

# STRUCTURALIST LEGAL HISTORIES

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## I

### INTRODUCTION

In this article's contribution to the symposium *Theorizing Contemporary Legal Thought*, I inquire into some of the topic's methodological difficulties. In particular, I suggest that, as the writing of contemporary legal thought is the writing of a kind of history, we ought to pay attention both to the special historiographical challenges we are likely to experience as well as those avenues that may better ease our passage into a telling of the "legal contemporary." Ultimately, my argument is that, although it has been in the periphery for a generation, structuralist legal history may be an edifying way of usefully constructing a history of contemporary legal thought.<sup>1</sup>

But first things first. Perhaps you haven't heard of contemporary legal thought. This could be because you already know it, only by another name, maybe the "new private law"<sup>2</sup> or "new legal realism."<sup>3</sup> Or maybe contemporary legal thought is a mystery due to a temptation to look for analogies in other disciplines, like art history.<sup>4</sup> If so, the idea of "contemporary art" may seem of little use, however, since we typically suspect legal history and art history to be very different things.<sup>5</sup> Trying a different approach, you might wonder if

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1. For a fuller account of the relation between legal structuralism and contemporary legal thought, see Justin Desautels-Stein, *Pragmatic Liberalism: The Outlook of the Dead*, 55 B.C. L. REV. 1041 (2014) [hereinafter Desautels-Stein, *Pragmatic Liberalism*].

2. Symposium, *New Legal Realism*, 31 LAW & SOC. INQUIRY 797 (2006); Symposium, *Is It Time For a New Legal Realism?*, 2005 WIS. L. REV. 335 (2005).

3. Symposium, *The New Private Law*, 125 HARV. L. REV. 1640 (2012).

4. RICHARD MEYER, WHAT WAS CONTEMPORARY ART? 16 (2013). See generally Julieta Aranda et al., *What is Contemporary Art? Issue Two*, 12 E-FLUX JOURNAL A1, A1 (2010); Tom McDonough, Response, *Questionnaire on the Contemporary*, 130 OCTOBER 122 (2009).

5. For one view of why it would not be good to make such an analogy, see generally J. Harvie Wilkinson III, *Subjective Art; Objective Law*, 85 NOTRE DAME L. REV. 1663 (2010). On the relation between aesthetics and law, see Nathaniel Berman, *Modernism, Nationalism, and the Rhetoric of*

contemporary legal thought is a meaningful category at all. Might it not be the same thing as the “modern” legal thought of the first half of the twentieth century? If not, and “modern” and “contemporary” have different meanings in legal history, what could they be?<sup>6</sup> Falling further, you might even wonder whether “modern” has any stable meaning, much less a “postmodern” contemporary.

Interestingly, in whichever register we ask it, the question of contemporary legal thought has rarely been answered.<sup>7</sup> One possible explanation for this lack is the balkanized state of legal studies in the United States, a condition in which judges, lawyers, and legal academics might operate in an intricately fragmented grid of expertise.<sup>8</sup> From this point of view, when we imagine “law” what we envision is something like the law school faculty webpage, divided up into its disparate areas of experts.<sup>9</sup> There are the business law experts, the civil rights experts, the constitutional law experts, the international law experts, and so on.<sup>10</sup> In “normal” times, these departments of expertise are not understood as

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*Reconstruction*, 4 YALE J. L. & HUM. 351 (1992); Pierre Schlag, *The Aesthetics of American Law*, 115 HARV. L. REV. 1047 (2002). See also COSTAS DOUZINAS & ADAM GEAREY, *CRITICAL JURISPRUDENCE: THE POLITICAL PHILOSOPHY OF JUSTICE* (2005); PETER GOODRICH, *LEGAL EMBLEMS AND THE ART OF LAW: OBITER DEPICTA AS THE VISION OF GOVERNANCE* (2013); LAW AND THE ARTS (Susan Tiefenbrun ed., 1999); LAW AND THE IMAGE: THE AUTHORITY OF ART AND THE AESTHETICS OF LAW (Costas Douzinas & Lynda Nead eds., 1999).

6. For a recent treatment of sociological jurisprudence in the United States, which might be the best candidate for taking the label “modern legal thought,” see DAVID M. RABBAN, *LAW’S HISTORY: AMERICAN LEGAL THOUGHT AND THE TRANSATLANTIC TURN TO HISTORY* (2012). See also JOHN HENRY SCHLEGEL, *AMERICAN LEGAL REALISM AND EMPIRICAL SOCIAL SCIENCE* (2011); G. Edward White, *From Sociological Jurisprudence to Realism: Jurisprudence and Social Change in Early Twentieth-Century America*, 58 VA. L. REV. 999 (1972).

7. The exception is Duncan Kennedy. See Duncan Kennedy, *The Hermeneutic of Suspicion in Contemporary American Legal Thought*, 25 LAW & CRITIQUE 91 (2014); Duncan Kennedy, *Three Globalizations in Law and Legal Thought, 1850–2000*, in *THE NEW LAW AND DEVELOPMENT: A CRITICAL APPRAISAL* 19 (David M. Trubek & Alvaro Santos eds., 2005).

8. Martin Flaherty has spoken to this in a different context, but I think his point is still illustrative:

Assessing how well a given theorist has relied on history presupposes that there are standards for making this assessment. Those standards most plausibly come from the discipline of history itself. This conclusion follows not so much because historians determine what is historically true, but because they commonly resolve what is historically convincing . . . . [R]emaining respectable is a belief in specialization. University departments, professional associations, topical journals, and electronic mail ‘listservs’ all testify to the ongoing assumption that the overall community needs smaller groups of experts to develop more specialized standards for the exploration of narrower fields. A final widespread assumption involves deference to these groups of specialists. Perhaps even more dramatically than other fields, the law has formalized this principle in relaxing the general evidentiary prohibition against opinion testimony for experts.

Martin S. Flaherty, *History “Lite” in Modern American Constitutionalism*, 95 COLUM. L. REV. 523, 551 (1995).

9. For two critiques of “legal expertise,” see DAVID KENNEDY, *GLOBAL GOVERNANCE: NEW THINKING ABOUT LAW AND POLICY* (forthcoming 2015); Annelise Riles, *A New Agenda for the Cultural Study of Law: Taking on the Technicalities*, 53 BUFF. L. REV. 973, 973–76 (2005).

10. As William Nelson saw it, most legal historians have traditionally focused on the common law,

having much to do with one another. Moreover, the debates that go on within these areas among the experts themselves splinter the territory even further. The history of the legal disciplines, according to this balkanized view, is a history of shards.<sup>11</sup> As Christopher Tomlins has suggested, “This is the scholarly world we live in now, a world of beautiful fragments that lacks a kaleidoscope, a world of noncausal relationality.”<sup>12</sup>

Although there are sure to be any number of causes for our scholarly hermitry, I suspect that this “beautiful fragmentation” is partially a residue of the postmodernism that arrived at American law schools in the 1980s,<sup>13</sup> and that it is this residue that now works as a block on our theorizing about contemporary legal thought.<sup>14</sup> That is, one possible reason for our general lack of conversation about the “legal contemporary” is that we have arrived at a place in which it has become increasingly difficult to have such conversations. Poststructuralist views of law have yielded an orientation toward legal history whereby the idea of unities and cross-cutting “totalizations” have become increasingly suspect, and “grand narratives” about evolving periods of legal thought have gone out of fashion.<sup>15</sup> But as the broad sweeps have been

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with a particular emphasis on property law. The history of regulation and the Constitution have also been recurring topics. “Most legal historians, then as now, engaged in narrow research . . . . But even as they addressed narrower topics, the professional orientation of most scholars in the discipline pointed toward the investigation and analysis of subjects of concern to their contemporaries in law.” William E. Nelson, *Legal History before the 1960s*, in *THE LITERATURE OF AMERICAN LEGAL HISTORY* 1 (William E. Nelson & John Reid eds., 1985).

11. The point is made in reverse in MICHEL DE CERTEAU, *THE WRITING OF HISTORY* (Tom Conley trans., 1988). Though I intend to foreground the relationship between fragmented history and the “postmodern” collapse of conceptions about objectivity in the social sciences, I do not mean to suggest that there was ever a time when the universe of historical experience was somehow “available.” For the seminal twentieth-century critique, see generally R.G. COLLINGWOOD, *THE IDEA OF HISTORY* (1946).

12. Christopher Tomlins, *What is Left of the Law and Society Paradigm after Critique? Revisiting Gordon’s “Critical Legal Histories,”* 37 *LAW & SOC. INQUIRY* 155, 158 (2012).

13. It is easy to write poststructuralism more broadly than it ought to be. In this article, I am focusing almost entirely on legal scholars in the 1980s working under the influence of Jacques Derrida. I also do not mean to deny the presence of any number of other influences.

14. Some will no doubt point to the so-called “linguistic turn” of the 1960s as the culprit here. For general overviews, see, e.g., *THE LINGUISTIC TURN* (Richard Rorty ed., 1967); WILLIAM H. SEWELL, JR., *LOGICS OF HISTORY* (2005); Judith Surkis, *When Was the Linguistic Turn? A Genealogy*, 117 *AM. HIST. REV.* 700 (2012). On Cambridge School contextualism, see Peter E. Gordon, *Contextualism and Criticism in the History of Ideas*, in *RETHINKING MODERN EUROPEAN INTELLECTUAL HISTORY* 32 (Darrin M. McMahon & Samuel Moyn eds., 2014); Quentin Skinner, *Meaning and Understanding in the History of Ideas*, 8 *HIST. AND THEORY* 3 (1969). On poststructuralism and intellectual history, see Mark Poster, *The Future According to Foucault: The Archaeology of Knowledge and Intellectual History*, in *MODERN EUROPEAN INTELLECTUAL HISTORY* 137 (Dominick LaCapra & Steven L. Kaplan eds., 1982).

