

# Law/Text/Past

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*How might legal historians read text? What is particular about their modes of reading as opposed to those employed by readers in other disciplines? This essay will analyze the distinctive features of legal texts such as those stemming from the pervasive reliance upon conventions or boilerplate as part of a bricolage construction, the focus upon legitimizing gestures to official authority, and the normative, almost instrumental nature of many legal texts. While other sorts of texts might be more expressive, statutes, for example, always include a sanction. Drawing upon numerous examples, the paper identifies an expansive array of texts, including extra-official legalism; rituals, procedure, and nonverbal texts; and imagined law. While seeking to provide sharp, analytic definitions of what is a legal text, it will forge a path somewhere between establishing a new dichotomy of text/context and, alternatively, proclaiming that everything is text (il n'y a pas de hors-texte). Without making a fetish of the problem of reading, I underscore the ways text might be chimerical, indeterminate, multivocal, slippery, and generally untrustworthy. Text has come to mean too much and too little.*

*Let me make clear what this paper is not about—it is not a guide to literary techniques for reading, a meandering meditation on the craft of history, or a manifesto for the importance of close readings. But I will situate the problem of text reading in our own historiographic milieu as legal historians. It is not simply the breakdown of the binary construct of law/society that leads to a more self-conscious understanding of how to read a legal historical text. Legal history is particularly subject to a postmodern sensibility, which erodes interdisciplinary borders, jurisdictional boundaries, and divisions between official and extra-official justice, and which contributes to disintermediation and the loss of the interpretive monopolies of professional elites. What is the role of the legal historian in this new world?*

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Janus must surely be the patron deity of legal historians. For even when we attempt to free ourselves from the awkward, increasingly unworkable framework of law and society, we find ourselves facing a new binary construct of text and context. This Essay is about how legal historians have come to define themselves through a fraught relationship with text. It examines the enticement of thinking of text as a separate sphere apart from the realia of circumstances, aloof from its readers and users, and—if one can still use the term in this posteverything age—as superstructure. Text has captivated scholars because it is inherently unstable and because it so neatly serves as the counterpoint, the dramatic foil of context. This essay is a brief excursus into the problems posed by text as a subject of inquiry, the difficulty of conceiving of text deeply embedded in its social context, and a proposal that our reading of text should lean toward our lawyerly, purposeful understanding of language as a normative site rather than our historian's conception of language as documentary—a cultural artifact that survives across time.

Legal historians have a long, complex relationship with text. In many ways, legal historians are a subspecies of intellectual historians, specialized readers of particular mandarin texts such as cases and statutes. While this description is certainly rather limited and cannot describe their varied activities today, legal historians often resort to claims that they can read certain texts with technical skill. Legal historians purport to know the precise usage of terms of art. They purport to distinguish, for example, between the magic words of one form of pleading under the writ system and those of another. Although these texts are not always so arcane, the focus on reading is a rather old-fashioned assertion of a guild monopoly directed toward mainstream historians, which surprisingly still often works. For nonhistorian colleagues in law faculties, however, we turn our other face toward context. We stake our authority upon knowing the period, deeply situating law in the particularities of a specific time and place.

These two faces are presented at different moments and to different audiences—historians and lawyers—and therefore some historians of law have become as comfortable in shifting, dual identity as any minority group. While

there are those who put the accent mark on the first half of the phrase, “legal,” and others who consider themselves truly part of the historical fraternity, most legal historians are simply artful dodgers of one sort or another. This is not surprising since so often legal historians have embraced what Henry Louis Gates calls a “two-toned” approach for strategic reasons.<sup>1</sup> To use a Chicago metaphor, this demands navigating down the Midway, alternating between text and context, between claims of expertise made upon legal text and claims made upon social knowledge, between a law school on one side of the windswept, difficult-to-cross divide, and the contextual scholars in the social science faculties on the other.

But this is not the first time legal historians have taken this path. Before text and context, there was a similar binary: law and society. The law and society dichotomy is deeply rooted in the kind of academic strategies legal historians employ. Moreover, it fits the neutral politics often inhabited by historians’ “noble dream” of objectivity and a lawyerly distaste for dogmatism.<sup>2</sup> When examining legal texts, historians could operate within the boundaries set by ordinary doctrinal analysis. However, the contextual approach, represented by the law and society movement had a comfortable relationship to mid-twentieth-century “end of ideology” ideologies. As Michael Grossberg has argued, the Wisconsin School of legal history, the *Ur*-practitioners of legal history grounded in the law and society movement, embraced a “historically coherent view of law as a rational instrument that could be seized upon by members of the dominant middle class to achieve consensual economic goals.”<sup>3</sup> Its interest in private ordering, empirical social science method, and functionalism often reflected a belief that social forces could be easily cabined into sensible categories.

It is remarkable how long these hollow boxes, law and society, have remained with us. Frayed, rusty, and somewhat dilapidated, this model continued to stand partly because of its usefulness in carving out a respectable role for legal historians and partly because there was no sense of what might take its place. As Robert Gordon pointed out, there always remains a conceptual problem for those who see the world as divided between two separate spheres, law and society—“to work out the secret of that relationship.”<sup>4</sup> Secrets can be compelling.<sup>5</sup>

This essay focuses upon a different sort of relationship—the role of the legal historian as an *interested reader* of text. I emphatically, however, do not want to construct a reader/text or a text/context dichotomy. Any discussion of legal

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1. HENRY LOUIS GATES JR., *THE SIGNIFYING MONKEY: A THEORY OF AFRO-AMERICAN LITERARY CRITICISM*, at ix–xviii (1988).

2. PETER NOVICK, *THAT NOBLE DREAM: THE “OBJECTIVITY QUESTION” AND THE AMERICAN HISTORICAL PROFESSION* (1988).

3. Michael Grossberg, *Social History Update: “Fighting Faiths” and the Challenges of Legal History*, 25 *J. SOC. HIST.* 191, 191 (1991).

4. Robert W. Gordon, *Critical Legal Histories*, 36 *STAN. L. REV.* 57, 60 (1984).

5. On the compelling nature of secrets, see LAWRENCE M. FRIEDMAN, *PRIVATE LIVES* (2004).

historians interrogating text should not replace one shopworn form of dualism with another. After all the binary paradigms—such as law/society or law-in-the-books/law-in-action—why add another? It does not seem to matter the source of these constructions: passé late nineteenth-century historicism (primitive/modern), liberal (status/contract), Marxist (base/superstructure), reconstructed Marxist thinking influenced by the historicism of the *Past and Present* school (patrician/plebe), or identity-based critical studies (insider/outsider), there is always some binary lurking in the background, which can be plucked out of obscurity and turned into the legal historical methodological approach du jour. At a time when we have witnessed the crumbling of the old binary distinctions, which defined scholarly thinking, from *sic et non* to elite and popular culture, it should come as no surprise that dualism is not a terribly attractive approach.

The goals of this Essay are fairly modest. It seeks to identify the relationship of legal historians to text. How do we explain the fact that text is of essential importance to legal historians and at the same time underexamined? First, as mentioned earlier, legal historians strategically shift back and forth between text and context, and never very thickly probe either category. Second, the very prevalence of text makes it less visible. Text is a precondition of legal historical study and is like water for fish—a milieu to be navigated rather than interrogated. Third, text itself is a maddeningly inexact construct. Jacques Derrida once famously declared “*il n’y a pas de hors-texte*”<sup>6</sup>—there is nothing outside the text. It is an expressive container for holding ideas, a discrete set of symbols, and a fluid, uncontainable part of a much larger fabric. In this sense, a text is a social construction, an agreed upon subject.

