think of exceptions. Since the 1970s, writes Hussein Agrama of the patently Euromodernist legal regime of Egypt, personal status courts have heard cases in

106. *Id.* at 808.

107. *Id.* at 793.

108. The anthropological literature on the theatricality of law is too extensive to annotate here, but for one celebrated example, see MAX GLUCKMAN, *THE JUDICIAL PROCESS AMONG THE BAROTSE OF NORTHERN RHODESIA* (2nd ed. 1967).

109. Goodrich, *supra* note 52, at 793–95.

110. E.E. Evans-Pritchard, *The Nuer of the Southern Sudan*, in *AFRICAN POLITICAL SYSTEMS* 293 (M. Fortes and E.E. Evans-Pritchard eds., 1940).

111. PAUL PHILIP HOWELL, *A MANUAL OF NUER LAW, BEING AN ACCOUNT OF CUSTOMARY LAW, ITS EVOLUTION AND DEVELOPMENT IN THE COURTS ESTABLISHED BY THE SUDAN GOVERNMENT* (1954).

112. *See, e.g.*, YVES DEZALAY & BRYANT G. GARTH, *DEALING IN VIRTUE: INTERNATIONAL COMMERCIAL ARBITRATION AND THE CONSTRUCTION OF A TRANSNATIONAL LEGAL ORDER* (1996).

113. *McPherson v. McPherson*, [1936] A.C. 177 (Can.).

private,<sup>114</sup> just the sort of thing that brought the wrath of the Privy Council down upon Justice Tweedie.

But more importantly, there is a translucent trace to be found in Goodrich's account of *McPherson*, a clue that helps explain when it is that the law has to be public, when it tends to be saturated in spectacle, and when it can take itself behind closed doors. In making his argument for the necessity of image-redolent spectacle, Goodrich points out that, while Tweedie was excoriated for taking the legal process out of the public eye, his judicial decision nonetheless stood. On one hand, the sanctity of the "sovereign" law that rules was firmly asserted in the *criticism* of the process; on the other, the enactment of the *decree nisi*—an act of "administration that govern[s]"—was upheld.<sup>115</sup> One might ask, *why* is that judicial decision deemed merely "administrative" and not also an exercise of sovereign law? Or in other words, how do we know when the law rules rather than governs, when, in its iterative practice, it is theology and when oeconomy?

If the answer is "when it is spectacle"—which is implied in the assertion that where there is no spectacle there is no law—we are faced with a tautology. The tautology disappears, however, and the glimmer of explanation appears, if we think about the problem by recourse to Walter Benjamin's *Critique of Violence*. Recall Benjamin's observation of the Great Criminal. He draws our ambivalent admiration, and is of enormous concern to authority, not because he breaks sundry laws but because he violates *the* law, thereby undermining the very foundations of order and sovereign governance.<sup>116</sup> Extend a step further and the general point becomes clear: When *the* law asserts its sovereignty—or when it is called into question—it appears to do so by means of spectacle, of sacral images, of Ritualization, upper case. When law, indefinite and ordinary, works its means and ends, it does so by way of humdrum administrative techniques, of everyday ritualization, lower case.<sup>117</sup>

The latter is no less law than is *the* law. It is just law in another register. It is in this workaday register, to close Goodrich's circle, where the immanent theology, the spectral images, and the latent dramaturgy of things legal make themselves invisible, only to re-present themselves, to force themselves into the light of day, when *the* law makes itself manifest, when it declares its sovereignty. This may also account for the adiaphorism of the legal academy of which Goodrich speaks in explaining why legal spectacle has not been much studied. Could it be that—whether or not the academy is afflicted by pragmatism—its predominant object of study and its everyday concerns are not *the* law, at least as Benjamin might have distinguished it, but law, the quotidian realms of legality in

114. Hussein Ali Agrama, *Secularism, Sovereignty, Indeterminacy: Is Egypt a Secular or a Religious State?*, 52 COMP. STUD. SOC'Y & HIST. 495, 512–14 (2010).

115. Goodrich, *supra* note 52, at 794.

116. BENJAMIN, *supra* note 28, at 241.

117. See Lavi, *supra* note 11, at 830–32 (discussing the anthropology of ritual).

which spectacle, imagery, dramaturgy lie quietly at rest, lurking latently beyond the scholarly gaze? After all, to the degree that legalities diffuse themselves into the culture of the ordinary, of the everyday, of the pragmatic business of being-and-doing, the sacral, spectacular moments of (*the*) law constitute a very small proportion of its life.

#### V. LAW, DIS/ENCHANTMENT, CULTURE

##### *Of Secularization, Ritual, and Estrangement*

In part, Shai Lavi's essay<sup>118</sup> might be read as a counter to Goodrich's determined unveiling of the spectrality of law, his attempt to enchant our history by drawing attention to "the shades of a sacred past or of a transcendent future that lurk beneath" its rational-secularized surfaces.<sup>119</sup> Indeed, Lavi's essay is something of an antidote to the turn of legal history toward the metaphysical suggested by "law as . . ." that Lavi identifies as of a piece with a wider reaction in legal and sociolegal scholarship to the work of disenchantment undertaken in the tradition of Max Weber by empiricism, historicism, and positivism.<sup>120</sup> Not that Lavi is a skeptic. His own historical research simply cautions him against treating enchantment and disenchantment as opposed inclinations with polar theoretical implications. For him, they proceed hand in hand.

How so? First, argues Lavi, the Weberian theory of secularization *itself* created the chimera of an enchanted religious past from which modernity is seen, retrospectively, to have departed; even more, modernity constituted itself as the epitome of the secular rationality that experienced faith as enchantment—and then projected its own experience of that faith onto the past. Far from being linear and sequential phenomena, then, enchantment and disenchantment were constructed simultaneously. Second, modernity invented an anthropology of ritual as a means of understanding behavior it now deemed irrational. That anthropology invested religious practice—which carried no connotation other than careful, repetitive adherence to rules of conduct, "the apt performance of what is prescribed"<sup>121</sup>—with intense symbolic meaning and sacral significance. Just as rationalization responds to the modern conceit that nothing is without reason, Lavi observes, "ritualization stems from the equally modern notion that nothing is without meaning."<sup>122</sup>

118. *Id.*

119. *Id.* at 814.

120. See Blank, *supra* note 12; see also Duncan Kennedy, *The Disenchantment of Logically Formal Legal Rationality, or Max Weber's Sociology in the Genealogy of the Contemporary Mode of Western Legal Thought*, 55 HASTINGS L.J. 1031 (2004).

121. TALAL ASAD, GENEALOGIES OF RELIGION: DISCIPLINE AND REASONS OF POWER IN CHRISTIANITY AND ISLAM 62 (1993), quoted in Lavi, *supra* note 11, at 825.