15. See generally *DERRIDA AND LAW* (Pierre LeGrand ed., 2009); COSTAS DOUZINAS & RONNIE WARRINGTON, *POSTMODERN JURISPRUDENCE: THE LAW OF TEXT IN THE TEXTS OF LAW* (1991); Symposium, *Deconstruction and the Possibility of Justice*, 11 *CARDOZO L. REV.* 920 (1990); Symposium, *Derrida/America: The Present State of America’s Europe*, 27 *CARDOZO L. REV.* 529 (2005). See also Jacques Derrida, *Structure, Sign, and Play in the Discourse of the Human Sciences*, in *THE STRUCTURALIST CONTROVERSY: THE LANGUAGES OF CRITICISM AND THE SCIENCES OF MAN*

(appropriately) rendered problematic, legal historians have thrown the baby out with the bathwater, pushing the discipline to be ever more historicist, more contextual, more contingent,<sup>16</sup> albeit more professionally accepted.<sup>17</sup>

To be sure, there was much wrong about the breadth of prestructuralist historiography, and it remains a curiosity how it managed for as long as it did.<sup>18</sup>

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(Richard Mackey & Eugenio Donato eds., 2007); Philip Lewis, *The Post-Structuralist Condition*, 12 DIACRITICS 2 (1982). For a more recent review, see TERRY EAGLETON, *THE EVENT OF LITERATURE* (2012).

16. See generally 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) (describing the downfall of unifying and totalizing visions of American legal history and the subsequent rise of contextual approaches). For representative discussions of legal historiography today, see generally TRANSFORMATIONS IN AMERICAN LEGAL HISTORY—LAW, IDEOLOGY, AND METHODS: ESSAYS IN HONOR OF MORTON J. HORWITZ (Daniel Hamilton & Alfred L. Brophy eds., 2010); STEPHEN FELDMAN, *AMERICAN LEGAL THOUGHT FROM PREMODERNISM TO POSTMODERNISM* (2000); Jack Rakove, *Two Foxes in the Forest of History*, 11 YALE J.L. & HUM. 191 (1999); Christopher Tomlins, *History in the American Juridical Field: Narrative, Justification, and Explanation*, 16 YALE J. L. & HUM. 323 (2004) [hereinafter Tomlins, *Narrative*]; G. Edward White, *The Arrival of History in Constitutional Scholarship*, 88 VA. L. REV. 485 (2002); Steven Wilf, *Law/Text/Past*, 1 U.C. IRVINE L. REV. 543 (2011). The recent A COMPANION TO AMERICAN LEGAL HISTORY (Sally E. Hadden & Alfred L. Brophy eds., 2013) is representative of the standard mode. It begins with a selection of chronological overviews and then turns to the bulk work, helpfully exploring the disparate histories of particular groups and subject areas. The fourth part of the book is dedicated to “legal thought,” though that section is similarly disaggregated into discussions of law and literature, critical legal studies, international relations, and discrete blocks of time. Recent book-length attempts at a grand telling of law’s history, up through the present, are often still illustrative of the dominant twentieth-century functionalist-historicist approach to legal history. LAWRENCE FRIEDMAN, *A HISTORY OF AMERICAN LAW* (3d ed. 2005); KERMIT L. HALL & PETER KARSTEN, *THE MAGIC MIRROR* (2d ed. 2009). Functionalist-historicism, described below, *infra* notes 86 & 90, asks about how law has responded to shifting social needs at a particular moment in time. One might wonder whether the domain of “applied legal history” comes closest to the search for contemporary legal thought. Alfred Brophy explains that applied legal history is “deeply researched, serious scholarship that is motivated by, engages with, or speaks to contemporary issues.” Alfred L. Brophy, *Introducing Applied Legal History*, 31 L. & HIST. REV. 233, 233 (2013). But my sense is that it does not. In contrast to the desire to dig beneath topical events in order to unearth deeper commonalities, “applied legal history” appears more interested in using history to understand current legal and political controversies. As Brophy points out, this sounds quite a lot like what is often criticized as “law office history.” *Id.* at 234. But for Brophy, the new turn to applied legal history is more robust and more sharply targeted. *Id.* For discussion of the “law office history” problem, see Laura Kalman, *Border Patrol: Reflections on the Turn to History in Legal Scholarship*, 66 FORDHAM L. REV. 87, 95–109 (1997); Alfred Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 SUP. CT. REV. 119, 155–58 (1965).

17. See Jessica Lowe, *Radicalism’s Legacy: American Legal History Since 1998*, ZEITSCHRIFT FÜR NEUERE RECHTSGESCHICHTE (forthcoming).

18. I take the decisive blow to have been rendered in Robert W. Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57, 100–02 (1984) (outlining the key claims advanced by poststructuralist and deconstructionist approaches to legal history) [hereinafter Gordon, *Critical Legal Histories*]. See generally Terrence J. McDonald, *Introduction*, in *THE HISTORIC TURN IN THE HUMAN SCIENCES* 1, 6 (Terrence J. McDonald ed., 1996).

The importance of theorists of the local and contingent operations of power and ideology as otherwise as different as Geertz and Foucault; the prominence of such theoretical terms (constantly redefined and contested) as hegemony, discourse, and identity, the multiple shifts from the global to the local, from the macro to the micro, and from structure to conjuncture and event in the distinctive intellectual practices of the era . . . are all both symptomatic and constitutive of these developments [in post-structuralist theory].

So, in many respects, the late-twentieth-century wave of critical historicism was a good thing.<sup>19</sup> But with the vision of the microgrid of faculty expertise that followed the critique also came a blindness to our potential to usefully generate patterns of argument in so much of our legal language.<sup>20</sup> Paralyzed by the new habit of seeking to establish discontinuities and ruptures, many legal historians turned away from these deeper digs for fear of committing the genuine errors of evolutionary functionalist historiography. I think, however, that as these patterns and structures have slipped into our disciplinary blind spots, we become less likely to get a glimpse of contemporary legal thought. Perhaps like you, I'm interested in seeing into these blind spots, but as we seek to do so we needn't follow the old roads back to an outdated evolutionary functionalism, with its progress narratives and crass totalizations.<sup>21</sup> The way is open back to a

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*Id.* See also PETER FITZPATRICK, *THE MYTHOLOGY OF MODERN LAW* (1992). Robert W. Gordon, *The Arrival of Critical Historicism*, 49 STAN. L. REV. 1023, 1024 (1997). In the view of some, this critical historicism now dominates the field of legal historiography. See Kunal Parker, *Law "In" and "As" History: The Common Law in the American Polity, 1790–1900*, 1 U.C. IRVINE L. REV. 587, 593 (2011).

A quarter century after the appearance of Gordon's article, particularly from the perspective of legal scholars trained in the humanities and social sciences who have acquired a berth on law faculties, the call to contextualize law, to place it "in" history as a way of diminishing its autonomy and of showing it to be a species of politics—or social context read as politics—seems entirely familiar. For historians engaged with the discipline of history, situating law in its social-historical context to achieve a variety of effects—to demonstrate its contingency, to reveal its politics, to underscore its imbrication in power relations, to hint at the possibility of its being remade, and so on and so forth—has been thoroughly normalized. 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.

*Id.* Discussing Gordon Wood's anxieties about the popularity of historical scholarship, Christopher Tomlins writes: "Wood argues that this is a necessary consequence of history's continued commitment to 'science'—the historical monograph is analogous to a scientific paper . . . . Specialization, however, discourages attempts at comprehensive generalizing narrative." Christopher Tomlins, *Review Essay—The Consumption of History in the Legal Academy: Science and Synthesis, Perils and Prospects*, 61 J. LEGAL EDUC. 139, 145–46 (2011) (book review).

19. Prestructuralist historiography is admittedly a strange term. All I mean by it is the designation of that mode of legal historiography that preceded, for lack of a better marker, Robert Gordon, *Historicism in Legal Scholarship*, 90 YALE L.J. 1017 (1981), and in the twentieth century was most popularly associated with Willard Hurst. See JAMES WILLARD HURST, *LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH-CENTURY UNITED STATES* (1956); see also Carl Landauer, *Social Science on a Lawyer's Bookshelf: Willard Hurst's Law and the Conditions of Freedom in the Nineteenth-Century United States*, 18 LAW & HIST. REV. 59 (2000).

20. See Desautels-Stein, *Pragmatic Liberalism*, *supra* note 1, at 1051–57.

21. Hayden White's work has been especially influential on my thinking here. White explains, A generally aesthetic attitude is no more intrinsically liberating than a purely cognitive one; in fact, it is repressive insofar as it involves a cognitive moment in its elaboration. What is required, it would seem, is an aesthetic attitude in which the cultivation of a style takes precedence over any curiosity about the true nature of the experience being stylized. A liberatory style would be one improvised solely for heightening pleasures on the occasion of their possibility but dissolved at the moment of gratification. Any attempt to extend the stylization improvised for one occasion to another, any attempt to generalize a style of comportment and to make of it a code applicable to all occasions, would represent a slippage

structuralist legal history—a way that generates intelligibility not through the postmodern elaboration of a never-ending series of social contexts, but through the construction of image and style, constrained by and operating through a conceptual structure.<sup>22</sup> This structure is neither apodictically accountable, nor always slipping down the rabbit hole of context-dependent perception. Structuralist legal history, something quite other than late-twentieth-century “critical legal history,” presents a yet-unexplored way to get to contemporary legal thought.<sup>23</sup>

But what is structuralist legal history, and how is it better suited to the search for contemporary legal thought?<sup>24</sup> Why might structuralist historiography help get the conversation going in a way that critical legal history has not? Unfortunately, in this article I can only hint at what are concededly partial answers. But before the hints, a little primer on structuralism.

## II STRUCTURALISM

In the intellectual climate of the 1960s, it was common to analyze social practices in linguistic terms.<sup>25</sup> This concededly odd posture had been a work in

from an aesthetic into an ethical attitude.

HAYDEN WHITE, *THE CONTENT OF THE FORM* 139 (1987). *See also* HAYDEN WHITE, *THE FICTION OF NARRATIVE* (2010); HAYDEN WHITE, *FIGURAL REALISM* (1999); HAYDEN WHITE, *TROPICS OF DISCOURSE* (1978). For a discussion of White’s work, see generally Symposium, *Hayden White: Twenty-Five Years on*, 37 *HIST. AND THEORY* 143 (1998).