Fourth, text is the locus of interpretation. A text is what we call a text for the purposes of analysis. This might be an easy definition, a kind of textual positivism. But where does it take us? Legal historians cut and reshape texts to fit their purposes, tailoring its dimensions to their needs. A text might be small—a statutory fragment—or long, rambling case, but there is always a decision being made about how to identify its size, boundaries, and contours. After a nip and tuck, a text always better fits a historical argument. Fifth, the very mutability and silences of the text deny interpretation. This point was made by Walter Benjamin. The term *text* comes from the Latin word *textum*, which means a woven cloth. It is woven as part of a much larger, more elusive pattern of remembrance and forgetting. According to Benjamin, the mother of text is Penelope: “the day unravels what the night has woven. When we awake each morning, we hold in our hands, usually weakly and loosely, but a few fringes of the carpet.”<sup>7</sup>

Legal historians are therefore as much the producers of text as the readers

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6. JACQUES DERRIDA, OF GRAMMATOLOGY 158 (Gayatri Chakravorty Spivak trans., 1998)

7. 2 WALTER BENJAMIN, *On the Image of Proust*, in SELECTED WRITINGS, 1927–1934, at 237, 238 (Michael W. Jennings et al. eds., 1999).

of text. But, at the same time, they are subject to its vagaries. This Essay seeks to identify both the power of legal historians over text and the numerous ways they are subject to the text's own demands. The relationship between legal historian and text, therefore, is not an easy hooking up—but a troubled, complex association that must be examined from the point of view of defining texts, and which changes over time. My focus will be upon ourselves—the historian at work doing what he or she does best, that is, providing temporality—rather than upon the text unmoored from time. Historians have a special gift of looking backward.<sup>8</sup> But after utilizing the gift of rearview vision, they must also decide—like Cassandra with her prophecy—what this vision might mean for contemporaries.

I will not offer any simple answers to the problems of texts. Indeed, the reader can quietly exit stage left, if he or she expects a straightforward methodological toolbox, the next big paradigm, or a primer on the heuristic, the exegetical, or the casuistic. This is not one of those bright yellow books found in the local college bookstore: Gadamer or Derrida for Dummies. Nor am I ready to concede with a simple gesture. Indeed, it is simplest to state what this essay is not. It is not a methodological guidebook, not a taxonomy of different sorts of modes of reading, not a celebration of the historian's *métier*, not a glimpse of the possibilities posed by borrowing tools from neighboring disciplines, not a historiographic essay, and not a manifesto—though I may slip into any of these genres for a few awkward moments. I would like to avoid the shopworn clichés of interpretive communities, representation, and the trial as either a performative drama with its roots in primitive ordeal by combat or as a cultural *tableau vivant* where the social fissures, differences, and contentions might be enacted.

The Essay is organized into four broad sections. Part I, What Might Be a Legal Text?, probes the possibilities and difficulties inherent in defining a text. It addresses many of the problems we have identified: the mutability of text, its porous boundaries, its enigmatic nature, and its self-contradictions. Must a text have an author? How should texts be read? Are legal texts different from other texts? It examines the way lawyers have imposed discipline on such chimerical documents, insisting that reading texts be a closely controlled craft that excludes alternative meanings as well as raising possibilities. The Strange Career of Legal Textualism, Part II, asks why legal historians have failed to explore the technologies of textual interpretation. This is especially puzzling in light of mainstream historians' preoccupation with issues of methodology. In this section of the paper, I offer a brief excursus in the sociology of knowledge for legal history. The avoidance of theory, methodology, and the heuristic turn is very much a part of how legal historians positioned themselves in the late twentieth-

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8. WILLIAM H. SEWELL JR., LOGICS OF HISTORY: SOCIAL THEORY AND SOCIAL TRANSFORMATION 81–85 (2005).

century legal academy. I also trace some of the promising roads not taken. Historical jurisprudence at the end of the nineteenth and beginning of the twentieth centuries might have curbed its impulse toward the folklorist readings of law and developed a full-bodied sense of the variety of legal cultures. Even more notably, legal history was originally included by legal realists in the array of disciplines with normative purchase. How did legal historians miss engaging in either historical jurisprudence's excavation of culture or legal realism's turn toward the normative at a critical moment in the early twentieth century?

Part III, *A Short Dictionary of Misunderstood Legal Historical Terms*, is based on Kundera's insight that lexicons might be constructed around sites of contention. It examines a series of phrases, which I hope might serve to open up the discussion of alternative historical methods. I chose to employ this sort literary device because of my discomfort either with a straightforward and limited set of methodological approaches or with the polemical tone of many historiographic studies. The Dictionary is intended to be illustrative, but not limiting, of alternative approaches to writing legal history. Part IV, *Blake's Telescope*, is a final meditation upon the optics of text reading. It argues that the way out of the dilemma of how legal historians should respond to texts may reside in the commonplace lawyerly ideal of identifying texts as bridges between the many possible readings of law and those with real normative power. Thinking about the normative meaning of legal texts emerges not simply from the external pressure of the law academy, but from the embedded purposeful rhetoric of the legal texts themselves.

## I. WHAT MIGHT BE A LEGAL TEXT?

### *A. Sickness unto Text*

Just as Victorian women might experience bouts of neurasthenia, historians—and legal historians are not immune—suffer from the close relative of a peculiar malady identified by Jacques Derrida: archive fever. What is archive fever?

It is to burn with a passion. It is never to rest, interminably, from searching for the archive right where it slips away. It is to run after the archive, even if there's too much of it, right where something in it anarchives itself. It is to have compulsive, repetitive, and nostalgic desire for the archive, an irrepressible desire to return to the origin, homesickness, nostalgia for the return to the most archaic place of absolute commencement.<sup>9</sup>

The archive simultaneously preserves and hides the past.

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9. JACQUES DERRIDA, *ARCHIVE FEVER: A FREUDIAN IMPRESSION* 91 (Eric Prenowitz trans., Univ. of Chi. Press 1996) (1995).

Is there such a disease as sickness from text as Derrida characterized *mal de texte* much as Derrida described *mal d'archive*? No doubt, legal historians race after texts in the fashion Derrida describes. The text promises to explain the reasons behind larger institutional or doctrinal changes, to unveil psychological postures, to demonstrate what we intuitively suspect is actually true. Yet almost every text is a disappointment. It insufficiently informs, lacks authority, or is incomplete. Text is chimerical, indeterminate, multivocal, slippery, and generally untrustworthy. And what is not a text? Text has come to mean too much and too little. It is the object of study, but it also serves as the conditions of communication.