122. Lavi, *supra* note 11, at 825.

Applying these theoretical perspectives to the history of Jewish religious law in Germany, Lavi finds that, in the late eighteenth and early nineteenth centuries, as the formerly autonomous Jewish community was brought under the supervision of the increasingly secular German state, its religious law was subjected to harsh criticism as “uncivilized and unbecoming of a modern age of reason, progress and rationality.”<sup>123</sup> Coterminously with a discourse of disenchantment that condemned it as superstition, however, Jewish religious law was represented by both its critics and its adherents as enchanted. Familiar practices, the meaning of which lay on their surface in the very act of their reiteration, underwent a process of estrangement, of “ritualization.” Jewish tradition became “a riddle, the symbolic and hidden significance of which has to be deciphered . . . supernatural, exotic.”<sup>124</sup>

Lavi draws a moral here for “law as . . . .” If “law as . . . .” is a reaction to twentieth-century legal realism and sociolegal positivism—a reaction that emphasizes the imaginative, the symbolic, the metaphysical—is not its attempt to reenchant itself enabled by that prior moment of disenchantment? For his own part, Lavi suggests, first, that we pause to consider the affinities between disenchantment and enchantment, specifically “the logic of their codependence”;<sup>125</sup> and second, that we consider anew the dialectic of religion and secularization, not, like Goodrich, to discover the metaphysical embedded in the rational, but to explore the extent to which meaning lies in the minutiae of practice itself, in habit and repetition.

The manner in which Lavi runs together enchantment, ritualization, and symbolization, and introduces into the mix the role in modernity of anthropology, challenges us to think further about the relationships among them. Although anthropology, he says, “is known for making cultures and customs that are distant and foreign more comprehensible”—that is, for disenchanting them—it also “strives to make that which is, in fact, becoming ever more familiar, into something strange, alien and enchanted.”<sup>126</sup> Many would argue, of course, that ostensibly familiar things *are* in fact “strange, alien and enchanted,” that it does not require anthropology to make the point. Still, Lavi’s larger observation holds. Indeed, it holds for humanists and social scientists across the breadth of the academy: critical estrangement is precisely what we do. Bertolt Brecht called it *Verfremdung* (defamiliarization), the effort to create in a public a capacity for critical insight by distancing it from the otherwise self-evident ordinariness of what it was seeing.<sup>127</sup> For an example we need look no further than Welke’s “Owning Hazard,” which defamiliarizes consumption, dramatically, by refracting it through

123. *Id.* at 823.

124. *Id.* at 825.

125. *Id.* at 842.

126. *Id.* at 832.

127. *See, e.g.,* MEG MUMFORD, BERTOLT BRECHT 60 (2009).

injury, agony, and death.<sup>128</sup>

If estrangement is the epistemic touchstone of what we do, let us apply it to our theory-work; specifically, let us defamiliarize ritualization and symbolization—which, self-evidently, seem to be associated with enchantment. Well, are they? Almost ninety years ago, A.R. Radcliffe-Brown, in a classical piece of anthropological writing, answered affirmatively, arguing that ritualization enchants, that it infuses mystery into the ordinary, that it symbolizes in a manner that demands decoding.<sup>129</sup> But a later generation of anthropology—embodied, genealogically, in the work of Evans-Pritchard, Mary Douglas, and Edmund Leach—took to treating ritual and symbolism as largely technical, repetitive behavior. Evans-Pritchard showed that African oracles, which appear to non-Africans as the most mysterious of ritual manipulations, are regarded by both adepts and supplicants as largely pragmatic, forensic procedures;<sup>130</sup> in a similar vein, Leach saw ritual as the communicative aspect of *all* behavior, repudiating altogether the dichotomy between the numinous and the profane.<sup>131</sup>

There is, in short, a large difference between Ritual, upper case, and ritualization, lower case.<sup>132</sup> In many cultural contexts, ritualization is less about enchantment than about habitual ways of doing things. Similarly, a symbol may be a puzzle to be decoded, but that does not make it a mystery, nor in itself enchanted, any more than a cipher is a thing of the Gods. It is only a mystery if it resists decoding *and* demands an interpretation whose referents can never be finally determined. All behavior is symbolic but only some of it is enchanted.

The lack of any *necessary* relationship between ritualization or symbolization and enchantment does not invalidate Lavi's argument; after all, he is careful to treat enchantment and disenchantment as co-present, not opposed to each other. Still, it would be helpful to know more about the substance of ritualization here, about its communicative content for those involved, about the numinous dimensions of the symbolic in Jewish law as it came under the secularizing impact of the German state, if only to determine the extent to which this historical account of “the relationship between science, realism, and disenchantment on the one hand, and metaphor, imagination, and enchantment, on the other” does

---

128. See Welke, *supra* note 91.

129. ALFRED R. RADCLIFFE-BROWN, *THE ANDAMAN ISLANDERS: A STUDY IN SOCIAL ANTHROPOLOGY* (1922); see also ALFRED R. RADCLIFFE-BROWN, *STRUCTURE AND FUNCTION IN PRIMITIVE SOCIETY* (1952).

130. E.E. EVANS-PRITCHARD, *WITCHCRAFT, ORACLES AND MAGIC AMONG THE AZANDE* (1937).

131. E.R. LEACH, *POLITICAL SYSTEMS OF HIGHLAND BURMA: A STUDY OF KACHIN SOCIAL STRUCTURE* (The Athlone Press 1970) (1954); see also MARY DOUGLAS, *PURITY AND DANGER: AN ANALYSIS OF CONCEPT OF POLLUTION AND TABOO* (Routledge Classics 2002) (1966).

132. See Jean Comaroff & John L. Comaroff, *Introduction* to *MODERNITY AND ITS MALCONTENTS: RITUAL AND POWER IN POSTCOLONIAL AFRICA*, at xi (Jean Comaroff & John L. Comaroff eds., 1993).

indeed take us beyond the opposition between “law and” and “law as . . . .”<sup>133</sup> For just as there exists no necessary relationship between ritualization and symbolization on the one hand and enchantment on the other, so the enchantment of the law is not necessarily distinguishable from, or opposed to, its technical dimension or its rationalization.

Which should come as no surprise. For, to be sure, modernity *sui generis* has sacralized the technical. A succession of its millennial faiths—Communism, Fascism, Free Market Capitalism—have all preached the power of *techné* to construct a better world for all. Perhaps the most potent expressions of this faith are evident in the fetishization of the law, of its instrumental capacity, as a systematic repertoire of rational practices, to yield an ordered, equitable, just society. What could be more enchanted than to believe that law has a life of its own: that it has the wherewithal to shape the very forces and relations that actually shape it, to create the world in its own image, to determine, for both good and ill, things that happen in that world, to make things appear commensurable, to yield rational solutions to irrational problems. These are all entirely magical ideas. Collectively, they indicate that it is in the very hyperrationality of the law that its fetishization, its ultimate enchantment, lies.

All of this suggests that Lavi’s moral for “law as . . . .” may not after all be fatal to its purpose. For if “law as . . . .” *has* emerged in reaction to law’s disenchanters, it is a reaction that recognizes their disenchantment as itself a means to enchant, a means heavily favored by the present but with a long history of its own, a means that “law as . . . .” resists. Lavi has underscored the affinities of disenchantment and enchantment. But what he describes as a codependence is more appropriately conceived of as a dialectic, a dialectic that leads us not simply to the metaphysical embedded in the rational, but also to the rationality of modernist metaphysics.

For some, the received—that is, the Weberian, predialectical—opposition between disenchantment and enchantment maps seamlessly onto a presumptive opposition between law and culture. Assaf Likhovski reminds us that this cannot be left unproblematized.<sup>134</sup> How, Likhovski asks, are we to theorize the relationship between law and culture? Is it causal? Does one construct the other? Or reflect it? Are they mutually independent? How does resort to the so-called “cultural defense” in liberal legal systems inflect and illuminate that relationship?