22. *See* Justin Desautels-Stein, *Back in Style*, 25 *LAW & CRITIQUE* 141 (2014).

23. Some are sure to remark, “Really? Haven’t we already been through this?” *See* Daniel Ernst, *The Critical Tradition in the Writing of American Legal History*, 102 *YALE L.J.* 1019, 1032 (1993) (book review). My argument is that while it is true, in a sense, that we have been here before, structuralist legal history has yet to enjoy its day in the sun.

24. For a while now, intellectual history has been an increasingly problematic term for describing a given mode of historiography. *See* John Diggins, *Consciousness and Ideology in American History: The Burden of Daniel J. Boorstin*, 76 *AM. HIST. REV.* 99 (1971). In some circles, intellectual history is immediately rendered suspect due to its privileging of the ideal over the material. For discussion, *see* *THEORY, METHOD AND PRACTICE IN SOCIAL AND CULTURAL HISTORY* (Peter Karsten & John Modell eds., 1992). But then, of course, we just end up in a debate about the meaning of materiality and law’s place in it. *See, e.g.*, E.P. Thompson’s famous attack on Althusser in E.P. THOMPSON, *THE POVERTY OF THEORY AND OTHER ESSAYS* (1978). Today, intellectual history is just as much common ground for poststructuralists as it is for J.G.A. Pocock’s descendants, thereby rendering the term difficult at best, meaningless at worst. For early discussions, *see* VERNON LOUIS PARRINGTON, *MAIN CURRENTS IN AMERICAN THOUGHT* (1927); Arthur Lovejoy, *Reflections on the History of Ideas*, 1 *J. HIST. IDEAS* 3 (1940). Pocock’s famous work here is *THE MACHIVALLIAN MOMENT: FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLICAN TRADITION* (1975). The effort to retool intellectual history in response to the materialist critique is well-captured in *NEW DIRECTIONS IN AMERICAN HISTORY* (John Higham & Paul K. Conkin eds., 1979). But contemporaneous with this effort was the emergence of a poststructuralist commandeering of intellectual history. *See* David Harlan, *Intellectual History and the Return of Literature*, 94 *AM. HIST. REV.* 581 (1989). Something of a piece with this trajectory was the publication of PETER NOVICK, *THAT NOBLE DREAM* (1987). For discussion, *see* Dorothy Ross, *Afterword*, 96 *AM. HIST. REV.* 704 (1991).

25. *See* FRANCOIS DOSSE, *HISTORY OF STRUCTURALISM, VOLUME I: THE RISING OF THE SIGN, 1945-1966* 45 (1997) (“In order to understand the structuralist paradigm . . . we have to begin with the

progress since World War II.<sup>26</sup> With Claude Lévi-Strauss at the helm,<sup>27</sup> Ferdinand de Saussure's semiotics was taken beyond linguistics to the rituals of familial relations, mythmaking, cuisine, and poetry, among other things.<sup>28</sup> The result was "structuralism."<sup>29</sup>

In the hands of the French intellectual elite, structuralist analyses took a given field, say, fashion, and suggested that the style of dress in a particular community could be explained as a language system.<sup>30</sup> Just as French was governed by a deep grammar (*langue*), scholars like Roland Barthes suggested that there was a language of fashion—fashion was *spoken* through the medium

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Saussurean break, since an entire generation read and considered [it] to be the founding moment.”); ANTHONY GIDDENS, *CENTRAL PROBLEMS IN SOCIAL THEORY* (1979); JOHN STURROCK, *STRUCTURALISM* 6–10 (2003); Douglas Tallack, *Introduction*, in *CRITICAL THEORY: A READER* 11, 11 (Douglas Tallack ed., 1995) (“In the 1960s Saussure’s model of language became paradigmatic for a number of important structuralist ventures which sought to analyze as systems of signs fashion, advertising, narrative and poetry, and whole cultures . . .”).

26. To be clear, this account is intended to describe the semiotics of continental philosophy, and not the related but distinct strand of thought running through analytic philosophy and beginning with Gottlob Frege’s writings. See, e.g., J.L. AUSTIN, *HOW TO DO THINGS WITH WORDS* (1975). For an exchange between the two branches, see Kevin Mulligan, *Searle, Derrida, and the Ends of Phenomenology*, in *THE CAMBRIDGE COMPANION TO SEARLE* 261 (Barry Smith ed., 2003); John Searle, *Reiterating the Differences: A Reply to Derrida*, 1 *GLYPH* 198 (1977). This is a reply to Jacques Derrida, *Signature Event Context*, 1 *GLYPH* 172 (1977); Derrida replies to Searle’s reply in *Limited Inc.*, 2 *GLYPH* 162 (1977). See also John Searle, *The Word Turned Upside Down*, N.Y. REV. BOOKS, Oct. 27, 1983, available at <http://www.nybooks.com/articles/archives/1983/oct/27/the-word-turned-upside-down/>; Reply from Mackey and rejoinder from Searle, <http://www.nybooks.com/articles/archives/1984/feb/02/an-exchange-on-deconstruction/?pagination=false>.

27. See generally CLAUDE LÉVI-STRAUSS, *STRUCTURAL ANTHROPOLOGY* (Claire Jacobson trans., 1963); CLAUDE LÉVI-STRAUSS, *THE SAVAGE MIND* (Univ. of Chi. Press 1966).

28. FERDINAND DE SAUSSURE, *COURSE IN GENERAL LINGUISTICS* (Wade Baskin trans., Perry Meisel & Haun Saussy eds., 2011). See also Richard T. De George & Fernande M. De George, *Introduction*, in *THE STRUCTURALISTS: FROM MARX TO LÉVI-STRAUSS* xi, xi (Richard T. De George & Fernande M. De George eds., 1972) (“Claude Lévi-Strauss is the undisputed high priest.”).

29. Structuralism begins well before the 1960s, depending on how the counting is done. When Roman Jakobson coined the term structuralism in 1929, he wrote,

Were we to comprise the leading idea of present-day science in its most various manifestations, we could hardly find a more appropriate designation than *structuralism*. Any set of phenomena examined by contemporary science is treated not as a mechanical agglomeration but as a structural whole, and the basic task is to reveal the inner . . . laws of the system.

ROMAN JAKOBSON, *Retrospect*, in *SELECTED WRITINGS* 711, 711 (1971). Others draw the field back to Sigmund Freud, Karl Marx, or even Giambattista Vico, writing in 1725. See TERENCE HAWKES, *STRUCTURALISM AND SEMIOTICS* 1 (2003). For another general history of structuralism, see EDITH KURZWEIL, *THE AGE OF STRUCTURALISM: LÉVI-STRAUSS TO FOUCAULT* (1980). Probably the best collection of structuralist works is available in *STRUCTURALISM: CRITICAL CONCEPTS*, VOL. I–IV (Jonathan D. Culler ed., 2006).

30. See Gilles Deleuze, *How Do We Recognize Structuralism?*, in *THE TWO-FOLD THOUGHT OF DELEUZE AND GUATTARI: INTERSECTIONS AND ANIMATIONS* 251, 261 (Charles J. Strivale ed., 1998) (“[T]he first [structuralist] criterion consists of this: the positing of a symbolic order, irreducible to the orders of the real and the imaginary, and deeper than them. We do not know at all yet what this symbolic element consists of. We can say at least that the corresponding structure has no relationship with a sensible form, nor with a figure of the imagination, nor with an intelligible essence.”)

of dress.<sup>31</sup> And just as French utterances might take a mind-boggling number of forms (*parole*), so too are there many, many ways to dress.<sup>32</sup> But structuralism was not simply a proxy for the obvious sense of open-endedness apparent in our choices to say certain things or wear certain outfits. More importantly, structuralism was also an argument about the *constraints* on what we say, or what we wear. These limits took the form of a deep grammar, governing and shaping the surface level forms in ways that were almost always invisible to the user of the grammar. Structuralists were interested in explaining what appeared to be random and highly discretionary social practices as constituted and controlled by largely unconscious rule-systems.<sup>33</sup> (To get a feel for what structuralists meant by the “unconscious,” consider that as you read these sentences or form your own, you don’t sweat the complex rules of English grammar, even though you might be hardly conscious of the details of that rule-system.)

If the structuralist thesis is strange, its career was even stranger. Raging onto the French intellectual scene, it was fizzling by the 1970s.<sup>34</sup> Confronted with questions about the possibility of accurately identifying such structures, the postulated differences between “depth” and “surface,” the role of the structuralist in discovering the structure (was he in the structure, too?), and the dubious existence of a transcendent structure totalizing all of social relations,

31. See Jonathan Culler, *Introduction*, in STRUCTURALISM: CRITICAL CONCEPTS, *supra* note 29, at 3 [hereinafter Culler, *Introduction*].

To investigate neckties, for instance, structuralism would attempt to reconstruct (a) the structure of neckties themselves (the oppositions—wide/narrow, loud/subdued—that enable different sorts of neckties to bear different meanings for members of a culture) and (b) the underlying ‘vestimentary’ structures or system of a given culture (how do neckties relate to other items of clothing and the wearing of neckties to other socially-coded actions?).

*Id.* See also ROLAND BARTHES, THE FASHION SYSTEM (Matthew Ward & Richard Harris trans., 1983).

32. This is Saussure’s distinction between *langue* and *parole*. *Langue* refers to the fundamental rules of syntax shaping the contours and boundaries of the linguistic structure. As Saussure explained, the *langue* represents “the whole set of linguistic habits which allow an individual to understand and be understood.” SAUSSURE, *supra* note 25, at 77. The *langue* is consequently social in nature, and determinate in scope. The *langue* is a system of constraints operating equally on each language speaker. Its contents are fixed and closed, and in the context of the system, universal. *Id.* at 76. In contrast is *parole*, which refers to the open, arbitrary, and individually created speech-acts made in light of the deep structure of the *langue*. *Id.* Thus, where *langue* is unconscious and out of sight, *parole* is intentional and visible. Where *langue* is syntax, *parole* is utterance. Where *langue* represents a field of coercion, *parole* is free. Where *parole* is apparent and everywhere, *langue* is only discoverable through an analysis of the common qualities demonstrable in *parole*. *Id.* at 73–77.