The encounter between the legal historian and the text is fraught with danger. Texts often slip out of our hands. By the term *mal*, Derrida meant misfortune or disquiet as much as fever—as it is often translated.<sup>10</sup> The anxieties of text reading affect some scholars more than others. For historians, moreover, there is an overheated pursuit, particular to their calling, for examining the shards of evidence, the fragments of text from historical actors is one of the few ways that the past can be reconstructed. Text fever is a kind of occupational disease. Legal historians spend their lives in a quest looking for smoking-gun texts—the writings or historical actors that exquisitely reveal the blend of motive, guile, and self-consciousness, which is not merely revealed by actions. This is what Michelet called “the exhumation of their deepest desires.”<sup>11</sup> But texts, like lovers, rarely turn out to be everything we imagine. Indeed, even if the text was illuminating, even confessional, it will inevitably expose its own lacunae.

In some ways, knowing the etiology of this disease is helpful. It spares us sliding down the rabbit holes of heuristic thinking. We cannot master the slipperiness of our ever-elusive texts, we cannot flee our text for context, and we cannot ever tie ourselves to the masts in order to be preserved from the sirens of multiple interpretations. Strikingly, we pretend that we have interpretive power. Our metaphors tell us a great deal about how we deal with texts in general—and all of them do not quite fit a legal text. Texts might be dissected (we “murder to dissect”<sup>12</sup>), unpacked like a portmanteau, or become an ocular instrument as we search for their deeper meanings.

But Derrida points us in a different direction—where we look inward toward the psyche of those searching for the past. In a sense, we are—in the delirium of our fevers—the creator and preserver of documents. A text is something we work upon while a document is something we create. Roland Barthes, Jacques Derrida, and Julia Kristeva have all pointed out that texts are multivocal, speaking to each

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10. CAROLYN STEEDMAN, *DUST: THE ARCHIVE AND CULTURAL HISTORY* 9 (Rutgers Univ. Press 2002) (2001).

11. *Id.* at 38.

12. WILLIAM WORDSWORTH, *The Tables Turned*, in *THE COLLECTED POEMS OF WILLIAM WORDSWORTH* 573, 573 (1998).

other like crickets on a summer evening.<sup>13</sup> The instability and chimerical character of texts is implicit to the text itself because no text can ever be disentangled from others. If a text cannot be anything more than a crossroad of other texts, if the reader is critical for making the text unified by seeing, then, perhaps, we should turn to the reader, the legal historian, to speak of a relationship between reader and text rather than the text itself.<sup>14</sup>

### B. Text and Difference

Legal texts *are* different—and therefore they must be read differently. As Brook Thomas has pointed out, “without a doubt legal texts can have literary qualities. But in the last analysis their function is different.”<sup>15</sup> Legal texts are often intentionally derivative, moving forward across time through constantly gesturing toward commonly accepted terms of art. Such texts seek to be exclusive, limiting alternative interpretive challenges to authority—and making claims to being closely reasoned and inevitable in their conclusions; and, above all, legal language is an instrument, a technology of power. It is impossible to read Robert Cover’s *Nomos and Narrative*—which underscores the literary quality of legal texts—without the curative reminder of *Violence and the Word*, which tells us that behind every legal word lurks a threat. Law plays on a “field of pain and death.”<sup>16</sup>

What makes an official legal text different? First, its authorial voice might be institutional (congressional history or legislative intent) rather than simply the voice of the single romantic author. The ventriloquist-like imposition of authorial intent upon the text is a cottage industry of sorts, legislative history, legislative history, which is often so flimsy that its artificial reason is often exposed. Second, the text is often a pastiche, a bricolage of terms from prior texts. Lawyers borrow shamelessly from each other. Indeed, the conservative use of language, pushing words forward through time, is a particularly notable aspect of lawyerly writing. Legal terms of art create well-traveled causeways between one text and another. But, more importantly, the similarity of texts created by using boilerplate or conservatively retained legal language suggests that intertextual readings—reading one text against another—must be an even more insistent task of the legal

13. See ELIZABETH A. CLARK, HISTORY, THEORY, TEXT: HISTORIANS AND THE LINGUISTIC TURN 130–38 (2004). Some of these issues have been addressed in a very fine essay addressed to legal historians. See William W. Fisher III, *Texts and Contexts: The Application to American Legal History of the Methodologies of Intellectual History*, 49 STAN. L. REV. 1065 (1997).

14. My thinking here has been influenced by Philip Hamburger’s excellent, and certainly unpostmodern, study in LAW AND JUDICIAL DUTY (2008), which reconfigures judicial review as a relationship of duties and cultural sensibilities owed by the judge. What are the duties of a legal historian?

15. Brook Thomas, *Reflections on the Law and Literature Revival*, 17 CRITICAL INQUIRY 510, 533 (1991).

16. Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601 (1986). On law as a technology of power, see CHRISTOPHER TOMLINS, FREEDOM BOUND (2010).

historian.

Third, legal texts are always texts seeking to limit the reader. They privilege one reading over another as more authoritative, more correct. Legal texts are always telling us like well-functioning signage not to take a particular doctrinal path, not to be misled by compelling arguments set forth by advocates that might lead us in a direction that will not be accepted as normative. If all texts have some limiting function for meaning—words are fences of a sort—then legal texts with their demands for interpretive exclusivity are particularly notable for the boundaries they place upon imaginative readings of alternative possibilities. Alternatives must always be justified. The art of distinguishing the case is what allows one to read a judicial decision differently from another. Fourth, as has been suggested, legal texts are instrumental texts. If, as Jackson Lears has written, “all history is the history of longing,”<sup>17</sup> then all interrogations of legal historical texts are forms of pleading.

## II. THE STRANGE CAREER OF LEGAL TEXTUALISM

American legal history seems to have come of age. It has a multivolume history of the country’s leading judicial institution, the Holmes Devise history of the Supreme Court.<sup>18</sup> Two massive encyclopedias have been published in the past few years. One, *The Cambridge History of Law in America*, is temporal, truly historiographic, in its scope, excavating the long nineteenth century. The other, *The Oxford International Encyclopedia of Legal History*, is itself a nineteenth-century artifact. It takes on the classic nineteenth-century comparative law project by cataloging the varieties of legal historical experience across the globe.<sup>19</sup> In nineteenth-century historical *Wissenschaft* fashion, *The Oxford International Encyclopedia of Legal History* encompasses the “great” and “major” legal traditions from China to English Common Law. A new biographic dictionary identifies important figures, while an older work, *The Founders’ Constitution*, makes our constitutional canon into something truly canonical—a text with a genealogical commentary on the same page.<sup>20</sup> Legal historians have brought the Constitution into the glossator tradition by scribbling along the margins comments, notes, and sources.<sup>21</sup> Moreover, the field has its own canonical works, in the areas of both

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17. JACKSON LEARS, *REBIRTH OF A NATION: THE MAKING OF MODERN AMERICA 1877–1920*, at 1 (2009).

18. 1–12 *THE HISTORY OF THE SUPREME COURT OF THE UNITED STATES* (Paul A. Freund & Stanley N. Katz eds., 1971–2006).

19. *THE CAMBRIDGE HISTORY OF LAW IN AMERICA* (Michael Grossberg & Christopher Tomlins eds., 2008); *THE OXFORD INTERNATIONAL ENCYCLOPEDIA OF LEGAL HISTORY* (Stanley N. Katz ed., 2009).

20. *See generally* *THE FOUNDERS’ CONSTITUTION* (Philip B. Kurland & Ralph Lerner eds., 1987); *THE YALE BIOGRAPHICAL DICTIONARY OF AMERICAN LAW* (Roger K. Newman ed., 2009).