To answer these questions, Likhovski deploys two instances from the legal history of taxation. The first deals with the transplantation of income tax from Britain to British Mandatory Palestine in the 1930s and 1940s; given that tax law is often considered “technical” and hence easily transferable, Likhovski observes, it

---

133. Lavi, *supra* note 11, at 814.

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

follows that its export to Palestine should tell us something about the extent of its cultural specificity. The second concerns income tax in Britain itself in the two decades after its introduction there (1799–1816); specifically, it addresses the cultural connotations of taxation for developing notions of privacy. To these cases Likhovski annexes a third, much shorter discussion of a 2004 Israeli Supreme Court case, *Israel Religious Action Center v. Ministry of Finance*, which involved the kabbalist miracle-worker Elazar Abu-Hatsera and his failure to pay taxes on money allegedly “given [to him] out of spiritual and religious belief” by followers whom he had blessed.<sup>135</sup> “Here was my *dybbuk*”—a wandering spirit possessing a living body—writes Likhovski, delightfully. “How should we view Abu-Hatsera’s cultural defense argument, and more generally, what exactly is the relationship of tax law and culture?”<sup>136</sup> His essay canvasses multiple options. Does law determine culture? Does culture determine law? Does either determine the other?

If we accept the terms that Likhovski has chosen for the analysis of his cases, it is hard to disagree with his conclusion that causality is complex, even indeterminate. But the cases are so dissimilar, and involve such different species of encounters between law and culture, that it is difficult to draw any definite conclusion from them—least of all in respect of in/determinacy. The first, the case of Abu-Hatsera, is about the tolerance of difference on the part of a legal regime, and even more, about the challenge posed to liberalism by claims to the sovereignty of religion. The second, the imposition of income tax on Mandatory Palestine, arose out of, and devolved upon, the cultural politics of empire. And the third, the case of British taxation and privacy, concerned the dialectics of culture and the law *within* the confines of a shared social universe. Only the last is material to the problem of determination. The Abu-Hatsera decision turned on whether to grant an exception to religious difference *within* the hegemony of national law; the Palestine example on whether to treat the “natives” as like enough, or too little like, ordinary Britons to be taxed. In neither instance was a change in culture wrought by the law, or a change in law wrought by culture. In each, the law dealt with matters cultural either by accepting them as a legitimate exception or by refusing to recognize them entirely.<sup>137</sup>

---

135. *Id.* at 846.

136. *Id.*

137. It is worth briefly elaborating these distinctions. In 1983, Benedict Anderson depicted the modernist polity as an imagined community founded on horizontal fraternity and cultural homogeneity. See BENEDICT ANDERSON, *IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGIN AND SPREAD OF NATIONALISM* (1983). Almost from that moment, if not before, nation-states, particularly in Europe, have been engaged in a headlong rush toward ever greater heterogeneity. One upshot is that identity politics are almost everywhere on the rise. Concomitantly, legal claims made on the basis of difference—in short, “cultural defenses”—are more and more common. In Africa, for example, they have become epidemic, to the extent that, in South Africa, for one, an entire jurisprudence is emerging around them. But the point is that the law into which they play is not that of the cultural context whence they come, but that of the culture from which they demand exception. So, for instance, when Jews in Manchester, England, or Zulus in South Africa

In the British example, the causal connection between the law and culture—Likhovski's theoretical conundrum—*is* actually broached. But here we encounter another problem, a problem less of relevance than of definition. Likhovski defines culture in a very particular way: as “a set of ideas, beliefs, symbols, values, social norms, and practices which are often unconscious, are relatively stable and static, and are widely shared by most members of a given social group.”<sup>138</sup> It is, he adds, distinct from politics and economics—and, by necessary extension, from law. Having reified culture and set it apart in this way, Likhovski then seeks to establish its relationship to another reified construct, this one left undefined: that is, “law.”

It is not surprising that, thus conceptualized, Likhovski finds it difficult to discover any determinate connection between law and culture. For as legal anthropology has long taken pains to point out, law does not exist *outside* culture at all. It lives integrally within it. From where else could its own significata, its own “ideas, beliefs, symbols, values, social norms, and practices,”<sup>139</sup> come if not from the cultural order of which it is part? Why else does it vary cross-culturally? Reciprocally, culture is everywhere mediated—given both manifest and material life—by law, however law may be endogenously conceptualized; which, in major part, is a cultural question to begin with. In short, the relation between law and culture is not one between two discrete, autonomous phenomena at all, but a relation of part to whole. Phenomena in part-whole relations, logically, neither reflect, nor construct, nor determine each other. They do all of these things some of the time and some of them all of the time. Rather than ask which determines, constructs, or reflects the other, the more pressing problem is to plumb the cultural processes by which is law made, reproduced, authorized, altered—and by what legal processes cultural worlds are produced, transformed, re-cognized.

This, in turn, demands that we see culture not as “a set of ideas, beliefs, symbols, values . . . which are . . . relatively stable and static, and are widely shared,”<sup>140</sup> but in dynamic, three-dimensional terms. A more contemporary anthropological view than Likhovski's treats culture as a field of signifying practices, the ground on which human beings seek—by means at once material and meaningful—to construct themselves and others; signifying practices that may be more-or-less stable, more-or-less labile, more-or-less contested, more-or-less

---

insist on exemption from the law of the land on the grounds of their beliefs, it is not Jewish rabbinical law or Zulu vernacular law on which their respective cultures are having an impact, but British and South African jurisprudence—and their capacity as liberal democratic legal systems to deal with diversity. Such struggles over the recognition of the excluded (example 1) are not the same as the problems that faced colonial regimes, whose functionaries had to decide on the treatment of indigeneity and difference under their regimes of rule (example 2). Nor are they the same as endogenous arguments in Britain, ideological arguments couched in British cultural terms, over privacy and taxation within a world defined by the presumption of sameness, likeness, unity (example 3).

138. Likhovski, *supra* note 134, at 846.

139. *Id.*

140. *Id.*

enduring, variously empowered. At any historical moment, some are hegemonic, taken for granted, others are ideological, being the ideas and values of different fractions of the population that subscribe to them; some are conscious, others are unconscious; many are suspended in between, recognized but not fully cognized.<sup>141</sup> Like economics and politics, law is constituted, reproduced, contested, and transformed within this field of meaning and practice. In it, some legal ideas, institutions, norms, and conventions become authoritative, hegemonic. Others become the object of ideological struggle. As they do, so they alter the cultural field—and, as the cultural field shifts its shape, so may they, but not necessarily or in any overdetermined historical proportions.

Law and culture, culture and the law, in sum, are not causally connected in any simple way. Nor are they independent of each other. The one is the field in which the other becomes objectified, authorized, enacted, amended—sometimes, as we have seen, by ritual means—but never mechanically or autonomically so. In the life of normative signs and practices there are always excesses and deficits, supplements and decrements. Hence the ever-present possibility of the unexpected, and of the erosion of prevailing hegemonies, orthodoxies, and ideologies.