33. See Culler, *Introduction*, *supra* note 29, at 3. (“Structuralism thus involves the attempt to spell out, explicitly, what members of a culture know without knowing it: the structures that underlie cultural practice, and make possible, for instance, people’s judgments about what is ordinary, strange, meaningful, or meaningless.”)

34. See PETER CAWS, STRUCTURALISM: THE ART OF THE INTELLIGIBLE 2 (1988) (“The career of the structuralist movement . . . was meteoric: a brilliant streak followed by relative extinction. It managed to pass to pass from novelty to fashion to cliché in a very few years, with hardly any interval of mature reflection.”)

structuralism shriveled.<sup>35</sup> Lévi-Strauss' ideas encountered what came to be known as “poststructuralism” and “deconstruction,” associated with the philosopher Jacques Derrida, and structuralism suffered for it.<sup>36</sup> Referring to some of the most famous structuralists, the literary theorist Terry Eagleton commented, “Fate pushed Roland Barthes under a Parisian laundry van, and afflicted Michel Foucault with [AIDS]. It dispatched Lacan, Williams, and Bourdieu, and banished Louis Althusser to a psychiatric hospital for the murder of his wife. It seemed that God was not a structuralist.”<sup>37</sup>

Putting divine intervention aside for now, at the moment when French structuralism was retreating, it found its way to American law schools, or at least, it arrived at Harvard in the mid-1970s.<sup>38</sup> In the hands of scholars working in what I call the Harvard School of legal structuralism, French structuralism counseled a semiotic approach to legal history just as others had taken a semiotic approach to anthropology and literature.<sup>39</sup> The idea here was that law ought to be understood as a language-system, where the forms of lexical argument are governed by a deep grammar.<sup>40</sup> In this first generation of legal

35. Representative discussions are found in EVE TAYLOR BANNET, *STRUCTURALISM AND THE LOGIC OF DISSENT* (1989) and MARK POSTER, *CRITICAL THEORY AND POSTSTRUCTURALISM* (1989). It is common to see Roland Barthes's *S/Z: AN ESSAY* (Richard Miller trans., 1975) as a transition piece from structuralism to poststructuralism. See, e.g., Bjørnar Olsen, *Roland Barthes: From Sign to Text*, in *READING MATERIAL CULTURE* 163, 165 (Christopher Tilley ed., 1990) (“What is considered as his shift from structuralism to poststructuralism denotes the third phase [in Barthes' work], of which *S/Z* is regarded as diagnostic. This shift was clearly influenced by *Tel Quel* textualism and the writings of Derrida and Kristeva.”). But as I argue, Barthes and Foucault are better understood as *refining* structuralism, and not going *post* structuralism. See also JONATHAN CULLER, *ON DECONSTRUCTION: THEORY AND CRITICISM AFTER STRUCTURALISM* 26 (1982).

And Barthes' best-known work, *S/Z*, is very difficult to classify, not because it avoids the issues on which a distinction between structuralism and post-structuralism is generally based but because it seems to adopt both modes with a vengeance, as though unaware that they are supposed to be radically different movements.

*Id.*

36. For early examples, see HAROLD BLOOM ET AL, *DECONSTRUCTION AND CRITICISM* (1979); JACQUES DERRIDA, *OF GRAMMATOLOGY* (Gayatri Chakravorty Spivak trans., 1976); Jonathan Culler, *Jacques Derrida*, in *STRUCTURALISM AND SINCE* 154 (John Sturrock ed., 1979); J. Hillis Miller, *Stevens' Rock and Criticism as Cure, II*, 30 GA. REV. 330 (1976).

37. TERRY EAGLETON, *AFTER THEORY* 1 (2003).

38. The understanding of structuralism's trajectory in France as opposed to its career in the United States has been plagued by the American tendency to view poststructuralism as the end of structuralism, rather than, at least as I see it, a helpful qualification. See also Culler, *Introduction*, *supra* note 29, at 4.

39. In a forthcoming work, I focus on Duncan Kennedy, Roberto Unger, Gerald Frug, and David Kennedy as representative of the various styles of legal structuralism being developed at Harvard Law School in the 1970s and early 1980s. JUSTIN DESAUTELS-STEIN, *THE PROBLEM WITH PRAGMATISM: A STRUCTURALIST HISTORY OF CONTEMPORARY LEGAL THOUGHT* (unpublished manuscript) (on file with author).

40. See, e.g., ROBERTO MANGABEIRA UNGER, *KNOWLEDGE AND POLITICS* 8 (1975) (“Problems, methods, and experience constitute the ‘deep structure’ of the thought. This ‘deep structure’ allows room for a variety of philosophical positions, depending on which part of the underlying experience is illuminated and which chain of problems pursued. But the number of these positions is limited, and their relationship to each other is determined by their place within the larger system.”); Duncan

structuralism, that deep grammar was often labeled “liberal legalism.”<sup>41</sup> But just as French structuralism declined in the face of deconstructionism, so too would American legal structuralism wither in the coming confrontation with poststructuralist legal theory.<sup>42</sup> Using Derridean language, James Boyle’s criticism from 1985 was illustrative of the mood:

Duncan Kennedy’s account of the fundamental contradiction [offers] a picture of “what went on” that draws on the participant’s awareness and yet transcends it. By uncovering “what is really going on,” the structuralist strand in critical legal studies tries to expose the constraining quality of the structures of everyday life, which are embedded in legal decisions, standard arguments, or in the unproblematic assumptions on which a discussion is based . . . . By offering a convincing account of knowledge, power, and life that is largely independent of the “intentionally acting subject,” [Kennedy’s structuralism] seems to undermine the central role that the subjectivist strand has held in the Western epistemological and political tradition. Each strand, in other words, both contradicts and relies on the other. Each

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Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976); Duncan Kennedy, *The Structure of Blackstone’s Commentaries*, 28 BUFF. L. REV. 205 (1979). There obviously has been much debate about whether these structures were believed to be transcendent and universal by proponents of the Harvard School. Unger’s discussion of “structure as hypothesis” opposed to “structure as science” is helpful.

In the plastic or narrative work of art, universality of meaning is often achieved not through abstraction from the particularity of individual things but by the very richness with which this particularity is represented. The work fails either when it lacks a general significance or when it stands for general ideas and ideals not fully expressed in the work itself but left in a formal, abstract state. In the first case, art becomes frivolous; in the second, didactic. But in the great work of art men are able to recognize that something is being shown that has a broad and therefore lasting significance and illuminates hidden features of many situations. This something, the universal, cannot be reduced to abstract propositions. It is embodied in expressions . . . ; it can be rediscovered elsewhere.

UNGER, *supra* note 40, at 144.

41. See, e.g., Gerald Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1057 (1980); David Kennedy, *Theses About International Law Discourse*, 23 GERMAN YEARBOOK INT’L L. 353 (1980). In A CRITIQUE OF ADJUDICATION [FIN DE SIÈCLE] 113–19 (1997), Duncan Kennedy distinguished between “Liberalism,” “liberalism,” and “conservatism,” using “liberal legalism” as a reference to the reflection of legal thinking in the context of “post-realist” “liberalism,” with a small l. This is consistent with LAURA KALMAN, *THE STRANGE CAREER OF LEGAL LIBERALISM* (1998). My discussion of “liberal legalism,” as opposed to Kalman’s designation “legal liberalism,” is much more than a proxy for welfare-state-era liberal politics, and is closer to Kennedy liberalism with a capital L. It is a liberalism that begins in the seventeenth century, triumphs in the nineteenth, is chastened and transformed in the twentieth, and, in my view, begins an intense affair with pragmatism in the twenty-first. My understanding of liberal legalism is worked out in Justin Desautels-Stein, *Race as a Legal Concept*, 2 COLUM. J. RACE & L. 1 (2012); Justin Desautels-Stein, *The Market as a Legal Concept*, 60 BUFF. L. REV. 387 (2012).

42. There is a sizable literature here. A few well-known examples include James Boyle, *The Politics of Reason: Critical Legal Theory and Local Social Thought*, 133 U. PA. L. REV. 685 (1985); Peter Goodrich, *Sleeping with the Enemy: An Essay on the Politics of Critical Legal Studies in America*, 68 N.Y.U. L. REV. 389 (1993); Thomas C. Heller, *Structuralism and Critique*, 36 STAN. L. REV. 127 (1984); David Kennedy, *A Rotation in Contemporary Legal Scholarship*, in CRITICAL LEGAL THOUGHT: AN AMERICAN-GERMAN DEBATE 353 (Christian Joerges & David M. Trubek eds., 1989); Gary Peller, *The Metaphysics of American Law*, 73 CAL. L. REV. 1151 (1985); Joan C. Williams, *Critical Legal Studies: The Death of Transcendence and the Rise of the New Langdells*, 62 N.Y.U. L. REV. 429 (1987).

contains the dangerous supplement, the trace, of its opposite.<sup>43</sup>

### III HISTORICISM

In many respects, I don't believe that the Harvard School was guilty of the sins attributed to it by poststructuralist legal scholars. But, we might wonder, if the structuralists weren't really trying to give a foundational account of "what went on," why did their cause never get a second hearing? In part, the collapse of legal structuralism had much to do with the shifted orientation of the structuralists themselves,<sup>44</sup> along with their allies. Robert Gordon's *Critical Legal Histories* is a case in point.<sup>45</sup> Gordon is more of an intellectual historian than a practitioner of legal structuralism, though his famous attack on prestructuralist legal historiography was very much in support of the Harvard School. Nevertheless, rather than paving the way towards a new mode of structuralist legal history, that article, curiously, helped shut it down. In other words, despite its interest in making room for a new structuralist historiography, truly fantastic articles like *Critical Legal Histories* nevertheless helped generate a disciplinary terrain in which it has become increasingly difficult to see contemporary legal thought as anything but a collection of "beauteous fragments."