21. *THE ANNOTATED U.S. CONSTITUTION AND DECLARATION OF INDEPENDENCE* (Jack N. Rakove ed., 2009).

overarching narrative and a methodological critique, which can be emulated and serve as the foil for disagreement. In a certain fashion, legal history embodies the Enlightenment project—encyclopedic surveys of knowledge—and the Romantic project—making and unmaking paradigms.

In 1960, there were only five legal historians operating in elite law schools while today legal historians are considered an essential part of the infield of any major law school. Christopher Tomlins's recent examination of the American Association of Law School faculty suggests that nearly five hundred legal academy professors identify legal history as a major subject interest.<sup>22</sup> Princeton's history department has its own distinguished chair in the field, the Class of 1921 Bicentennial Professor of the History of American Law and Liberty.<sup>23</sup>

Not surprisingly, legal historians are in a celebratory mood.<sup>24</sup> As with any successful discipline, legal history has fragmented into schools representing different approaches: Stanford and Wisconsin law schools reflect a long-standing law and society tradition that is rooted in the empirical social sciences; Yale—under the nuanced guidance of Robert Cover and Robert Gordon—has produced legal cultural history. Without a law school, Princeton's Hendrik Hartog has encouraged a particular focus on the role of the strategies of ordinary people within legal frameworks. His own writings have accomplished the miracle of Birnam Wood by converting Willard Hurst's deep forests filled with trees into people constantly on the move for legal answers to the puzzling predicaments of neighborly disagreements, family strife, and the deep psychological desire for heirs. Harvard Law School, as always, has focused on whatever Harvard thinks is important. A professional organization hosts yearly conferences with devoted attendees who regularly travel to its meetings. A succession of first-rate conferences has marked rites of passage for its most senior scholars. And legal history even has the ultimate sign of coming-of-age for any discipline: a web site to trumpet its latest accomplishments.<sup>25</sup>

But I hesitate to join the huzzahs celebrating disciplinary triumphalism.

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22. Chris Tomlins, *Legal History in U.S. Law Schools*, LEGAL HIST. BLOG (Nov. 1, 2010, 5:55 PM), <http://legalhistoryblog.blogspot.com/2010/11/legal-history-in-us-law-schools.html>; see also William J. Novak, *Constitutional Theology: The Revival of Whig History in American Public Law*, 2010 MICH. ST. L. REV. 623, 624. G. Edward White describes the formative period for United States legal history at Harvard in *The Origins of Modern American Legal History*, in 2 TRANSFORMATION IN AMERICAN LEGAL HISTORY: LAW, IDEOLOGY, AND METHODS: ESSAYS IN HONOR OF MORTON J. HORWITZ 48 (Daniel W. Hamilton & Alfred L. Brophy eds., 2010).

23. For a discussion of the emergence of legal history as a field at Princeton University, see my conversation with Stanley N. Katz, which will be published in *Law and History Review*.

24. Charles Donahue Jr., *Whither Legal History?*, in 1 TRANSFORMATIONS IN AMERICAN LEGAL HISTORY: ESSAYS IN HONOR OF PROFESSOR MORTON J. HORWITZ 327 (Daniel W. Hamilton & Alfred L. Brophy eds., 2009).

25. LEGAL HIST. BLOG, <http://legalhistoryblog.blogspot.com/index.html> (last visited May 30, 2011). Recent major conferences honoring leading U.S. legal historians include those dedicated to Lawrence Friedman, Morton Horwitz, Stanley Katz, and William Nelson.

Thick tomes did not prevent nineteenth-century Protestant theology from turning into an intellectual dinosaur. While legal historians often have claimed to be most comfortable with fellow historians, their connection has frayed as the larger historical academy has experienced new trends. The turn toward narrative makes historical study look remarkably nonanalytic—the antithesis of the lawyerly focus on crisp intellectual maneuvering among texts. Identity history has placed gender, race, and class at the core of historical studies. Legal historians, on the other hand, still often think about law as a reified category aloof from identity politics, beginning sentences with phrases such as “the law conceives . . .” A brooding omnipresence in the sky does not have a skin tone. The straightjacket of national jurisdictions, most significantly, has made legal historians seem fixed upon rigid national boundaries at the very moment that mainstream historians are probing the plasticity, elasticity, and permeability of territories.<sup>26</sup> When was the last time that a subaltern has made a cameo appearance in an important legal historical monograph? If the new cultural history has often meant a history embodied—shifting the gaze to bodies as the object of sex and death, pleasure and identity—legal historians have been curiously disembodied.<sup>27</sup>

Legal historians, in other words, have been left behind by other historians. Legal historians are borrowers from borrowers. As intellectual magpies traveling from nest to nest, they occasionally bring methodologies borrowed from other areas of scholarship to bear upon their own legal historical enquiries. When was the last time someone borrowed from us? We inherit derivative methodologies, and often remain uncritical of our own historiographic preconceptions. How many legal historians simply follow cases one after another like beads on a rosary until they reach a believable conclusion that this *is* the past? Much legal historical work is of the headnote tradition—cases simply represent holdings—which, in turn, represent the slow accretion of legal doctrines. In some ways, while we claim the mantle of historians—even if our heads are sometimes insufficiently anointed with the dust of archives—the fact is that among historians we are provincials.

Moreover, as I suggested at the beginning, the tilt toward the historical academy rather than the legal has left us with the worst of both worlds. We are often insufficiently archival, poorly attuned to methodological concern. As the

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26. Exceptions include Christopher Tomlins, *In a Wilderness of Tigers: Violence, the Discourse of English Colonizing and the Refusals of American History*, 4 THEORETICAL INQUIRY L. 451, 505–43 (2003); LAUREN BENTON, *A SEARCH FOR SOVEREIGNTY: LAW AND GEOGRAPHY IN EUROPEAN EMPIRES 1400–1900* (2009). The “straightjacket of national jurisdictions” is borrowed (with modification) from GEORGES DUBY, *L'ÉCONOMIE RURALE ET LA VIE DES CAMPAGNES DANS L'OCCIDENT MÉDIÉVAL* (1962).

27. On embodiment, see Miri Rubin, *What is Cultural History Now?*, in *WHAT IS HISTORY NOW?* 80, 83 (David Cannadine ed., 2002); Patricia O'Brien, *Michel Foucault's History of Culture*, in *THE NEW CULTURAL HISTORY* 25, 34 (Lynn Hunt ed., 1989). For a critique of these directions in the history academy, see JONATHAN CLARK, *OUR SHADOWED PRESENT: MODERNISM, POSTMODERNISM, AND HISTORY* (2004).

dealers in a particular kind of text, we are often detached from other aspects of a historical period to be proper contextualists. The textual turn, as I have argued, cannot provide an escape path since it is simply the latest enunciation of a new historical methodology, each of which has ultimately proved to be a *révolution manquée*—a revolution that did not happen. Or, perhaps, a better image might be a banana republic coup. The radio station is seized; a colonel in neatly pressed camouflage fatigues issues a statement about the failures of the old regime and makes overstated promises about what will come in its place. It is all very dramatic. In the end, however, this change in regime also fails. These are all reasons to rethink our identity. All the faux theory in the world will not make us “real historians.”<sup>28</sup> Nevertheless, as I will argue in Part IV, we have retreated from the normative task of lawyers—and, I believe, this is the side of our identity that offers the most promising possibilities.