What does all this suggest for the work of legal history? To the degree that it cannot but address this underdetermined, open dialectic of law in culture—not law *and* culture, note, nor even law *as* culture, but law *in* culture—the task of the discipline is to make visible the processes by which the means and ends of the law, in all their Ritual and ritualized guises, become portrayed, practiced, and understood as sensible; even more, to unravel the processes by which those means and ends become the hegemonic, axiomatic instruments by which right is exercised, by which property is made private, by which violence is sublimated into juridicide. By which, in other words, law becomes a fetish.<sup>142</sup>

Modern secular law, born of the separation of *lex naturae* from *lex dei*, has always had the quality of a fetish. Thomas Aquinas anticipated the point in the thirteenth century by noting how the sacral (“grace”) completed, by perfecting, all “natural law.”<sup>143</sup> The point is echoed in Benjamin’s critique of the mythic violence at law’s originary core,<sup>144</sup> in Derrida’s analysis of the mystical foundation of its authority,<sup>145</sup> and in Agamben’s attempt to find the key to power in the

---

141. See 1 JEAN COMAROFF & JOHN L. COMAROFF, OF REVELATION AND REVOLUTION: CHRISTIANITY, COLONIALISM, AND CONSCIOUSNESS IN SOUTH AFRICA 19–32 (1991).

142. See John L. Comaroff, *Reflections on the Rise of Legal Theology: Law and Religion in the Twenty-First Century*, 53 SOC. ANALYSIS 193, 195 (2009), reprinted in CONTEMPORARY RELIGIOSITIES: EMERGENT SOCIALITIES AND THE POST-NATION-STATE 193 (Bruce Kapferer et al. eds., 2010).

143. WALTER ULLMANN, LAW AND POLITICS IN THE MIDDLE AGES 272 (1975).

144. BENJAMIN, *supra* note 28.

145. Jacques Derrida, *Force of Law: The “Mystical Foundation of Authority,”* in ACTS OF RELIGION 228 (Gil Anidjar ed., 2002).

triangulation of sovereignty, the sacrificial, and the juridical.<sup>146</sup> In the history of the present, the signs of law's fetishization—"the form in which an idea will constantly confront the historical world, until it is revealed fulfilled, in the totality of its history"—become yet more pronounced.<sup>147</sup> They are to be read in the tidal wave of national constitutions written and rewritten since 1989, with their stress on political, economic, social, even cultural rights; in the emergence of new, expansive forms of "transnational legality" and of legally-oriented NGOs;<sup>148</sup> in the rapid growth of a global intellectual property regime;<sup>149</sup> in the rampant judicialization of politics,<sup>150</sup> its rendering into lawfare;<sup>151</sup> in the rising, worldwide "hegemony of human rights"<sup>152</sup> and everyday "legal consciousness;"<sup>153</sup> and, most of all, in the resort to litigation to deal with an ever broader spectrum of everyday matters. None of these things in itself is new, patently; that, after all, is the point of theorizing them *historically*. But changes in degree, when they accumulate sufficiently and come together in new assemblages, may amount to changes in kind. Thus it is that "the law" appears in the present more and more as a fetish: as an abstraction made real, a highly animated abstraction to which is attributed the mythic, numinous capacity to configure the world in its own image. Interrogating how this has come to be is, ultimately, what legal history is for.

## VI. THE LAW AS FETISH, AS FRAMEWORK, AS GRACE

### *Of War, Governance, and the Rule of Rules*

John Witt does precisely that in respect of the laws of war. For an answer, he turns to a history that begins in the first moments of European settlement on the

146. GIORGIO AGAMBEN, *HOMO SACER: SOVEREIGN POWER AND BARE LIFE* (Daniel Heller-Roazen trans., Stanford Univ. Press 1998) (1995).

147. BENJAMIN, *supra* note 29, at 45–46; John L. Comaroff & Jean Comaroff, *Law and Disorder in the Postcolony: An Introduction*, in *LAW AND DISORDER IN THE POSTCOLONY* 1, 22–35 (Jean Comaroff & John L. Comaroff eds., 2006).

148. David Schneiderman, *Constitutional Approaches to Privatization: An Inquiry into the Magnitude of Neo-Liberal Constitutionalism*, 63 *L. & CONTEMP. PROBS.* 83, 87–106 (2000); see also DEZALAY & GARTH, *supra* note 112; Yves Dezalay & Bryant Garth, *From the Cold War to Kosovo: The Rise and Renewal of the Field of International Human Rights*, 2 *ANN. REV. L. & SOC. SCI.* 231 (2006).

149. ROSEMARY J. COOMBE, *THE CULTURAL LIFE OF INTELLECTUAL PROPERTIES* (1998); Rosemary J. Coombe, *Intellectual Property, Human Rights & Sovereignty: New Dilemmas in International Law Posed by the Recognition of Indigenous Knowledge and the Conservation of Biodiversity*, 6 *IND. J. GLOBAL LEGAL STUD.* 59 (1999).

150. Cf. Martin Chanock, *'Culture' and Human Rights: Orientalising, Occidentalising and Authenticity*, in *BEYOND RIGHTS TALK AND CULTURE TALK: COMPARATIVE ESSAYS ON THE POLITICS OF RIGHTS AND CULTURE* 15, 34 (Mahmood Mamdani ed., 2000).

151. See John L. Comaroff, *Colonialism, Culture, and the Law: A Foreword*, 26 *LAW & SOC. INQUIRY* 305 (2001); see also Comaroff & Comaroff, *supra* note 147, at 26–31.

152. Heinz Klug, *Transnational Human Rights: Exploring the Persistence and Globalization of Human Rights*, 1 *ANN. REV. L. & SOC. SCI.* 85 (2005).

153. PATRICIA EWICK & SUSAN S. SILBEY, *THE COMMON PLACE OF LAW* (1998).

North American mainland and continues through the present.<sup>154</sup> His evidence offers almost a textbook case for fetishization. As warfare has become more destructive, laws of war have proliferated. And legal expertise—increasingly hyperrationalized and technicized, we might add—has become an integral part of military command and control, to the extent that “[l]awyers [now] sit in on targeting decisions.”<sup>155</sup> War law itself is no modern novelty, of course; it has “run like a thread through the history of American military operations” and of the Republic’s social experience of armed conflict.<sup>156</sup> Nor has its use changed much in tune with modern circumstance. The past reveals no prior golden age of American respect for the laws of war from which the present, in its confrontation with asymmetric conflicts, informal combatants, and terrorism, has diverged. Throughout its history, American engagement with these laws has been “a complex and sometimes ugly experience.”<sup>157</sup>

How then to answer the question, “[w]hat is this thing, the laws of war?”<sup>158</sup> Witt suggests, as a general proposition, that law is a domain of conflict amongst competing social-cultural groups and that laws are framed in the course of that conflict. This, he says, is true of *any* legal regime. Take, as an example, the clashing cultural norms in the pursuit, practice, and purpose of combat that attended European relations with autochthonous American populations from the beginning of mainland settlement. From that clash emerged an intellectual framing of European war law that excluded “barbaric” indigenous violence from the ambit of what was allowable—which, in turn, reinforced settler perceptions of Indian warfare as savage and unruly. Witt’s account is interactive: cultural contest occurs in a legal field and (re)constructs that field. In this particular instance, it produced a mode of legal differentiation between European and Indian endogenous to the history of war law itself. Indeed, it became “a central feature of the laws of war, one that American jurists and soldiers helped to elaborate and secure.”<sup>159</sup>

In other, similar cases, Witt considers how the role of American irregular combatants in nineteenth-century campaigns of expansion alters our understanding of the substance and significance of laws of war framed by military professionals; and he shows how the laws of war have been a resource in political struggles over the definition of state power and in the construction of the property regime of the Early Republic, notably in the matter of slavery. These historical cases, taken together, Witt argues, make it plain that war law has been created and recreated not in exegetic disquisitions upon formal doctrine but in circumstances of active social and cultural conflict. As such, war law stands not as a measure of

---

154. John Fabian Witt, *The Dismal History of the Laws of War*, 1 U.C. IRVINE L. REV 895 (2011).

155. *Id.* at 898.