To see how poststructuralist historicism put legal historians off-sides the question of contemporary legal thought,<sup>46</sup> it is helpful to put Gordon's article in a very short history of history writing.<sup>47</sup> In the historiographical mode G. Edward White has called prehistoricist, late-eighteenth- and early-nineteenth-century historians saw the past as operating in a smooth and continuous line culminating in the present.<sup>48</sup> When these historians identified what they

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43. Boyle, *The Politics of Reason*, *supra* note 42, at 743–44. For further discussion, see GARY MINDA, *POSTMODERN LEGAL MOVEMENTS: LAW AND JURISPRUDENCE AT CENTURY'S END* 115 (1995).

44. Duncan Kennedy, Roberto Unger, Gerald Frug, and David Kennedy, all in one way or another, sought to chasten their own views of legal structuralism in the 1980s and 90s. Of the four, David Kennedy's reversal was the most severe. See David Kennedy, *Critical Theory, Structuralism, and Contemporary Legal Scholarship*, 21 *NEW ENG. L. REV.* 209 (1986).

45. Robert W. Gordon, *Critical Legal Histories*, 36 *STAN. L. REV.* 57 (1984). I think this article is a helpful piece to focus on due to its extremely accessible status. See generally Lowe, *supra* note 17. See also Hendrik Hartog, *Introduction to Symposium on "Critical Legal Histories"*, 37 *LAW & SOC. INQ.* 147, 148 (2012) ("'Critical Legal Histories' . . . must be there as a part of a student's socialization into our discipline—and I suspect it will continue to remain so for years to come.").

46. For a different and interesting version of the story, see generally Lowe, *supra* note 17.

47. For ease of presentation, this brief summary relies heavily on two recent treatments of the issue: White, *Arrival*, *supra* note 16, and Rabban, *supra* note 6.

48. See GEORG IGGERS, *THE GERMAN CONCEPTION OF HISTORY: THE NATIONAL TRADITION OF HISTORICAL THOUGHT FROM HERDER TO THE PRESENT* (1968) (reflecting on the emergence of German historicism and its relevance here); see also Roger Berkowitz, *From Justice to Justification: An Alternative Genealogy of Positive Law*, 1 *UC IRVINE L. REV.* 611 (2011); Howard Schweber, *The Science of Legal Science: The Model of the Natural Sciences in Nineteenth-Century American Legal Education*, 17 *LAW & HIST. REV.* 421 (1999).

believed to be natural law principles of past experience, they saw these same natural laws governing the politics of their own day.<sup>49</sup> The past was not, as it would later become fashionable to say, a foreign country;<sup>50</sup> the past *was* the present, only older, premised on the existence of universal principles fashioning the various forms of human life.<sup>51</sup> The principles were static, originating in God or Nature, and manifested in endless repetitions of “birth, decay, and renewal.”<sup>52</sup> As a result, prehistoricist scholars expected that the lives of their children would unfold in much the way that life had been lived by their parents.<sup>53</sup>

In contrast with this prehistoricist view of a static past-into-present continuum, evolutionary historicism emerged among late-nineteenth-century U.S. historians and lawyers in the context of a repudiation of prehistoricist “presentism.”<sup>54</sup> This repudiation was partially premised on new conceptions of time itself, wherein the past was seen as segmented from the present.<sup>55</sup> The historian’s task was no longer directed at the identification of time’s endless repetitions, but was now about telling the truth about that past—about what had really happened—rather than commandeering the past into the service of particular policy briefs about the present.<sup>56</sup> This new historicism was also fueled by the emergence of the American social sciences and the application of the scientific method to human affairs.<sup>57</sup> In this context, the past increasingly became irrelevant to social studies; it was the present that was the target of the modern social scientist, asking how empiricism could make for a better world, right now.<sup>58</sup> For this generation of social scientists working before World War I,

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49. White, *Arrival*, *supra* note 16, at 499. See also Robert Gordon, *Recent Trends in Legal Historiography*, 69 LAW LIBR. J. 462, 462 (1976). He argued that, on the legal side at this time,

[I]t did not much matter whether a legal historian believed that the law gurgled spontaneously upwards from the culture and deposited itself in the judgments of courts, or was carefully extracted from the culture by black-robed legal scientists. Separately or in combination, both ideas led to the same conclusion, that the only materials one needed to consult for the study of legal history were legal materials, the formal, internal products of the legal system.

*Id.*

50. L.P. HARTLEY, *THE GO-BETWEEN* (1953).

51. White, *Arrival*, *supra* note 16, at 505.

52. *Id.* at 499, 501.

53. *Id.* See also DOROTHY ROSS, *THE ORIGINS OF AMERICAN SOCIAL SCIENCE* 8–9 (1992).

54. White, *Arrival*, *supra* note 16, at 506. See also Christopher Tomlins, *Review Essay—The Consumption of History in the Legal Academy: Science and Synthesis, Perils and Prospects*, 61 J.L. & EDUC. 139, 141 (2011) (“The first generation of professional historians attempted to displace the preceding generation of patrician amateurs by constructing ‘scientific’ empirical history (to go along with legal science, political science, and so on). They led the discipline in an arid landscape of rigid factualism, evolutionist in general perspective but suspicious of any more pointed form of causality.”).

55. Tomlins, *Narrative*, *supra* note 16, at 332.

56. White, *Arrival*, *supra* note 16, at 509–10.

57. The story is complicated to the extent White and Ross both show how early stages in the development of the social sciences were committed to prehistoricism. See Ross, *Origins*, *supra* note 53, at 64–88; White, *Arrival*, *supra* note 16, at 504–05.

58. White, *Arrival*, *supra* note 16, at 506.

history was becoming beside the point, if not an obstacle for the new empiricist.<sup>59</sup> Thus, late nineteenth century historians found themselves between a rock and a hard place: the rock being presentist beliefs in transcendent and timeless custom they wanted to reject;<sup>60</sup> the hard place being the apparent irrelevance of the past for modern social science that seemed difficult to avoid.<sup>61</sup>

The answer was the plugging of evolutionary theory into the new historicism.<sup>62</sup> In this light, the past was not relevant to the present due to a belief that the two domains were somehow governed by the same customs, as in the natural law thinking of the prehistoricists; the past was relevant because it was in the acorn of past times that the growing oak of the present found its origins.<sup>63</sup> As White has put it, evolutionary theory filled the position for historicists that providence had filled for the prehistoricists.<sup>64</sup> Of course, at one level, the rules constituting the acorn and the tree were at odds—but this was precisely the point. History changes constantly over time, and the rules making sense of change similarly evolve as well.<sup>65</sup> But history *progresses*, slowly accumulating its received wisdoms through trial and error, pushing humanity further and further still towards a better contemporary,<sup>66</sup> even though the ultimate principles—those ultimates governing both the acorn and the tree—might in some sense be seen as timeless.<sup>67</sup> Thus, historicists argued with their social science

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59. *Id.*

60. *Cf.* Rabban, *supra* note 6, at 326.

61. *Id.*

62. *Id.* at 511.

Drawing upon a historicist conception of historical change and the methodology of Darwinist evolutionary science, [historicists] recharacterized the narrative of history as a continuous progression of change, which, on careful investigation, could be made into the progressive accumulation and refinement of historical truth. The collective derivation of that truth, however, required that the historian investigator assume the detached posture of the scientific observer. It required that historians be objective.

*Id.* The well-known debates between advocates of “consensus history” and “progressive history” fall in this space. For representative discussions, see generally CHARLES A. BEARD & MARY R. BEARD, *THE RISE OF AMERICAN CIVILIZATION* (1927); LOUIS HARTZ, *THE LIBERAL TRADITION IN AMERICA: AN INTERPRETATION OF AMERICAN THOUGHT SINCE THE REVOLUTION* (1955); RICHARD HOFSTADTER, *AMERICAN POLITICAL TRADITION AND THE MEN WHO MADE IT* (1973); OSCAR HANDLIN & MARY HANDLIN, *COMMONWEALTH: A STUDY OF THE ROLE OF GOVERNMENT IN THE AMERICAN ECONOMY: MASSACHUSETTS, 1774–1861* (1947).

63. Of course, this mode of making the past relevant by accommodating functionalist historicism wasn’t immune from historicist critique. See JOHN REID, *1966: Legal History*, in *THE LITERATURE OF AMERICAN LEGAL HISTORY*, at 101–02; Gordon, *Historicism*, *supra* note 19.

64. White, *Arrival*, *supra* note 16, at 510–11.

65. See, e.g., W.W. ROSTOW, *THE STAGES OF ECONOMIC GROWTH: A NON-COMMUNIST MANIFESTO* (1991).

66. Rabban, *supra* note 6, at 327–28; White, *Arrival*, *supra* note 16, at 511.

67. To the extent whiffs of “timelessness” appear in progress narratives, I think all we are seeing is the same paradox identified in Pocock’s discussion of the common law. See J.G.A. POCKOCK, *THE ANCIENT CONSTITUTION AND THE FEUDAL LAW* 30–38 (1987). See also Paulo Barrozo, *The Great Alliance: History, Reason, and Will in Modern Law*, 78 *LAW & CONTEMP. PROBS.*, nos. 1–2, 2015 at 235.

contemporaries, that the past was relevant to the work of the political scientist for the same reason that evolutionary biology was relevant to the biologist: We can better understand our present condition by reflecting on the manner in which we have arrived, and this understanding ought to be scientifically objective.<sup>68</sup> That is, we can understand the present in virtue of its inevitable and objectively ascertainable *difference* with the past—not its sameness.<sup>69</sup>

Arguably, evolutionary historicism ruled the discipline for one hundred years, from roughly 1870 to 1970.<sup>70</sup> As one might expect, by the 1970s, the distinction between past and present common to all evolutionary historicists, and its affiliation with the canon of objective historical excavation, was at the

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68. White, *Arrival*, *supra* note 16, at 512.