But our law academy legacy also has its limits. It is striking that there are almost no autobiographies of law professors.<sup>29</sup> The legal profession, and especially the legal academy with its focus on performative pedagogy, does not favor the cultivation of internality. Even when lawyers were influenced by reading ancient classics, they gravitated to Ciceronian rhetoric rather than Stoic self-examination. In contrast, numerous fine memoirs of historians have been written.<sup>30</sup> Historians are inclined to this genre for a variety of reasons: to create a document for a future generation of historians, to situate their themes within the larger intellectual and political currents of their times, to apprentice a next generation of scholars through the telling of a *Bildungsroman*—the how-I-became-a-historian genre. Nevertheless, what is striking is that the degree of self-regard, inner-consciousness, awareness, and attunement to psychological postures, knowing the deeper aspects of the personality referred to by the French as *labyrinthe intérieur*—call it what you will—seems notably lacking among lawyers. Legal historians seem to share this outer-directedness. What might remedy this situation? Short of

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28. This phrase is borrowed from Joan Scott. See BECOMING HISTORIANS 51 (James M. Banner, Jr., & John R. Gillis eds., 2009).

29. The exception is ELYN R. SAKS, THE CENTER CANNOT HOLD: MY JOURNEY THROUGH MADNESS (2007). But this is the exception that proves the rule. It is part of a genre of works describing the struggle with psychiatric illness, including KAY JAMISON, AN UNQUIET MIND (1995), and WILLIAM STYRON, DARKNESS VISIBLE: A MEMOIR OF MADNESS (1990).

30. For just a few examples, see INGA CLENDINNEN, TIGER'S EYE: A MEMOIR (2002) (linking the inward observation of the progress of an illness with the outward observational skills of the historian); GEORGES DUBY, L'HISTOIRE CONTINUE (1991) (historian whose personality emerges from engaging in the craft of reading documents); JACQUES LE GOFF, MY QUEST FOR THE MIDDLE AGES (2006) (historian responding to the politicized antiquarianism of Vichy); ERIC HOBBSBAM, INTERESTING TIMES: A TWENTIETH-CENTURY LIFE (2003) (historian at the nexus of contemporary politics); JACOB KATZ, WITH MY OWN EYES: THE AUTOBIOGRAPHY OF AN HISTORIAN (1995) (historian as shaped by life experience of early life in a small village); GEORGE MOSSE, CONFRONTING HISTORY: A MEMOIR (2000) (explaining the significance of gay, Jewish, and progressive beginnings for the historian as outsider). The complex ways that historians read their own lives is examined in ALAIN BOUREAU, HISTOIRES D'UN HISTORIEN KANTOROWICZ (1990).

encouraging Freudian psychoanalysis or promoting mandatory training through Saint Ignatius's spiritual exercises, it is unclear how to promote the transformation of the legal historical psyche. Yet without such a change, the reading of texts in a truly sophisticated way remains out of reach.

Legal history has developed in its particular fashion largely because certain roads have *not* been taken. There were two particularly promising approaches that were missed: historical jurisprudence in the *fin de siècle* and the historical contribution to legal realism in the 1920s and 1930s. The first of these paths, historical jurisprudence, argued that the contingent and evolutionary transfiguration of past forms might have a critical influence on how we think about making law in our own times. F.W. Maitland brought a sense of the *longue durée*, and a willingness to ask enduring questions about the origins of liberty and the nature of equality.<sup>31</sup> He embraced, rather than fled, emerging debates in political theory. Paul Vinogradoff brought to historical jurisprudence a "cosmopolitan note."<sup>32</sup> He divided the world of historical jurisprudence into the rationalists, nationalists, and evolutionists. Unlike Maitland, he brought into the discussion psychology, empirical investigations, and a concern with how a sense of rootedness influenced historical process.<sup>33</sup>

Historical jurisprudence was an alchemical movement, turning the experience of history into the logic of law. In contrast to the Rawlsian dance of the seven (or more) veils, it does not strip human beings of their culture and past, but creates a radically situated subject. It was this idea of law as situated, reflecting community language, and consciously or unconsciously held norms, that prompted Oliver Wendell Holmes to claim that "the *rational* study of law is still to a large extent the study of history."<sup>34</sup> Historical jurisprudence held out the promise of culture as the defining centerpiece of law's past. However, it also embraced less promising approaches. Historical jurisprudence usually conceived of law's general principles as eternal, operating across time in a different fashion depending upon the society—but remaining forever. It identifies the unchangeable more readily than the changeable. And some of these unchangeable, immutable principles struck a discordant mystical chord of memory by evoking their national

31. G.R. ELTON, F.W. MAITLAND (1985). See especially the introduction of F.W. MAITLAND, STATE, TRUST, AND CORPORATION, at ix–xxxix (David Runciman & Marcus Ryan eds., 2003). My essay, *The Invention of Legal Primitivism*, 10 THEORETICAL INQUIRY L. 485 (2009), seeks to use historical jurisprudence as part of a project of recovery. Two important new works have contributed to the recovery of the historicist tradition in nineteenth-century American law: DAVID M. RABBAN, LAW'S HISTORY: AMERICAN LEGAL THOUGHT AND THE TRANSATLANTIC TURN TO HISTORY (forthcoming 2011) and KUNAL M. PARKER, COMMON LAW, HISTORY, AND DEMOCRACY IN AMERICA, 1790–1900: LEGAL THOUGHT BEFORE MODERNISM (2011).

32. Nick O'Brien, *In Vino Veritas: Truth and Method in Vinogradoff's Historical Jurisprudence*, 29 J. LEGAL HIST. 39, 51 (2008).

33. 1 SIR PAUL VINOGRADOFF, OUTLINES OF HISTORICAL JURISPRUDENCE 1–160 (1920).

34. JULIUS GOEBEL JR., A HISTORY OF THE SCHOOL OF LAW, COLUMBIA UNIVERSITY 315 (1955).

particularity though such concepts as legal *Volksgeist*. None of this rather fuzzy historicism seemed to fit with an impatient, modern reading of law as science. With the rise of legal realism, legal historians were excluded from a much larger enterprise of reforming law.

If historical jurisprudence was so soundly rejected by legal realists, might there be another way for legal historians to contribute to the legal realist project? Could they bring to bear the deeply situated, highly granular, robustly contextualized past—with its dense culture at once so different and so similar to our own—upon contemporary legal problems, and at the same time embrace change? Was it possible for legal historians in the golden age of legal realism to join a chorus that included sociology, psychoanalysis, and political economy and to sing its notes enunciated clearly enough so it could participate in the functional transformation of law into a modern regulatory system? In other words, framing the question for our own time, how should historians speak in a normative voice?

During the 1920s, Julius Goebel's course at Columbia, Development of Legal Institutions (DLI), constituted an attempt to situate legal texts in their contexts. The course was intended as a means for "repudiating the tradition which confined legal historical inquiry to a mere genealogy of cases." It focused on the role of social sciences, "political, economic or social factors in the growth of particular rules or institutions." Goebel saw law "not as an isolated phenomenon, but as a phase of civilization."<sup>35</sup> There was a real possibility of constructing a legal history for the age of legal realism. The DLI casebook, for example, began with murky beginnings of coverture but ended with the New York Married Women's Property Act of 1848. Change was central to this story. As a consequence of the market revolution of the nineteenth century, women emerged as rights-bearing actors who could alienate or manage property independent of their husbands. Law, students should learn, is flexible, contingent, and liable to change with circumstances. The paternalism of common law notions of control over the property of wives, which marks the casebook's endpoint, served as a lesson and a warning.