156. *Id.* at 899.

157. *Id.* at 901.

158. *Id.* at 896.

159. *Id.* at 903.

the legality of the American way of warfare—the mistake made by each of the prevailing “master narratives”—but as a wide-ranging, persistent “framework for moral contestation . . . about ends and means” that has animated and shaped the ethical conceptualization of “some of the gravest moments in American history.”<sup>160</sup>

Witt’s analysis of legal regimes as dynamic fields of social and cultural contestation avoids many of the problems that arise from reducing law and culture to discrete isolates, and from treating the latter as a static, ahistorical repertoire of shared beliefs and symbols. His thesis, that the legalities of war take shape in a contested field of meaning and practice—that is *within* culture—and in the process alter it, is convincing. To call law a “framework” for ethical debate, however, is open to question. In doing so, Witt suggests that law is more significant as a site in which action occurs than as a substantive species of practice on its own account. He also implies that, as a context, law’s framing function persists through time relatively unchanged, even as its discursive and pragmatic content may alter. This view of “the thing, the laws of war” as a persistent framework within which conflicts occur is consistent with Witt’s disapproval of the two received master narratives which, while offering competing perspectives (declension, novelty), nonetheless share a stress on discontinuity. “They can’t both be right,” he says.<sup>161</sup> Declaring them both wrong is Witt’s prelude to the production of an alternate narrative of continuity, of law as framework for multiplicitous (social, cultural, political) contests.

There is no need to embrace the discredited master narratives—Witt effectively lays waste to them both—to point out that, as a matter of historical logic, they *can* both be right; that is, if one allows the possibility that the laws of war of the nineteenth and early twentieth centuries were different from those of the late twentieth and early twenty-first centuries. Whether or not they were is an empirical question. But, as we have already noted in respect of the metaphysics of dis/enchantment, there is good reason to be careful when considering the question of dis/continuity; all the more so if we recall our earlier point that, in so far as it is a hyperrationalized, technicist departure from the past, contemporary war law is almost a textbook instance of fetishization. The conclusion? We ought to be wary of presumptions of continuity, not least those that lurk in the conceptualization of law as an enduring framework—one that is essentially always the same thing in function if not form. If nothing else, they carry the risk of dehistoricizing history.

---

160. *Id.* at 911.

161. *Id.* at 898. Witt’s argumentative strategy here—discovery of two prevailing master narratives, distinct from each other and both wrong, and substitution of a third—is reminiscent of his earlier history of the origins of workmen’s compensation. See JOHN FABIAN WITT, *THE ACCIDENTAL REPUBLIC: CRIPPLED WORKINGMEN, DESTITUTE WIDOWS, AND THE REMAKING OF AMERICAN LAW* (2004).

Paul Frymer explores the legal incidents attendant upon one of the cultural conflicts that figure in John Witt's essay: that between indigenous populations and the rapidly expanding antebellum American republic.<sup>162</sup> The result is an extended commentary in the genre of American Political Development—of which Frymer is a leading exponent—on the assumption of the “weak state” that has long pervaded scholarship on the period.<sup>163</sup> Frymer concedes that the antebellum United States did not look like a conventional imperium: it was not highly centralized or bureaucratized, nor was it possessed of extensive fiscal-military resources. This does not mean, however, that expansion was not a governmental project. The state may have lacked the conventional apparatuses of empire, but the instruments that it did possess were used effectively to further territorial growth. “These features of state power [were not] regulatory agencies and militaries, but rather the political and legal control exercised over land distribution through the creative use of property laws and the ability to move settler populations strategically so that the nation could both populate and defend the vast spaces.”<sup>164</sup> This form of empire-building by subcontract was not uncommon among eighteenth- and nineteenth-century European imperialists; in fact, it was more the norm than the exception in colonial era expansion, in which a state of colonialism often preceded the colonial state.<sup>165</sup> The deployment of private enterprise and forces of order to serve a public purpose underscores the significance of the state's peripheries and proxies, its capillaries and noncommissioned collaborators in the microprocesses of colonization. “Land laws replace the need for bureaucracies, and settlers . . . replace the need for armies. Courts need not create or implement policy reform but need only to help perpetuate the legitimacy of specific rules.”<sup>166</sup> Here we have the hidden transcripts—hidden, that is, in plain sight—of American state formation that are attracting increasing attention these days, creating precisely the nexus of legal and general historiography for which Laura Edwards calls.<sup>167</sup>

Indeed, just as Edwards draws our attention to the “blur” of law and society at local levels of governance, so Frymer's account of Native American removal makes plain how the same blur can be found at every level of state practice. Indian

---

162. Paul Frymer, *Building an American Empire: Territorial Expansion in the Antebellum Era*, 1 U.C. IRVINE L. REV. 913 (2011).

163. For recent description, critique, and debate of the “weak state” assumption, see William J. Novak, *The Myth of the “Weak” American State*, 113 AM. HIST. REV. 752 (2008), and *AHR Exchange: On the “Myth” of the “Weak” American State*, 115 AM. HIST. REV. 766, 766–800 (2010). See also BRIAN BALOGH, *A GOVERNMENT OUT OF SIGHT: THE MYSTERY OF NATIONAL AUTHORITY IN NINETEENTH-CENTURY AMERICA* (2009).

164. Frymer, *supra* note 162, at 917.

165. John L. Comaroff, *Reflections on the Colonial State, in South Africa and Elsewhere: Fragments, Factions, Facts and Fictions*, 4 SOC. IDENTITIES 321 (1998).

166. Frymer, *supra* note 162, at 918.

167. Edwards, *supra* note 37. For one recent example of the fusion of legal and general historiography, see BALOGH, *supra* note 163.

removal is typically seen as a national “policy” associated specifically with Andrew Jackson’s presidency; and it *did* have advocates in his administration, as well as in political-military circles.<sup>168</sup> But, Frymer shows, Indian removal was as much process as policy, pursued incessantly and through a plurality of mechanisms throughout the legal system. “[L]egal mechanics disempowered indigenous populations on a day-to-day basis, moving slowly but surely to engulf their lands within the province of American authority. By the time ‘Indian Removal’ became the official policy of the national government, much of the work of American expansion had already been accomplished.”<sup>169</sup> Nor was this species of legal imperialism a nineteenth-century invention. It began with European settlement.<sup>170</sup> American federalism merely added new layers, new subtleties, new sites to its workings.

It is a commonplace of progressive theory—in legal history as in other realms of sociolegal studies—that law is the ultimate solution to the problems that it causes: that it furnishes the rights with which the oppressed may counter the might of their oppressors. Well, does it? And what if it does? Mariana Valverde addresses these questions in her essay on the epistemological significance of contemporary Canadian Aboriginal land claims litigation,<sup>171</sup> which follows on fittingly from Frymer’s account of the legal mechanics of nineteenth-century indigenous dispossession in the United States. Her findings are quite remarkable. On one hand, in the matter of recognizing “native” title, Canadian courts have yielded a degree of remedial ground to Aboriginal claimants by allowing limited procedural and evidentiary provision for vernacular practices of claiming. On the other, in defining the sovereign against whom claims are made, the courts have embraced a “wholly magical” conception of “The Crown,” of its “inherent virtues,” and of their dutiful expression by the Canadian state, to stand in for, and thereby effectively fend off, what might otherwise be framed as indigenous rights.<sup>172</sup> Instead of justice accomplished by a politics of recognition, the Crown produces completion, or promises it, in the form of “grace.”<sup>173</sup> We are, it seems, returned once more to the metaphysics of enchantment.