69. See generally VISION AND METHOD IN HISTORICAL SOCIOLOGY (Theda Skocpol ed., 1984).

70. In a well-known article from 1975, Robert Gordon suggested (while not explicitly using the term) that evolutionary historicism was an aspect of classical legal thought, beginning around 1880. Robert Gordon, *Introduction: J. Willard Hurst and the Common Law Tradition in American Legal Historiography*, 10 LAW & SOC. REV. 9, 12 (1975). Gordon explained that, in classical legal thought, evolutionary historicism had an “internal” dimension to it, such that the evolution of law was strictly separate from any social contexts. Evolutionary historicism, in this view, was formalistic due to its commitment to the idea that legal history was “only the history of past state commands, rather than the history of an entire culture.” *Id.* at 20. In contrast, and in what I call “modern legal thought,” evolutionary historicism took on an external dimension. In this modern shift, legal historians investigated nonlegal materials and social contexts, and believed that interdisciplinary approaches to legal history were more empirically accurate. *Id.* at 33–34. David Rabban has more recently argued, however, that this division between an internal historiography belonging to classical legal thought and an external historiography for modern legal thought is misleading, if not just wrong. Rabban, *supra* note 6, at 512–19. See also Parker, *supra* note 18. I think Rabban is right to argue that evolutionary historicism is a mode of historiography common to both the proponents of classical and modern legal thought alike—but it is a mistake to gloss over how evolutionary historicism manifests differently depending on whether we look at in the classical or modern styles. As Rabban explains it, late-nineteenth-century evolutionary historicism included beliefs in the rightness of looking at law as progressively responding to changing social needs, often in the light of ideas about racial superiority; the rightness of custom over regulation; the rightness of judicial navigation of an apolitical common law over the political work of legislators; and the rightness of postbellum individualism as expressed in late nineteenth century developments in property, contract, and tort law. Rabban, *supra* note 6, at 325–80. These ideas, all in orbit around beliefs in a classic liberal public–private distinction, are the ideas of classical legal thought. See, e.g., Kennedy, *Three Globalizations*, *supra* note 7, at 25–37. In modern legal thought, evolutionary legal thought merged with the functionalist jurisprudence, which recommended to the jurist a course of action in which many of the classical premises were reversed. Race science increasingly took a back seat as questions piled up about the veracity of late nineteenth century narratives about so-called “Teutonic origins;” the customary aspects of the common law were seen as political and ideological; legislation becomes highly favored as a technique for solving society’s problems; “social” conceptions of the private law took on new significance over and against “individualist” conceptions; the answers to concrete legal disputes could be determined through the judge’s investigation of the social purposes meant to be realized by a particular rule, rather than the true principles disclosed by a progressively developing set of customs. See generally, Desautels-Stein, *Race as a Legal Concept*, *supra* note 41; Desautels-Stein, *Pragmatic Liberalism*, *supra* note 1, at 1066–73. In the context of legal historiography, functionalism directed the work of legal historians to understand changes in the legal system as a series of responses to preexisting social needs and interests that weren’t necessarily progressive, directed by “common sense” or the law of nature, or promoted by racial destiny. Legal history, on this modern view, could still be “objective” just as the classical purveyors of evolutionary historicism believed, though it was also “contingent”—a word with less purchase in the context of classical legal thought. Rabban, *supra* note 6, at 326–27.

center of deconstructionist and poststructuralist critique.<sup>71</sup> This was troubling, since historians required a foothold in time in order to pinpoint the right past into which the right present had evolved. But if it was becoming too challenging to objectively speak of past and present, historicism seemed lost. Drawing on Peter Novick's work, White explained:

Post–World War II scholars had an enhanced sense of the cultural homogeneity of American civilization; America was modern, democratic, antitotalitarian, capitalist, and largely free from ideological polarization. It was a vivid “present,” to be juxtaposed against or to obliterate a quite different “past.” But by the early 1980s . . . scholars saw their present as confused, polarized, unstable. As a clear sense of the late twentieth century “present” vanished, the objectivity canon virtually collapsed as a central professional ideology for late twentieth century historians.<sup>72</sup>

It is in the midst of this collapse of the past–present distinction, and along with it evolutionary historicism, that I now want to focus on Gordon's *Critical Legal Histories*.<sup>73</sup> In that article, Gordon famously crushed evolutionary historicism, both as it manifested itself both in classical and modern legal thought.<sup>74</sup> After the crushing was complete, Gordon then suggested that the way was open for a new mode of postobjectivist historiography—a mode that I interchangeably refer to as “critical historicism” (Gordon's phrase) and “poststructuralist historicism.”<sup>75</sup> Gordon explained that the new postobjectivist historiography involved three moves. The first move blurred the distinction between law and society that was so fundamental for modern evolutionary historicists, like Willard Hurst.<sup>76</sup> These historians sought to understand how law had changed over time in response to the basic conditions of material life by

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71. In the context of general historiography, see Novick, *supra* note 24, at 628. For a representative critique in law, see Mark Tushnet, *Perspectives on the Development of American Law: A Critical Review of Friedman's 'A History of American Law,'* 1977 WIS. L. REV. 81, 82–83 (1977).

[Tushnet's review] develops two criticisms of Professor Friedman's pluralist, materialist perspective. First, by taking as settled that the legal order is a faithful mirror of the social and economic order, Professor Friedman ignores the influence of autonomy on the legal order. . . . Second, by focusing exclusively on 'those who call the tune,' he ignores the ideological functions of the legal order, as a means of persuading both oppressor and oppressed that their conditions are just.

*Id.* See also Christopher Tomlins, *The Strait Gate: The Past, History, and Legal Scholarship*, 11 LAW, CULTURE, & HUMAN. 12 (2009) (“Past, present, and future do not compose a natural order: their lineage is an artefact of human invention. The moment at which we live, the moment of now, is surrounded and infused by all that has been, a spectral murmur indifferent to time passing that is our constant companion.”).

72. White, *Arrival*, *supra* note 16, at 611–12.

73. See Gordon, *Historicism*, *supra* note 63, at 1044 (“[t]he Progressive amalgam's long domination over the organization of scholarly thinking about law is breaking up, and nothing comparable is in prospect to replace it. Legal scholars can still be found who write in all the traditional responsive modes, but no new amalgam seems to be crystallizing.”); Gordon, *Recent Trends*, *supra* note 49, at 466 (“We used to think there were two realms: the realm of law and the realm of social context. On closer inspection ‘law’ seems to dissolve and merge into context; we have been in the swamp all along without even knowing it.”).

74. Gordon, *Critical Legal Histories*, *supra* note 18, at 71.

75. *Id.* at 102.

76. *Id.*

identifying the essential “needs” of society and the powerful interests that had a hand in shaping those needs.<sup>77</sup> They then sought to locate the many ways in which these social threads unpacked in any given legal system, though without reference to a necessary progress narrative: how had legal rules emerged in response to social needs and practices, however unfair? For Gordon, the new critical historiography rejected this distinction between a prelegal social realm and a legal order somehow directed by these more “fundamental” social forces. For Gordon’s new legal historians, society was just as much legally constructed as the other way around.<sup>78</sup> The point, from here on out, would be to reject stale, functionalist depictions of law as society’s everlasting lady-in-waiting, and to do this one needed to recognize that “law and society are inextricably mixed.”<sup>79</sup>

The second move pushed this idea further. Gordon explained that, on the way towards critical historicism, one had to accept not only the mutually constitutive nature of law-in-society but also a prioritization of law’s role in the construction of society.<sup>80</sup> It was not precisely clear in the article why Gordon privileged law’s role in this way, particularly as it followed the seeming counterpoint that law and society were “inextricably mixed.” Probably as a result, this emphasis on law’s constitutive role in the social, which necessarily came at the expense of the social role in constituting law,<sup>81</sup> was somewhat ill-formed.<sup>82</sup> Gordon seemed anxious about the point, explaining that the critic “takes each event as situated not on a single developmental path but on multiple trajectories of possibility, the path actually chosen being chosen not because it had to be but because the people pushing for alternatives were

77. *Id.*

78. *See id.* at 103.

Yet, in practice, it is just about impossible to describe any set of “basic” social practices without describing the legal relations among the people involved—legal relations that don’t simply condition how the people relate to each other but to an important extent define the constitutive terms of the relationship . . . .

*Id.*

79. *Id.* at 107.

80. *See id.* at 111.

In short, the legal forms we use set limits on what we can imagine as practical options: Our desires and plans tend to be shaped out of the limited stock of forms available to us: The forms thus condition not just our power to get what we want but what we want (or think we can get) itself.

*Id.* But as Gordon explained recently, his focus here was mostly on legal structuralism, and he had not intended on suggesting that all forms of critical historiography would include these three elements. *See* Robert Gordon, *Critical Legal Histories Revisited*, 37 *LAW & SOC. INQ.* 200, 205 (2012) (“All I was trying to do was to explain what a particular kind of critical legal history—the work pioneered by Duncan Kennedy and his circle on the history of contradictions in liberal legal thought—was all about and why it was worth doing. Kennedy’s work had struck me and many others reading it for the first time as shockingly, brilliantly enlightening, and it made me at least reevaluate my prejudice going in that doctrine was mostly a sideshow.”).

81. *See* Christopher Tomlins, *What is Left*, *supra* note 12, at 160 (“Gordon’s destruction of evolutionary functionalism, however, had taken the matter a long step further by leaving little basis for a legal history that was *not* the history of doctrine.”).

82. Gordon, *Critical Legal Histories*, *supra* note 18, at 112.

weaker and lost out in the struggle . . . ”<sup>83</sup>

But this shaky emphasis on law’s constitutive role in the social slid quickly towards a more reliable and trendier third move: “indeterminacy located in contradiction.”<sup>84</sup> That is, while the new critical historian might focus on law’s role in determining social needs, rather than the other way around, one must be reminded that “law” never means any one thing. Borrowing from Duncan Kennedy’s analysis of *Blackstone’s Commentaries*, Gordon explained that this deep sense of law’s indeterminacy was grounded in a fundamental contradiction between “our need for others and our fear of them.”<sup>85</sup> Thus, the new critical historiography was committed to exploring reality’s astonishingly complex blending of law in the political, emphasizing law’s role in what was nevertheless conceded as a state of mutual constitution, and elaborating law’s endlessly indeterminate, albeit constitutive, social life.