Yet this moment when legal history might speak with a realist, normative voice disappeared almost as soon as it was conceived. If historical jurisprudence lost to analytic philosophy and deontological liberalism, then the historicism of realism might be said to have been the victim of an empirical realist turn. The irrelevance of history became a legacy of realism—precedent provided a dead weight from the past that created burdens for the recasting of a modern, outcome-driven legal system. As legal realism abandoned history for the two-dimensional temptress of law and economics, legal historians turned inwards. Legal historians abandoned the normative project.

The failure of legal history to seize the normative moment was in part itself a

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35. *Id.*

victim of historical contingency. In large part, this missed moment was due to the failure of Goebel's Columbia experiment. Goebel often seemed to portray common law as our Roman law—filled with obscure doctrinal adherence to traditional common law doctrine.<sup>36</sup> He demonstrated a penchant for creating a common law that was dense, full of obscure terms of art, and dry-as-dust interpretations of the specifically English past in an ever more global world.<sup>37</sup> Indeed, Goebel seems to have retreated from social historical concerns and by the 1930s increasingly placed a premium on the particular technical knowledge of lawyers. Partly as a result of a dispute over how the Littleton-Griswold bequest should be deployed, Goebel turned against Richard Morris, who also taught in Columbia University at the time. Morris was a pioneering historian of colonial legal history with a special focus on labor law. In a devastating attack against Morris in the 1931 *Columbia Law Review*, Goebel called Morris “inept,” “naïve,” and “uninspired.”<sup>38</sup> Karl Llewellyn followed up this academic mugging by calling Morris's book “relentlessly botched,” and the work of a layman, not a lawyer.<sup>39</sup>

The assault on Morris, as Christopher Tomlins has pointed out, represented boundary tending by lawyerly legal historians, a means of excluding those without formal legal training.<sup>40</sup> Morris's social history was cast out of the camp of real legal historians. This was not simply an episode where academic egotism led to clashes over what constitutes rigorous scholarship. Something important had occurred. The Goebel-Morris controversy prompted legal history turning away from deeply contextualized history at the very moment when the field could have embraced the normative project of legal realism, and when social history and textual history could have combined to create new common ground for understanding our legal past.

### III. A SHORT DICTIONARY OF MISUNDERSTOOD LEGAL HISTORICAL TERMS

In *The Unbearable Lightness of Being*, Czech novelist Milan Kundera includes “a Short Dictionary of Misunderstood Words.” These are words seemingly shared, but in fact subject to multiple, often conflicting meanings by a romantic couple, Sabina and Franz: women, betrayal, living in truth, parades, light, and darkness.

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36. JULIUS GOEBEL JR., *CASES AND MATERIALS ON THE DEVELOPMENT OF LEGAL INSTITUTIONS* (1929); John P. Dawson, *Development of Law and Legal Institutions* (1963) (unpublished manuscript) (on file with author).

37. The apotheosis of common law as *our* Roman legal history might be found in the new casebook, which claims lineage from Goebel: JOHN H. LANGBEIN, RENÉE LETTOW LERNER & BRUCE P. SMITH, *HISTORY OF THE COMMON LAW: THE DEVELOPMENT OF ANGLO-AMERICAN LEGAL INSTITUTIONS* (2009).

38. PHILIP RANLET, RICHARD B. MORRIS AND AMERICAN HISTORY IN THE TWENTIETH CENTURY 11–20 (2004); Julius Goebel Jr., *King's Law and Local Custom in Seventeenth Century New England*, 31 COLUM. L. REV. 416 (1931).

39. Karl Llewellyn, *Law and the Modern Mind: A Symposium*, 31 COLUM. L. REV. 82 (1931).

40. Christopher Tomlins, *History in the American Juridical Field: Narrative, Justification, and Explanation*, 16 YALE J.L. & HUMAN. 323 (2004).

According to Kundera, there is the “semantic susurrus of the river flowing” through this language.<sup>41</sup> An intimate vocabulary captures the connection between them. For our purposes, I will try to define a few phrases that might guide the relationship of legal historians to texts: The Countergenealogical Gesture, Palimpsest Legalism, Legal History of the Imagination, and Thin Normativity/Thick Normativity.

### A. *The Countergenealogical Gesture*

What does it mean to operate in a countergenealogical fashion? It means to search for alternative paths and roads not taken, elective affinities that do not seem to be obvious connections. Often legal historians trace the origins of contemporary legal doctrine or institutions in a comfortable, linear fashion—such as, for example, uncovering the intellectual pedigree of federalism or the early modern structure of appellate actions—and, especially when it is done well, there is much to be gained from identifying origins. Indeed, the legal historian’s role of noting continuities is not a new one. Law was traditionally the keeper of both official codes and official pasts. In the Greek polis, public documents were kept in the *arkheíon*, which was often the home of the magistrate. Continuity, however, tends to replicate what Bentham called the “everything-as-it-should be”<sup>42</sup> form of legalism and renders legal history the least dangerous branch of legal science.

Law does not replicate itself naturally with one rule begetting another in Biblical style. Instead, laws have resonance, which can reverberate through time by being seized upon by others mining the past. Antiabortion activists have claimed kinship to the resistance of Northern nineteenth-century Americans to the Fugitive Slave Act of 1850, which required the capture of slaves in Free States and the return to their masters, contrary—in the minds of many Americans—to a higher moral law. Antigay marriage proponents have mined the antipolygamy movement of a century earlier. These are examples, of course, of the *Nachleben*, the afterlife of statutes—an afterlife, which only comes into existence because later generations have identified threads of real or even make-believe connections. Genealogies are often a matter of constructing a family romance—identifying antecedents as an invented past.

This focus on rupture rather than continuity has been suggested by others. Robert Gordon eloquently calls for

any approach to the past that produces disturbances in the field—that inverts or scrambles familiar narratives of stasis, recovery or progress; anything that advances rival perspectives (such of those as the losers rather than the winners) for surveying developments, or that posits

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41. MILAN KUNDERA, *THE UNBEARABLE LIGHTNESS OF BEING* 89–117 (Michael Henry Heim trans., 1984).

42. 2 JEREMY BENTHAM, *The Book of Fallacies*, in *THE WORKS OF JEREMY BENTHAM* 436, 443 (Russell & Russell 1962) (1843).

alternative trajectories that might have produced a very different present—in short any approach that unsettles the familiar strategies that we use to tame the past in order to normalize the present.<sup>43</sup>

But the countergenealogical gesture is not just about undoing existing narratives. It also means the constructing of new narratives across time in order to challenge familiar claims of legitimacy grounded upon the transmission of legal ideas from one generation to the next.