The threads of dis/enchantment interweave throughout Valverde’s essay. In the landmark 1997 case of *Delgamuukw v. British Columbia*, the Supreme Court of Canada ruled that territorial claims presented in the Aboriginal vernacular—in the performance of ritual narratives and songs, rather than in documentary and

168. See, e.g., DANIEL WALKER HOWE, *WHAT HATH GOD WROUGHT: THE TRANSFORMATION OF AMERICA, 1815–1848*, at 342–57 (2007).

169. Frymer, *supra* note 162, at 942.

170. See, e.g., CHRISTOPHER TOMLINS, *FREEDOM BOUND: LAW, LABOR, AND CIVIC IDENTITY IN COLONIZING ENGLISH AMERICA, 1580–1865*, 93–190 (2010).

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

172. *Id.* at 957.

173. *Id.*

archival texts—should be reconciled at trial with “the ordinary rules of evidence” rather than dismissed as “hearsay.”<sup>174</sup> Precisely how this was to be done was left unclear. Subsequent litigation has tended to affirm that, while “mythical” (enchanted) testimony might be granted exception, “there is a boundary that must not be crossed between a sensitive application and a complete abandonment of the rules of evidence.”<sup>175</sup> The normative, disenchanting procedural episteme, in other words, must remain intact. To be accorded the necessary exception, furthermore, both mythical evidence and those who proffer it must meet technical standards of anthropological authenticity that prove their unchanged, unbroken cultural lineage.

Meanwhile, in other cases, Canadian courts have found that the state has a “duty to consult” affected Aboriginal peoples in matters, for example, of resource development; it is a duty, though, that inheres in “the honour of the Crown” rather than in either the redress of historical injustice or “modern rights doctrines.”<sup>176</sup> In these cases, the balance of enchantment and disenchantment is reversed. Where in native title litigation mythical evidence was to be accommodated, grudgingly, to otherwise unyielding technical rules of evidence, in “duty to consult” cases the Crown determines doctrine and its development. Valverde suggests that, in general, Aboriginal litigants might well find advantage in proceedings that invoke the “duty to consult.” But control over the terms of participation in *all* cases, whether by “changing what counts as evidence of legal possession” or by “peering into medieval mists” to refine the obligations of the Canadian state, remains securely in the grasp of the law.<sup>177</sup> Here, Canadian courts’ epistemic innovation has produced grace in action, purposeful sovereignty in practice. Glancing backward to Peter Goodrich’s invocation of *MacPherson*—also a Canadian case—we are allowed another glimpse of legality-as-theology at the very moment of its enactment as effective oeconomy. Rather than provincialize itself by “putting in question” its own self-knowledge,<sup>178</sup> Canadian law determinedly subsumes Aboriginal metaphysics within Eurocentric technical rules and disciplines in one line of cases, while enthusiastically asserting the transcendence of a Eurocentric metaphysics embodied indexically in the numinous honor of the Crown in the other. Canadian law, it would appear, is in full control of the logic of its own dis/enchantment, and hence of the definition of the legal resources that oppressed subjects might use in contests with sovereign authority.

---

174. *Delgamuukw v. British Columbia* (“*Delgamuukw v. the Queen*”), [1997] 3 S.C.R. 1010 (Can.).

175. *Mitchell v. Minister of National Revenue*, [2001] 1 S.C.R. 911 (Can.), *quoted in* Valverde, *supra* note 171, at 957.

176. Valverde, *supra* note 171, at 966.

177. *Id.* at 971.

178. *Id.* at 956.

## VII. TERMS OF ARGUMENT, REALMS OF DISCOURSE

*Of Law, Economics, Politics, and Governmentality*

How terms of argument are controlled, how a realm of discourse is defined, how epistemes are brought to life or banished is the topic of Roy Kreitner's essay.<sup>179</sup> Kreitner interrogates the late nineteenth-century American debate over money; specifically, over bimetallism. Famous for its roots in agrarian populism, the debate pitted deeply entrenched interests—farmer and industrialist, debtor and creditor, West and East—against each other. It climaxed in the 1896 presidential election. And then, abruptly and puzzlingly, it disappeared from American politics. Kreitner explains why by pointing to the “generative power” of the terms of dispute. He shows that the argument was won by transforming those terms, thus to produce a new discursive field and “a new discourse of money.”<sup>180</sup>

Although Kreitner asks us to think of the battle over money as a jurisprudential contest, law is not foregrounded as an actor or an active principle in his analysis. Unlike Frymer and Valverde, he offers no catalog of cases or statutes—or of legal theorists. This suggests that, like John Witt, Kreitner sees legalities as a framework within which cultural contestation occurs, which is (more or less) where he ends up. But it is not where he begins. His account is rather of a realignment between politics, economics, and law as modalities of thought and action. It lays bare a discursive recoding of the terms of conflict that (i) removes distribution from the ambit of politics, (ii) naturalizes the economy as a realm of spontaneous, individualized action, and (iii) substitutes law as a facilitator of transactional exchanges for law as medium of purposive intervention. In place of a polity in which socioeconomic outcomes are a legitimate subject for political determination by “representatives in government,” in which government is “the human face of the state,” in which “the state instantiates popular will” through legislation, and in which law is “open to functional determination,” this realignment produces a “microeconomic figuration” that “banish[es] the collective and its politics from the money equation.”<sup>181</sup> In that figuration, debate over monetary questions is “conducted in economics” not politics, money becomes “facilitative of purely private and wholly individual exchange, endlessly repeated, among all individuals,” and law becomes the “backdrop” to money's mediating role, “the ground, the known quantity or accepted baseline for individual action . . . a limitation on what politics might even attempt to achieve.”<sup>182</sup>

The battle of monetary standards coincided with the dissolution of classical legal thought in Oliver Wendell Holmes Jr.'s antifoundational, antimetaphysical

179. Roy Kreitner, *Money in the 1890s: The Circulation of Politics, Economics and Law*, 1 U.C. IRVINE L. REV. 975 (2011).

180. *Id.* at 976.

181. *Id.* at 1010.