The best example of the new critical historiography, Gordon concluded, was legal structuralism.<sup>86</sup> This returns us to the point from above: Gordon was

83. *Id.*

84. *Id.* at 114.

85. *See id.* (“This indeterminacy exists because legal rules derive from structures of thought, the collective constructs of many minds, that are fundamentally contradictory.”).

86. *See id.* at 116–17 (tagging legal structuralism as “surely the most distinctive critical contribution,” calling it “legal historiography as the intellectual history of the rise and fall of paradigm structures of thought designed to mediate contradictions.”). And to be clear, this was Duncan Kennedy’s structuralism, not that belonging to Morton Horwitz. For Gordon, Horwitz broke with much of the prior work in functionalist-historicist legal history. Robert Gordon, *Morton Horwitz and His Critics: A Conflict of Narratives*, 37 TULSA L. REV. 915, 921 (2002). But unlike the version of critical historiography Gordon described in 1984, Gordon understood Horwitz to have launched an argument about law’s determinate (and constitutive) relation with society.

This commitment led [Horwitz] to his sharpest point of disagreement with colleagues in Critical Legal Studies, who were disposed to argue that the association of any given set of legal doctrines or principles methods (sic) with legal-political outcomes was never anything but contingent, because types of legal argument could be ‘flipped’ so as to be turned to any imaginable purpose. No, Horwitz said: at any given time, legal-argument types . . . tend to favor privilege, have an inbuilt ‘tilt’ towards particular outcomes and not others.

*Id.* at 926. Of course, separating Horwitz from the final category of critical legal history discussed at the end of Gordon’s article hardly means that the book was neither important nor new. As Wythe Holt wrote in a review, “Horwitz has shattered the grip of conventional legal history on the past, making it now impossible for the old apolitical, deterministic or idealistic categories to see so powerful, so convincing, or so useful . . . Horwitz has opened a whole new universe for us, the real universe of the past and the present.” Wythe Holt, *Morton Horwitz and the Transformation of American Legal History*, 23 WM. & MARY L. REV. 663, 667–68 (1982). In contrast, however, Chris Tomlins has argued that although *Transformations I* was certainly influential, it is a mistake to read the book as having wrought a break in the metanarrative of twentieth-century functionalist historicism:

Horwitz’ withering appraisal of outcomes was highly influential, and of course, his unapologetic attribution of an instrumental role to law in crafting those outcomes was highly controversial. But American legal historiography’s metanarrative remained essentially unaltered . . . Now certainly this outcome may well have been the product of conscious choice. Historians in the 1980s and 1990s were deeply suspicious of metanarrative, particularly its potential to confine the imagination within interpretive structures unfriendly to particular modes of inquiry, or particular subjects. One may prefer a history without metanarrative; piecemeal pluralism may indeed be the better row to hoe.

hardly interested in debunking legal structuralism. So what happened? The crux of the problem, and the reason structuralist legal history fell away as critical legal history took off, was the confusing relation between law's constitutive role in society and the apparent inability of law to constitute anything if it was really so indeterminate. When adherents of the Harvard School claimed that law was political, the point was not to merely reenact the legal realist attack on classical legal thought.<sup>87</sup> Instead, to claim that law was political was to stress the nature of argumentative patterns and the often-arbitrary nature of the legal claims swimming in those patterns. But, and this is crucial, for the structuralists the seemingly unconstrained nature of legal argument is highly disciplined by the system's *langue*. That is, for legal structuralists, and unlike for legal realists, the claim "law is politics" makes no sense when it is severed from the formal constraints provided by the legal grammar. "Indeterminacy rooted in contradiction" just wasn't the right way to present the idea; "structured indeterminacy," with its double nod in the directions of *langue* and *parole*, is much closer.

But in Gordon's telling, this holism—the unity threading lexical arguments and grammatical rules together in a "structured indeterminacy"—was missed entirely. To be sure, the content was there. But over the course of the discussion, the three moves were articulated in the form of a checklist instead of in the form of a more organic structure of legal argument. What's more, the important emphasis on the grammar constraining indeterminacy in legal structuralism was articulated instead as "law's constitutive role in society." In a way, Gordon's choice to frame the point in this way made a lot of sense;<sup>88</sup> but without also hammering the way in which law itself was deeply structured, the reader was left without much understanding of how that phrase could have any real meaning since law itself was—apparently—endlessly indeterminate.

The consequence of framing the elements in this way was dramatic. In the years that followed, Gordon's stress on law's constitutive role in politics came to be seen as out of step with the general sway of poststructuralist thinking.<sup>89</sup> At

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Christopher Tomlins, *American Legal History in Retrospect and Prospect: Reflections on the Twenty-Fifth Anniversary of Morton Horwitz's Transformation of American Law*, 28 *LAW & SOC. INQUIRY* 1135, 1142 (2003).

87. For an interesting account of what indeterminacy meant for Jerome Frank, see Charles Barzun, *Jerome Frank and the Modern Mind*, 58 *BUFF. L. REV.* 1127 (2010).

88. See, e.g., Karl Klare, *Law-Making as Praxis*, 40 *TELOS* 123 (1979) (discussing a constitutive theory of law).

89. The problem here is the same problem other critics had with Duncan Kennedy's espousal of "non-causality" in *Blackstone's Commentaries*. Kennedy had explained that "what I have to say is descriptive, and descriptive only of thought. It means ignoring the question of what brings a legal consciousness into being, what causes it to change, and what effect it has on the actions of those who live in it." Kennedy, *Blackstone*, *supra* note 40, at 220. David Trubek's reaction: "If Kennedy omits any discussion of the effects of legal consciousness in a 173-page article on Blackstone's legal thought, how confident can he be that his method bears any relationship to his political intent?" David Trubek, *Where the Action Is: Critical Legal Studies and Empiricism*, 36 *STAN. L. REV.* 575, 612 (1984). Kennedy was not Trubek's only target; this was a problem for all of legal structuralism. Until it could show how

the same time, the first and third steps merged, making room for the view of critical legal history that would follow.<sup>90</sup> The first move—Gordon’s critique of evolutionary historicism, along with the attendant blurring of law and society and the complex and contingent dynamics inherent in that relationship—lined up nicely with the argument for legal indeterminacy. “Indeterminacy,” after all, seemed to bear a family resemblance to concepts like “complexity” and “contingency.” In this posture, critical legal history was primed for its new mission: finding the traces of the ebb and flow of a rootless, unstructured discursivity.<sup>91</sup> The cumbersome notion of law’s constitutive role in society, along with talk of the “fundamental contradiction,” was easily detached from the broader program.<sup>92</sup> Not only was it unclear why these “tin cans”<sup>93</sup> had been

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legal structures actually affected what went on in society, why would anyone care to read a complicated analysis of *Blackstone’s Commentaries*? Trubek concluded, “This is a challenge that CLS must meet. Until we can produce convincing maps of the relationships between elite ideological production, the social definition of meaning, and the history of social relations, we will not be able to sustain the claims made for Critical studies.” *Id.* Focusing more on Gordon, Jack Schlegel has offered a similar critique:

Bob’s choice to retain to the end the assumption that a functionalist account of law must assert a positivist’s necessary relationship between need and response was troubling because it relegated those CLS scholars who saw a world filled with contingent functional responses to the land of not sufficiently thorough, i.e., partial, instrumentalist critiques, to a building away from the main house as it were. This choice engendered a certain amount of hard feelings among scholars who saw things this way—not a good result in a group that, although portrayed in the law school world, and eventually the national press, as an advancing horde, was in fact quite small. Moreover, a defense of the constitutive role of legal norms in social life, and so of the kind of doctrinal scholarship that Bob wished to trumpet, did not require any particular resolution of the question of law’s functionality. Logically, law might have been constitutive and necessarily functional, constitutive and not necessarily functional, or constitutive and not functional at all. The claim for constitutiveness did not rise or fall based on the position taken with respect to the functionality of law’s response to social life. Perhaps the argument for constitutiveness was cleaner, and so easier to make, from the assumption that functionality assumed necessity. But, beyond such considerations, it is hard to see why those CLS adherents who didn’t see things that way needed to be relegated to the out buildings.

John Henry Schlegel, *CLS Wasn’t Killed by a Question*, 58 ALA. L. REV. 967, 971 (2007).

90. It is easy to miss the point here. It is not that legal historians and law and society people did not care about law’s role in constituting the social. They cared about it a great deal. Thus, by saying it was the first and third moves that took off, leaving the second behind, this is not meant to suggest that the new approach entailed a privileging of the social over the legal. That, after all, was the modus operandi of the functionalist historicist. Rather the point to focus on is that the whole idea of *privileging* was rendered suspect after poststructuralist historicism took hold. Law and society were mutually constitutive, and so it made sense to spend time looking at both sides, but it did not make sense prioritizing one side over the other. To do so would miss the true complexity of the real. *See, e.g.*, HISTORY, MEMORY, AND THE LAW (Austin Sarat & Thomas Kearns eds., 1999).

91. *See, e.g.*, MARIANNE CONSTABLE, JUST SILENCES (2005); GUYORA BINDER AND ROBERT WEISBERG, LITERARY CRITICISMS OF LAW (2000).

92. *See, e.g.*, Pierre Schlag, *Cannibal Moves: An Essay on the Metamorphoses of the Legal Distinction*, 40 STAN. L. REV. 929, 935 (1988).

Scholarly talk of models or paradigms or fundamental contradictions becomes vulnerable . . . . And the possibility of isolating any particular split for discussion begins to seem naive. It no longer seems possible to trace the ostensible incoherence of liberal legalism to a fundamental contradiction such as self/other or public/private.

*Id.*

there in the first place, but it was also becomingly evident that such positions were deeply problematic for their “totalizing” view of law’s discursive origins.<sup>94</sup> The idea of structuralist legal history, lashed at the waist to those tin cans, sunk out of sight.