### *B. Palimpsest Legalism*

To borrow a psychoanalytic term, which was in turn borrowed from art history, if you peel off one layer of history on a canvas, another might be discovered underneath. This section will discuss the methods that might be used to strip away one past to see another. Here is how Freud identifies the palimpsest:

[S]uppose that Rome is not a human habitation but a psychical entity with a similarly long and copious past—an entity, that is to say, in which nothing that has once come into existence will have passed away, and all the earlier phases of development continue to exist alongside the latest one.<sup>44</sup>

We can peel away existing pasts and discover beneath them surprising hidden pasts. Take the classic question of tracing the beginnings of British North America's legal and constitutional order. The received tradition is one of settlement, grants of authority from the Crown, and the establishment of legal institutions such as courts and legislatures. Such a narrative hands down legal authority in the fashion of an apostolic succession. The monarch and his chartered agents, Parliament and its courts are repositories of the legalities of early America—and these, ultimately, would be transfigured in the final succession into a new American constitutional order for the ages.

Yet among the earliest legal codes of the postencounter New World were those written by buccaneers and utopians. Pirates established direct democracies with equal voting rights and equal shares in the booty.<sup>45</sup> Their regulations, binding and difficult-to-change charters, framed in wooden, seaborne worlds, spoke to the different sorts of hierarchies made possible by leaving Europe. What does it mean that New World constitutionalism might have its origins between the devil and the deep blue sea?

Or, perhaps, America's legal tradition begins in the aspirations of Europe. Before actual legal structures were created, however, they were imagined. For some, like Thomas More, the New World was a place where “all things grew

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

44. SIGMUND FREUD, *CIVILIZATION, SOCIETY AND RELIGION: GROUP PSYCHOLOGY, CIVILIZATION AND ITS DISCONTENTS AND OTHER WORKS* 257 (James Strachey trans., 1985).

45. PETER T. LEESON, *THE INVISIBLE HOOK: THE HIDDEN ECONOMICS OF PIRATES* 175 (2009).

milder, the air less burning, the soil more verdant, and even the beasts were less wild.”<sup>46</sup> In such an environment, it might be possible to experiment with new forms of governance. More’s *Utopia*, Francis Bacon’s *New Atlantis*, and James Harrington’s *Commonwealth of Oceana* all reflected the impact of envisioning new worlds founded upon theories of legal governance. Francis Bacon’s island is governed by a charter that limits the commonwealth’s intercourse with the outside world. Knowledge is gathered from the far corners of the globe by carefully selected emissaries sent by the collegiate Solomon’s House, and which is housed in a variety of galleries. Limiting public knowledge is core to the suppression of luxury and vice.<sup>47</sup> Distance and self-consciousness, attributed as a literary conceit to the New World, allows the *New Atlantis* to flourish. *Oceana*, too, is a marvelous island commonwealth. The orders of Harrington’s imagined society mediate between a small aristocracy and an informed populace.

Peel away the ordered written federal constitutionalism of today with its separation of powers, densely parsed clauses, and sparse amendments, and one can find earlier origins for America—the state constitutions of the late eighteenth-century described by Gordon Wood, for example, in *The Creation of the American Republic*. Peel off another layer and there is the swashbuckling constitutionalism of pirates, attempts to impose order on property and social relations at the edge of empire. Peel off still one more layer, and there lie the new world utopian visions of More, Bacon, and Harrington.

### C. *Legal History of the Imagination*

Often by definition, a legal text is a text because it is official—created by the arbiters of legal authority: legislatures and councils, judicial figures, monarchs, and constitutional conventions. This is a kind of Austinian positivism adopted by legal historians. As John Austin defined law, it is a “rule set by men,” a command of a superior to an inferior with sanctions for noncompliance—or, in short, a bark with a bite.<sup>48</sup> The purpose of such a definition was to provide a description of what law excludes as a category. Law emphatically was not custom, natural law, divine normative interventions, or the embodiment of justice in rules. Law was seen as a hegemonic power of the state.

In fact, however, a great deal of law has been made *outside* of official legal boundaries: imaginary punishments, mock execution, parodic statutes, stillborn reform proposals, and fabular narratives about how law came into being. Law is often envisioned, formulated, and represented as a cultural artifact by a wide array

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46. SIR THOMAS MOORE, *UTOPIA* 3 (Ronald Herder ed., Dover Publications unabr. ed. 1997) (1516).

47. SIR FRANCIS BACON, *ESSAYS AND NEW ATLANTIS* 272 (Gordon S. Haight ed., Classic Club 1942) (1521–1626).

48. JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* (Wilfrid E. Rumble ed., Cambridge Univ. Press 1995) (1832).

of historical actors, including the common people, independent of government's power to command and punish.<sup>49</sup> This might be called the legal history of the imagination.

Take, for example, a 1785 proposal I found some years ago in the Public Record Office in London. It was a plan for transporting English felons to the banks of the Gambia River in West Africa, which was intended to address the crisis prompted by the American Revolution ending North America as the site of convict transportation. Insalubrious prisons and hulks—ships moored in the Thames Estuary or Plymouth Harbor—were bursting at the seams. Where would convicted British criminals now be sent? The author, an ordinary citizen, pointed out that mortality rates differed radically according to the length of the river with the closest section to the coast being the healthiest and the furthest part of the river inland being the most dangerous. This observation, probably based upon actual evidence from the slave trade, would be used to punish in proportion to the severity of the crime. Murderers would be placed, for example, in the least salubrious territory, while those disciplined for less brutal offenses might live near the Gambia's headwaters. What was so intriguing was that proportionality had just recently been introduced as a basic principle for criminology, most notably in Cesare Beccaria's *On Crimes and Punishments*.<sup>50</sup> Determining precisely how to measure out pain, to create a new calculus of punishment, was only beginning to be worked out and only later would be inscribed in official criminal law statutes.<sup>51</sup>

Law might be made out of myth. Indeed, legal historians must free themselves from the shackles of a kind of historical positivism—Leopold von Ranke's *wie es eigentlich gewesen ist*—this is as it actually was—as well as legal positivism. French medievalist Alain Boureau, for example, shows how one of the best known laws of the Middle Ages, the *jus primae noctis*, the right of the feudal lord to have sexual relations with the bride of a vassal on her wedding night, was, in fact, an exceedingly well-circulated myth.<sup>52</sup> Robert Tsai is currently working on a project identifying a collection of constitutions, “America's Forgotten Constitutions,” written by citizens as diverse as nineteenth-century utopians, from John Brown's followers to twentieth-century white supremacists.<sup>53</sup> Elsewhere, I have shown how Jewish legal commentators constructed an entire alternative

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49. STEVEN WILF, *LAW'S IMAGINED REPUBLIC: POPULAR POLITICS AND CRIMINAL JUSTICE IN REVOLUTIONARY AMERICA* 7 (2010).

50. CESARE BECCARIA, *ON CRIMES AND PUNISHMENTS AND OTHER WRITINGS* (Richard Bellamy ed., 1995).

51. Report from the Committee on Transportation to Africa (May 9, 1785) (Public Record Office, London, H0432/6); Steven Wilf, *Imagining Justice: Aesthetics and Public Executions in Late Eighteenth-Century England*, 5 *YALE J.L. & HUMAN.* 51 (1993).