182. *Id.* at 1010–12.

acid bath, recounted so well by Kunal Parker.<sup>183</sup> The coincidence suggests an alternative reading. Rather than mark a fundamental shift from politics to economics, the battle might be seen as a consequence of a modernist loss of faith in the possibility of absolute monetary value—the *denaturalization* of money—turning it into the stuff of policy, of social construction, its meaning to be fought out across a whole gamut of institutional and discursive sites: politics, law, economics.<sup>184</sup> Given, however, the long, troubled history of fiat currency in the United States and its predecessor colonies, it is difficult to imagine that late nineteenth-century Americans had any faith in absolute monetary value to lose. Which is why Kreitner’s emphasis on the modernist shift—toward the treatment of policy as a matter of technique to be governed by expertise rather than politics—is more compelling. It is also highly compatible with the history of American progressivism, as Kreitner’s description of the discourse that would dominate monetary policy underscores. It was founded on “an economics for which the technical analysis of . . . incentives would reach new heights in powerful modeling and elegance, creating (or at least greatly reinforcing) a mode of expertise with which it would be difficult to compete.”<sup>185</sup> This, of course, is economics as science, and, less obviously, as completion, drowning resistant subjects in “abstract relations . . . a model of structural objectivity . . . the authority of scientific expertise.”<sup>186</sup> All are modes of discourse that resonate with, rather than undermine, the “classical legal thought” that rendered law as a “natural(ized) baseline for the analysis of exchange.”<sup>187</sup>

Kreitner himself sees the separation and naturalization of distinct “spheres” of law, economy, and politics as a powerfully Weberian denouement, which returns us once more to the salience of dis/enchantment in making sense of it. On one hand, the emergence of “scientific” disciplines, and the surrender of policy to their discourse of expertise, speaks to a process of disenchantment. On the other, to attribute to the human sciences a capacity to produce nomothetic knowledge about social life is to fetishize them in a manner that enchants their very hyper-rationality. There is no better example of the double character of dis/enchantment in this respect than Roscoe Pound’s turn-of-the-century “Law in Books and Law in Action.”<sup>188</sup> Pound posited “action” against “books” as a supremely disenchanting critique of legal formalism, laying the foundation for legal realism and sociolegal positivism. Simultaneously, however, he fetishized disciplinary knowledge as the enchanted alternative. Lawyers, he said, should “cease to assume

---

183. Parker, *supra* at note 6.

184. This interpretation was proposed by Morton Horwitz at the “Law As . . .” Conference in a commentary on Kreitner’s paper, *available at* [http://ocw.uci.edu/courses/course\\_banner.aspx?id=113](http://ocw.uci.edu/courses/course_banner.aspx?id=113) (follow “Interpretations – Law, Policy, Economy – Commentary” hyperlink).

185. Kreitner, *supra* note 179, at 1012.

186. *Id.*

187. *Id.* at 1012–13.

188. Pound, *supra* note 56.

that jurisprudence is self-sufficient.”<sup>189</sup> They should “make the law in action conform to the law in the books . . . by making the law in the books such that the law in action can conform to it.”<sup>190</sup> How? By “look[ing] the facts of human conduct in the face,” which meant, crucially, “look[ing] to economics and sociology and philosophy.”<sup>191</sup> The social world was to be apprehended by looking at once at human conduct *and*, by resort to professional discourses, past it. Disciplinary expertise alone had the capacity to judge what the facts of human conduct were—and what they signified.<sup>192</sup>

Once it had separated them, Pound’s sociological jurisprudence sought to reconcile books with action, the juridical with the social, on its own, new, terms. Each was granted a specific reason for being: the disciplines existed to discover social facts—“the facts of human conduct”—by the deployment of expertise; the juridical existed to regulate them by resort to law, its own expertise. Reconciliation, however, was predicated on sustaining separation. Indeed, Pound dedicated his career to defending the legitimacy and inviolability of the juridical—and its autonomy from the social.<sup>193</sup> His innovation, in short, was to sharpen the lines of difference between the legal and its (economic, political, social) context by constituting each of them as distinct, and distinctive, realms of knowledge.<sup>194</sup>

Modernity, of course, was to reify, deify, define, and discipline those realms of expertise, perhaps none so much as law and economics, which were later to be joined in a hyphenated conjuncture—Law-and-Economics—a conjuncture at once ideological and scholarly, enchanted and disenchanting. These disciplines, among others, became the producers, purveyors, and arbiters of universal truths, of the nomothetic and the naturalized, of new technologies of public life. And they shipped their truths and technologies to the farthest corners of the earth, where indigenous populations and places became laboratories in which those technologies might be tested, those truths further refined.

Just such a passage takes us to Ritu Birla’s India,<sup>195</sup> where a specifically English version of one universally enchanted technology of public life, the self-regulating free market, was installed by the colonial state in the nineteenth and early twentieth centuries. Narrating its history through the lens of postcolonial—and particularly Foucauldian—theory, Birla considers the differences between “law and economy” and “law as economy” as optics on the workings there of governance. “Law and” economy, she argues, treats each element as a distinct

---

189. *Id.* at 36.

190. *Id.*

191. *Id.* at 35–36.

192. *See* Tomlins, *supra* note 10, at 199–202.

193. *Id.* at 201.

194. *Id.* at 200–01.

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

system, each a *logos*, each “an arena outside the other.”<sup>196</sup> In this iteration, “law” acts on “the economy” to produce effects, namely, “market relations.” Those effects may garner acceptance or provoke resistance but, whichever it is, the separation of the two “systems” is underscored. By contrast, “law as” economy stresses their mutual entailment, expressed in the etymological union of *oikos* with *nomos*, in a household order produced and reproduced by regulative convention, in practices of “arranging, managing and governing,” in administration.<sup>197</sup> In this iteration, the interpellation of the market requires the deliberate disembedding of a prior economy from its vernacular context. To illuminate that process, Birla turns to political economy in its Foucauldian transformation—that is, governmentality—“as a potent modern arrangement of power directed at managing political subjects as bodies and populations,” at distinguishing, in language that recalls Peter Goodrich, “the ‘terrestrial’ self-interested economic subject” from “the ‘celestial’ abstraction of the citizen,” and at inscribing upon that subject modes of conduct productive of a specific habitus.<sup>198</sup> For the legal historian the challenge is to locate what it is that grants governmentality its potency through interrogating law both as *logos* (after Goodrich) and *nomos* (after Edwards); both in its vocalizations of “sovereignty,” that is, and in its production of the social. “Thinking law as economy,” Birla adds, “opens a robust engagement of the relationship between law as *nomos* or convention”—which, she reminds us, Weber defined as conduct *without* coercion—and “law as *logos*.”<sup>199</sup> The former, recalling Edwards, she describes as “the situated, located historicity of conduct and practice”; the latter, now recalling Goodrich and Valverde, as “sealed scripted judicial logic and sovereign (even divine) performative, as standardizing Benthamite logic and the commands [of] sovereignty.”<sup>200</sup>

In showing how the Raj displaced a vernacular capitalism in India with colonial capitalism, how the latter was created and sustained by “market governance,” and how the market itself became “an ethico-political sovereign” that monopolized both the definition of “economy” and the “imagining of the social,”<sup>201</sup> Birla returns us one last time to the dialectics of dis/enchantment. As she notes, the “disembedding” of the economy “marks the abstracting of the ‘self-regulating market’ from the density of social meanings, a process that rendered ‘the market’ a model for all social relations.”<sup>202</sup> The market abstracted, naturalized, rendered universal is the market disenchanted. Yet, as Birla’s Foucauldian analysis demonstrates, the market was *not* stripped of all social meaning. It was simply

196. *Id.* at 1018.

197. *Id.* at 1021.

198. *Id.* at 1017; *see also* Goodrich, *supra* note 52.

199. Birla, *supra* note 195, at 1020.

200. *Id.* at 1020; *see also* Edwards, *supra* note 37; Goodrich, *supra* note 52; Valverde, *supra* note 171.