#### IV

#### STRUCTURALIST LEGAL HISTORIES

But now let us imagine that the recent history of legal historiography had taken a different turn, and that Gordon’s interest in establishing a platform for structuralist legal history had been more successful. We could imagine that he began as he did, conceding the poststructuralist anxiety about causality and the interminable relation between law and society. But next, in this imagined rewrite, legal structuralism is introduced as a way of *responding* to this anxiety rather than acting as its object. If framed this way, rather than situating legal indeterminacy as a more aggressive version of early-twentieth-century legal realism, we would encounter the much less familiar idea of structured indeterminacy. As I have suggested, in structuralism, but not legal realism, the train of legal indeterminacy and its caboose of judicial discretion only make sense in the semiotic context of *legal constraint*, that is, in the context of the deep rules of legal grammar. There is certainly a free play of legal argument here, but it is a free play only intelligible from inside the governing forms of the structure. If Gordon had couched indeterminacy in this structuralist sense, rather than attempting to explain the *langue* through the proxy idea of law’s

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93. In a frequently cited passage from *Roll Over Beethoven*, co-authored with Peter Gabel, Kennedy distanced himself from the discussion of a fundamental contradiction in *Blackstone’s Commentaries*, calling it the tin can hanging around the neck of critical legal studies. Duncan Kennedy et. al., *Roll Over Beethoven*, 36 STAN. L. REV. 1, 15 (1984).

94. See Hartog, *supra* note 45, at 153.

To insist on the constitutive power of law, its capacity to shape lives and understandings outside of law, was, in that context, to issue a bold challenge to prevailing scholarly fashions. To think of law as a producer of consciousness was to give law a power to challenge most of the mainstream discourses about law. Now, a full interrogation of what constitutive means in legal history is a subject for another occasion. Today, I am less confident than I was in 1984 that I understand it. How to distinguish legal values from religious or political values—what turns, for example, on calling a faith or belief in promise keeping a legal value—is a question that concerns me today. I know that many of the nineteenth-century lay people I study were immensely sophisticated in their mobilization and use of legal institutions. They understood testator’s freedom; many, even when semiliterate, seemed to have understood the effects of the Statute of Frauds on their transactions. But were they constituted by law in any significant degree? Or, on the other hand, is it better to describe their consciousness through the lens of existential or economic or psychic conflicts (all of which, of course, have some legal features)? And when I read legal history that mobilizes the term (usually inspired consciously or unconsciously by Gordon), it sometimes seems to me that the word “constitutive” is mobilized most often by those who wish to justify the significance of what they do without looking far beyond the confines of the law library or the Westlaw or Lexis databases. “Constitutive” then becomes a way to foreclose deeper study and exploration.

*Id.* See also Joan Williams, *Critical Legal Studies: the Death of Transcendence and the Rise of the New Langdells*, 62 N.Y.U. L. REV. 429 (1987).

constitutive role in the social, a clearer and more promising vision of structuralist legal history might have emerged.

Unlike prior forms of evolutionary historicism, this distinctive mode of legal historiography proceeds on the assumption that the past–present distinction and the canon of objective description are both impossible. Rather than offer an account of structures progressively evolving over time, structuralist historiography denies the possibility of obtaining apodictic accounts of legal history, progressive or otherwise. There is simply no way for the historian to get out of the way of her own prefigured interpretive orientations that will necessarily shape the forthcoming historical narrative. Further, rather than work in evolutionary historicism’s modern mode and offer an account of legal structures functionally emerging in response to preexisting social needs, structuralist legal history tends to emphasize the other half of the law-in-society dialectic: although it is certainly true that law is shaped by social needs and interests, it is also the case, and perhaps more important to understand, that law itself shapes social needs and interests. Law is constitutive of the social. But for structuralist legal history, this point is neither arbitrary nor empirically determined; rather it follows from the structuralist emphasis on the *langue*, the idea that law is only relatively indeterminate at its surface levels. Law can be meaningfully framed as constitutive of the social because law itself is highly structured. However, it is here that the structuralist historian turns back to the poststructuralist anxiety and assures that this *langue*, this constraining structure, is only and ever one single language—a simulacrum, an image, a style. This would have been structuralist legal history: a method for aligning legal indeterminacy within a structure of formal constraints, with the tendency to produce an image of law’s constitutive role in politics, rather than the more familiar image of politics as law.

But it didn’t happen this way. Instead, it was critical or poststructuralist historicism that followed in the years after the publication of *Critical Legal Histories*. Writing in a 1997 symposium dedicated to the “arrival of critical historicism,” Gordon summarized the state of legal historiography with an emphasis on two elements from 1984: (1) legal historians had come around to the idea that law’s relation to society was far more complex than had been articulated by the modern proponents of evolutionary historicism, and (2) the project of writing legal history, as with the project of writing legal holdings, was deeply, and happily, indeterminate.<sup>95</sup> Both Gordon’s promotion of structuralist

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95. See, e.g., Gordon, *Arrival*, *supra* note 18, at 1024.

I would say that [critical historicism involves] 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 as of those as the losers rather than the winners) for surveying developments, or that posits 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.

*Id.*

legal history and the idea that law was constitutive of society were gone. Indeterminacy emerged as a raw, unstoppable force, capable of twisting any argument, and any account, in any way whatsoever.<sup>96</sup> This was the indeterminacy of legal realism on steroids, *unstructured*.

In that same issue that Gordon announced the arrival of critical historicism, Terry Fisher pointed to four “critical” styles of historiography littering the field at the turn of the new century.<sup>97</sup> Fisher did include legal structuralism among them, but without hesitation emphasized its desuetude.<sup>98</sup> All the action was in arguably poststructuralist territory: textualism, contextualism, and new historicism.<sup>99</sup> These (more or less) poststructuralist modes of historicism were certainly distinct from the mid-twentieth century forms of evolutionary functionalism and their commitments to the canon of objectivity. The new poststructuralist historicism rejected the very possibility of evolutionary objectivity, in either its classic or modern mode.<sup>100</sup> Writing more than a decade later in 2012, Gordon explained:

A strong antifunctionalist, antideterminist critique tends to dissolve the history of any social phenomenon into simply thick description, skeptical alike of grand narratives and indeed any accounts of causation. It is all very contingent, all very complicated. To the extent this does happen, it is a mixed blessing. It is the job of history—is it not?—to mess up and complicate the generalizing social sciences’ models of how the world works with evidence that in one place or another actual developments skipped a stage in a model or went through the stages in reverse or bypassed the stages altogether.<sup>101</sup>

This certainly sounds right, and no doubt, poststructuralist historicism is a mixed blessing. But as we peer out towards the possibility of contemporary legal thought, perhaps we are ready for a new order of things. It no longer seems clear, I believe, that poststructuralist historicism has really escaped the traces of its functionalist predecessor.<sup>102</sup> Is it possible that, a full generation after

96. Gordon, *Critical Legal Histories*, *supra* note 18, at 114.

97. Fisher, *supra* note 16, at 1075–76.

98. *See id.* (“Partly as a result [of Duncan Kennedy’s apparent renunciation of the fundamental contradiction], in the late 1980s the production of scholarship in the [structuralist] vein diminished sharply.”).

99. *Id.*

100. *See* Laura Edwards, *The History in Critical Legal Histories*, 37 LAW & SOC. INQUIRY 187, 197 (2012).

As scholars, it is our job to order our evidence, to pull meaning out of it, and to construct telling narratives. But we have to do so with the knowledge that there will be no clear, definitive result and no end to this process. We will always come up short, even if we learn a great deal, because the complications of the past can form a vast array of patterns and we will see different ones each time we look, depending on where we are at the time. That tension is the point, not the problem—and certainly not a problem that can be solved.

*Id.*

101. Gordon, *Revisited*, *supra* note 80, at 212.

102. *But see* Edwards, *supra* note 100, at 197.

The contradictions are not about history; they are about historical scholarship, which is deeply historicist and profoundly critical of functionalism but still based around functionalism, particularly functionalist approaches to the law. And so we remain stalled, as long as history itself remains mired in the same functionalist quagmire that Gordon describes in “Critical

*Critical Legal Histories*, that poststructuralist historicism has offered us a deepening rather than a chastening of the functionalist style? At first blush, this seems totally wrong given Gordon's merciless annihilation of evolutionary historicism. It does seem entirely possible however, and in my mind quite likely, that while Gordon's critique remains as fresh as ever, the mode of poststructuralist historicism that followed that critique is also vulnerable to the critique itself. If there is good reason to think this is the case, Gordon is in the best of company. In one of the most startling and still-relevant law review articles of the twentieth century, Felix Cohen raised a critique in the first half of his argument that devastated the proposal offered in the second.<sup>103</sup>

With this caveat in mind, my suspicion is that the poststructuralism that followed *Critical Legal Histories* actually intensified—in its postobjectivist way—the “law and. . .” paradigm of modern evolutionary historicism, rather than having brought it to an end. As a result, poststructuralist historicism not only lacks the tools we need to see beyond the functionalism of the moderns, it actively forecloses the historical methods we need to get past the fatigue of the flux and the trace. To move forward, perhaps we need to go back, for, as Tomlins suggests,

[w]here historicism dedifferentiates law by deriving its meaning from its context (collapsing law into context), the objective here is to determine how law emerges in material practices that construct its categorical differentiation (which is as a practical matter observable). *We can think of all this as a turn away from post-structural historicism, back toward a structuralist account of law.*<sup>104</sup>

It is absurd to imagine that structuralist legal history is some kind of methodological panacea. On its own very stylized terms, it cannot be. But it does hold promise and the possibility of making headway in areas yet to be explored. Contemporary legal thought, perhaps, is among them.

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Legal Histories.” We can identify the problem, but we are still so enmeshed within it that we cannot yet see our way out.

*Id.*

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

104. Christopher Tomlins, *The Presence and Absence of Legal Mind: A Comment on Duncan Kennedy's Three Globalizations*, 78 LAW & CONTEMP. PROBS., nos. 1–2, 2015 at 1.