52. ALAIN BOUREAU, *LE DROIT DE CUISSAGE: LA FABRICATION D'UN MYTHE (XIII<sup>E</sup>-XXE SIÈCLE)* (1995).

53. ROBERT TSAI, *DEFIANT DESIGNS: AMERICA'S FORGOTTEN CONSTITUTIONS* (forthcoming 2012).

universe of pre-Sinai law in order to pose the jurisprudential possibility of a legalism more oral, more customary, more discretionary, and more concerned with the psychological question of how a norm-bearing person might be created outside of the blunt obligations imposed by a divine law-giving moment.<sup>54</sup>

In other words, imaginary law might be mimetic borrowing of official legal forms—such as Tsai’s constitutions; a canvas for trying out new ideas and challenging the legal status quo—such as pre-Sinai law; or even vested with its own normative power. Providing an example of imagined law with normative purchase, E.P. Thompson famously and controversially showed how the ritual sale or exchange of a wife substituted for the absence of divorce among the common people in nineteenth-century England.<sup>55</sup> Even more intriguingly, imaginary law might be used to construct over-arching narratives that might replace our traditional stories about legal origins.

#### *D. Thin Normativity/Thick Normativity*

Thin normativity is the usual kind practiced in the rarified atmosphere of law reviews: change the following provision to provide for a different outcome. Thick normativity is the shifting of lenses. What happens to the way contract doctrine might be constructed if an historian unearths evidence of equitable considerations in an earlier period? What does it mean for contemporary law if the private/public distinction only emerges in its present-day form late in the nineteenth century? How important is the fact that transparency was a central feature of late criminal punishment in the period of the American Revolution? Thick normativity identifies the role of the legal historian to reorient the viewer. If as Marcel Proust once said, a voyage of discovery consists not in seeking new landscapes but in having new eyes, how can legal historical work provide glimpses of alternative worlds? Thick normativity is an arrow directing the is/ought distinction firmly in the direction of the ought.

#### IV. BLAKE’S TELESCOPE

According to William Blake, the problem with the telescope is that it alters “the ratio of the spectator’s organs but leave objects untouch’d.”<sup>56</sup> Legal history shares this optic. Filing and reorganizing text in neat narrative categories, sometimes describing continuities and other times focusing upon rupture, legal historians magnify the microcosm of legal documents. They chart the constellations of how the documents are related to change. When the documents do not fit together, they readily adopt all sorts of legerdemain to force them into a

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54. STEVEN WILF, *THE LAW BEFORE THE LAW*, at xiii (2008).

55. E.P. THOMPSON, *The Sale of Wives*, in *CUSTOMS IN COMMON* 404, 404–07 (1991).

56. 1 WILLIAM BLAKE, *THE POETICAL WORKS OF WILLIAM BLAKE* 496 (Edwin Ellis ed., 1906).

pattern. However, legal historians less commonly are willing to dissect texts, plumb their multiple meanings, and—in a sense doing violence to the text—operate on them to reassemble legal expression in order to show their inherent possible meanings. The butter knife, not the scalpel, has been their favorite instrument. They often shy away from the essential tasks of lawyers—close reading and seeking social change—and remain coiled up in their comfortable academic niches. As scholars, legal historians have proved more at ease with a distant vision than with tangible normative proposals. The object has too often remained untouched.

Since this Essay sings the praises of thick normativity, let me conclude with a normative or, at least, prescriptive summation. I have tried to strike a path midway between two frequently taken roads in discussions about historians and their work, and to apply these to the ways we might think about the future of legal history. On the one hand, we should be more self-conscious about methodology than merely reasserting the centrality of craft. Of course, there is the historian's Boy Scout Code of Honor: we must be careful with sources, pursue facts diligently, recognize the contributions of others, hone a finely attuned intuitive sense of the political and social culture of a period, cultivate felicitous rhetoric, and always keep in mind the mantra of change over time. But *métier* should not mean that we embrace a vow of theoretical impoverishment.

On the other hand, we cannot turn into the young and the restless, a James Dean (Rebel without a Scholarly Pause) sort of academic discipline always cruising down the road in search of the next big methodological approach. After the social history turn came the cultural anthropological turn, then came the linguistic turn, and, finally, the global turn, which took the road into the borderlands, past subalterns, and across boundaries. After all these turns, is it any wonder that we are experiencing a sense of intellectual vertigo?

No doubt, some legal historians will keep waiting for the next big paradigm. Will it be a classic cross-field borrowing (cultural anthropology, literary historicism) or a recent French import (Bourdieu's *habitus* for humanity)? Or simply a shift of subject matter (the history of emotions or everyday life)? While those seeking a new paradigm might consult Gordon's pocket guide to the exotic varieties of legal historical approaches, an even greater temptation is to reach for a do-it-yourself methodological tool kit. Rummaging about for methodologies, however, is no more satisfying than the search for an off-the-rack suit without any sort of measurement whatsoever. Will "law as . . ."—with its close textual reading—be any more of an agreeable paradigm than "law and . . . ."?

I have argued that we somehow have to bridge the distance between the legal text as a situs of interpretation and the legal text as a technology of power. We need to recognize that every legal text reflects a fundamental tension. True, texts are chimerical, opening up all sorts of alternative possibilities. But, as I stated, this can lead to a sense of text sickness, a sense of vertigo as the text becomes an

increasingly slippery place to stand. Perhaps the antidote is that we also have a history of reading texts that limits possible interpretations. Many of the approaches I discussed in *A Short Dictionary of Misunderstood Terms* were mechanisms to work through the problem posed by mixing overly mutable texts with overly rigid forms of reading. Countergenealogical gestures create alternative narratives. Palimpsest Legalism provides a method for archeological digging to show how one past effaces another. Imaginary law takes us to the full palette of legal thinking—looking at law as envisioned as well as real legal rules with real sanctions. All of these ways of reading demand ordering, disciplining texts into patterns, structures—and, ultimately, into normative possibilities. We must answer the legal realist question, asked when legal realists still saw history as a possible handmaid to legal change: what does the legal past inform the legal future?

This Essay insists that the demand for normative readings of law's past comes from the particular ways that legal historians must read purposeful legal texts. As suggested, we failed to take advantage of the possibilities posed by historical jurisprudence and legal realism of a normative turn to history, and we have often sidestepped the sort of creative methodologies posed in *A Short Dictionary of Misunderstood Legal Historical Terms*. We are *compelled* by using the very methods that would best probe the deeper meanings lurking within statutes, cases, and imagined legal texts to craft normative responses to those texts. There is no reason, as the metaphor of Blake's telescope suggests, that the optic of legal text reading has to embrace a flight from engaging in the larger project of proposing changes in inherited legal rules. Galileo's observatory tower in Padua looks remarkably like the turret of a Renaissance *palazzo*, reaching to the sky. It has all the hubris of the fortified home of a Florentine or Venetian patrician. The soaring height, the square observation point sitting aloft a narrow redbrick turret, and the decorative carving of the buttresses—all this bespeaks a raw assertion of power. If a Renaissance artist wished to depict the Tower of Babel, he or she need not proceed any further. Imagine this structure in Galileo's own time. Within this battlement stands a figure squinting through a small brass telescope. The lenses are scratched, the length of the brass tube extends barely an arm's length into the heavens—and the object remains untouched. His text is the arrangement of the stars on the evening's dusky canvas. Has he forced the heavens to yield another one of its secrets? But Galileo has come to recognize a more important truth: observation is simply the beginning of heresy.