201. Birla, *supra* note 195, at 1023.

202. *Id.* at 1025.

overlayed with new significata, of which one, at least for the colonizer, was its putative universality, its rationality, its . . . modernity. Palimpsest economism, Steven Wilf might suggest.<sup>203</sup> Put another way, “the” market was not disenchanting. It was enchanted in a different register. At the same time, vernacular capitalism, with all of *its* enchantments, continued to exist—as “culture,” at once ancient and ever present, at once provincialized, privatized, ritualized. “[T]he colonial legal regime codified shifting, locally situated customary conventions into scripted logics of religious personal laws, thus rendering formerly negotiable hierarchies and differences—themselves oppressive, and so not to be celebrated—as rigid and fixed.”<sup>204</sup> The thought resonates with others among our authors: Goodrich, Valverde, Edwards, and Wilf, already present, are joined by Lavi and Schmidt.<sup>205</sup>

Birla’s conclusion stresses that the coercive force of innovation—the recoding of one economy as universal, another as “culture”—inheres in law as “sovereign performative” (*logos*).<sup>206</sup> There are limits to its efficacy, of course: the “ever presence” of culture offers vernacular practice opportunities to evade the laws that attempt to regulate it. Custom retains a currency with which legalities cannot keep up.<sup>207</sup> Reading law *as* economy, however, dissolves the difference between colonial and vernacular capitalism in at least one critical respect: “the practice of economy *enacts* law through arranging, managing and governing. As *nomos* or convention, economy marks a set of actions that speak, as distinct from the more familiar speech that acts, or the speech-act, the *logos* (the word and system) that marks the autonomous performatives of sovereignty, ethical or political.”<sup>208</sup> The dissolution underscores the presence of coercion in the *nomoi*, the actions that speak, no less than in the speech-act, in the “debt servitude” of vernacular Indian capitalism, with its “uncompromising patriarchy and strict gender codes,” as much as in the colonial capitalism that sought to displace it.<sup>209</sup> We have run full circle to Laura Edwards’s “peace,” it seems: a peace “profoundly patriarchal” and “highly gendered,” in which subordinates are at once incorporated and kept in their place.<sup>210</sup>

After all that we have been through, to end with the intrinsic, ubiquitous coerciveness of the law—a bite with *every* bark,<sup>211</sup> whether *logos* or *nomos*,<sup>212</sup>

203. See Wilf, *supra* note 31.

204. Birla, *supra* note 195, at 1024.

205. See Lavi, *supra* note 11; Schmidt, *supra* note 67.

206. Birla, *supra* note 195, at 1025.

207. See Kunal M. Parker, *Context in History and Law: A Study of the Late Nineteenth-Century American Jurisprudence of Custom*, 24 LAW & HIST. REV. 473 (2006).

208. Birla, *supra* note 195, at 1035.

209. *Id.* at 1024.

210. Edwards, *supra* note 37, at 570.

211. Wilf, *supra* note 31, at 560.

212. Birla, *supra* note 195.

whether Calcutta or the Carolinas<sup>213</sup>—might seem a modest conclusion. So what else is new? Well, among other things, the numinous magic of concealment in all its myriad forms that inheres in legalities, in their arcane powers.<sup>214</sup> It is this magic, as Catherine Fisk and Robert Gordon put it in their introductory essay, that “make[s] the state and its exercises of power . . . disappear,”<sup>215</sup> whether by dissolving it into “nothing but history,”<sup>216</sup> by naturalizing it,<sup>217</sup> by hiding it out of sight,<sup>218</sup> by dispersing it into webs of cultural complexity,<sup>219</sup> or by disguising it as something else.<sup>220</sup> It is in the very act of concealment, we would suggest, that the impetus and the possibility lie for law to complete itself, to extend its hegemony, to fulfill its self-appointed purpose, to secure its sovereignty. But its completion has often been resisted,<sup>221</sup> its hegemony exposed,<sup>222</sup> because, like all things occult, the magic of legalities—their dissimulation<sup>223</sup>—is imperfect, subject to failure. That which is concealed is always open to discovery; which, finally, is the task of history. In penetrating the magicality of the law—in opening up to critical view its gaps,<sup>224</sup> silences,<sup>225</sup> incapacities,<sup>226</sup> or simply its routines<sup>227</sup>—lie opportunities to question its sovereignty, to break the grip of *techné*, to recover its *poesis*, to reassert its creative capacity to seek justice.

#### VIII. CONCLUSION

As each of us has had previous occasion to observe—indeed, one (Tomlins) in response to the other (Comaroff)—Janus, the God of Gates and of those who keep them, is surely these days the most popular of academic deities;<sup>228</sup> little wonder, this, in an age of purposefully directionless direction. In the very first essay in this collection, Steven Wilf names Janus the God of Legal Historians.<sup>229</sup> Once more we are catching up to the curve. This time we are way behind. Maxime

---

213. Edwards, *supra* note 37.

214. Valverde, *supra* note 171.

215. Catherine L. Fisk & Robert W. Gordon, *Forward: “Law As . . .” Theory and Method in Legal History*, 1 U.C. IRVINE L. REV. 519, 538 (2011).

216. Parker, *supra* note 6.

217. Kreitner, *supra* note 179.

218. Frymer, *supra* note 162.

219. Likhovski, *supra* note 134.

220. Witt, *supra* note 154.

221. Spaulding, *supra* note 76.

222. Welke, *supra* note 91.

223. Goodrich, *supra* note 52.

224. Berkowitz, *supra* note 47.

225. Constable, *supra* note 59.

226. Schmidt, *supra* note 67.

227. Lavi, *supra* note 11.

228. See John L. Comaroff, *Foreword* to *CONTESTED STATES: LAW, HEGEMONY AND RESISTANCE*, at ix (Mindie Lazarus-Black and Susan F. Hirsch eds., 1994); Tomlins, *supra* note 23, at 209.

229. Wilf, *supra* note 31, at 544.

du Camp, famed author of *Paris, Its Organs, Its Functions, Its Life*, anointed Janus the God of History more than 150 years ago. History, he explained, “is like Janus, it has two faces.” But, he added, “Whether it looks at the past or at the present it sees the same things.”<sup>230</sup>

We take Wilf to be suggesting something not altogether dissimilar, if less of temporalities than of substance. Legal historians should be bifocal, but we should also temper our respect for the claims of difference made for themselves by the twin topoi of our attention, law and history. We must of necessity keep an eye on each, but the point of having two eyes is not to suffer double vision. It is to have properly focused, more acute in/sight. Each of the essays in this collection encourages us to gaze upon the past and present with two eyes, and to understand that, as our perspectival depth deepens, we will see how ineluctable differences and dichotomies dissolve into clarity—or, better yet, transpose themselves into dialectics of comprehensible proportions. The moral of the story? That our critical vision, in all its careful bifocality, ought to aspire to one resolved object of study, capaciously conceptualized. Legal history should not always be looking in two directions, forever glancing nervously from one to the other.

“Law as . . .,” we reiterate, is neither a manifesto nor a prescriptive statement of intent. Neither does it seek to be a paradigm. 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”<sup>231</sup> 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. Having spoken here of the urge toward completion and all the dangers inherent in it, we are comfortable with the serial periods that mark an ongoing process rather than a full stop. We hope, nevertheless, that the essays presented here have demonstrated that “law as . . .” is not without its uses, its promises, its provocations.

You have finished, statesman.

The State is not finished.

Allow us to change it

To suit the conditions of life.

—Bertolt Brecht, *Versuche* 2 (1930)

---

230. Maxime du Camp, epigraph to Walter Benjamin, *Paris, Capital of the Nineteenth Century, Exposé [of 1939]*, in WALTER BENJAMIN, *THE ARCADES PROJECT* 14 (Howard Eiland & Kevin McLaughlin trans., 1999).

231. See BENJAMIN, *supra* note 29.