Foreword

"Law As . . .": Theory and Method in Legal History

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In convening the "'Law As . . .': Theory and Method in Legal History" symposium, Christopher Tomlins and Catherine Fisk invited new work on the theory of legal history and on the method by which legal historians do their work. A number of scholars from a variety of disciplines, not all of them historians or lawyers, were invited to offer their thoughts about reorienting legal history generally, and sociolegal history in particular, away from the long-dominant framework of "law and society" and toward a new framework that does not depend on a binary, or a conjunction of two distinct fields imagined as outside of each other. The conveners posed the idea of legal history as being the study of "law as . . ." about which we shall say more below. As is customary, papers were written and circulated. Over two days in Irvine in April 2010, we gathered to discuss sixteen papers divided into four panels. The exchange of ideas was facilitated by four discussants—John Comaroff, Robert Gordon, Morton Horwitz, and Christopher Tomlins—and four moderators—Catherine Fisk, Risa Goluboff, Ariela Gross, and Hendrik Hartog. Faculty, graduate students, and law students from UC Irvine and other universities also participated in the conversation. Thus, the symposium as it appears to you in text comprises not only the paper authors' ideas, but also, through this Foreword and in the Afterword by Comaroff and

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Tomlins, some of the ideas suggested by moderators and discussants, including many people in the audience.[1] The division of labor between article authors, on the one hand, and moderators and discussants, on the other, reflects an effort to draw together some of the most renowned legal history scholars in the United States over the last thirty years with those who are newer to the field, are less well known to legal historians, or produce work that suggests particularly interesting departures from the familiar terrain of legal history in matters of either theory or method.

In what follows, we explain the "law as . . ." concept of the symposium and introduce the papers by suggesting various ways in which they answered the call to contemplate legal history from the perspective of "law as . . . ." We identify the theoretical and methodological commonalities among the papers and suggest five distinct themes present in their answers to the symposium's call.

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Legal historians, as well as scholars of anthropology, sociology, politics, philosophy, and other fields who study law and the past, have long taken their intellectual cues from the problematic of the "law and" or "law &" theory. "Law and" was first grounded on Roscoe Pound's turn-of-the-twentieth-century distinction between law "on the books" and law "in action" as well as Oliver Wendell Holmes Jr.'s statement (following the famous aphorism: "[t]he life of the law has not been logic: it has been experience") that "[t]he law embodies the story of a nation's development through many centuries . . . ."[2] The "law and" idea was enlivened and extended by Legal Realism in the 1920s and 1930s, and given depth by the research of the law and society movement that began in the 1960s and continues today. From its start, the "law and" theory has explained law through its relations to cognate but distinct domains of action—society, culture, politics, and economy. "Law and" scholarship has generally described, parsed, and theorized the relations among these domains of action. Legal historians use "and" as a reminder that one should study law not as distinct from all else, as entirely self-contained and self-generating, or as a "brooding omnipresence in the sky."[3] Thus, what may be a matter of rhetorical convenience becomes a crucial but largely unexamined ontological statement and cognitive habit. "Law and" scholarship perpetuates the idea that, even though law is situated in society, law is distinct from society and can, or must, be studied in relation to it.

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1. Only those whose names appear as authors should be faulted for their shortcomings; the ideas expressed here came from many sources.

2. O.W. HOLMES, JR. THE COMMON LAW 1 (1923).

3. S. Pac. Co. v. Jensen, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting) ("The common law is not a brooding omnipresence in the sky but the articulate voice of some sovereign or quasi sovereign that can be identified . . . .").

The "law and" theory identifies society as law's most important determinative context, and makes both law and society subject to empirical study.[4] There are many methods by which empirical claims may be made in "law and" scholarship. In that way, "law and" has been far more ecumenical and eclectic than many social science and humanities disciplines in deciding how one should conduct social research and interpret its results. This methodological catholicism may help account for its enduring appeal. In introducing the live symposium, Dirk Hartog confessed an inclination, or experience, that may have been shared by many: the desire to be a sociologist/historian/lawyer at one point, an anthropologist/historian/lawyer at another. The law and society framework allows for this kind of methodological wandering over the course of a career.

The core theory underlying "law and" is the predominance of causally functional and empirical accounts of law. The scholar's job is to examine how law arises out of activity in the social sphere and how, in turn, law reacts back upon and causes changes in that sphere. The scholar must also discover patterns and regularities in those interactions that would ideally allow causal generalizations. The theory is that law is a purposive or functional activity; people create law, or make use of law in a particular way for a reason, and the result of these activities, whether intended or not, is that law becomes what it becomes and society becomes what it becomes.

The "law and" framework has been a highly productive one for nearly a century, spurring humanities, social science, and law scholars to produce insightful, provocative, and canonical works on topics covering nearly the entire field of human endeavor. Under many different names and methodologies—including sociological jurisprudence, law and society, law and economics, and empirical legal studies—"law and" scholarship pervaded a wide range of academic disciplines, as well as the professional education and training of lawyers and the work of judges. The impact of "law and" can hardly be overstated.

The "law and" framework was as productive in legal history as in the rest of the academy, both in terms of its institutional impact and intellectual influence. As Steven Wilf[5] observes, legal historians became important members of faculties in many law schools and history departments and their work spilled over into sociology, anthropology, economics, critical theory, literature, and other fields. Methodological crises in many social science and humanities disciplines in the 1990s led many scholars to embrace history as a kind of salvation. The work of legal historians enriched jurisprudential scholarship as well, forcing theorists and philosophers of law to consider social context as a far more significant feature of law than the jurisprudence—even the historical jurisprudence—of the nineteenth

4. Some of the ideas expressed in these paragraphs have also been explored in recent years by Christopher Tomlins. *See* Christopher Tomlins & John Comaroff, *"Law As . . .": Theory and Practice in Legal History*, 1 U.C. IRVINE L. REV. 1039 (2011).

5. *See, e.g.*, Steven Wilf, *Law/Text/Past*, 1 U.C. IRVINE L. REV. 543 (2011).

century had allowed.

Beginning in the late 1970s, however, critical theory produced a trenchant critique of the functional and empirical account of law/society relations on which the "law and" framework rests. Theories of causal regularities in law/society relations were elusive and unstable; they tended to break down under critique into indeterminacy marked by complexity and contingency.

For the critics of law/society relations, it was fun to destabilize the widely accepted verities about the origins and function of law. It was fun to skewer the just-so stories that tended to dominate legal scholarship and still persist in so much law and economics work. Yet, scholars took the critique seriously and were forced to question both the theory underlying our work and the nitty-gritty of what we do on a daily basis. Can we make causal claims? What kind? Should we try? More broadly: What should we study? How much and what kind of study of the "social" is desirable or necessary? What is the "social" and how can we distinguish it from "law"? When legal historians go into the archive, what should we read and how should we interpret the papers we find there? Should we even be in the archive at all? At the most extreme, what is "history" and what is "law"? Or, as Norman Spaulding asks, musing on Hayden White's suggestion that Hegel posited that there could be no history without law, "why put history in relation to law at all?"[6] Does history—that is, the ability to represent reality as history—depend on the existence of a subject constituted in relation to or, more specifically, as resistance to a system of law? Or, as Ritu Birla says, perhaps legal history as critical practice must "confront the problem of the autonomous subject exercising intentioned agency."[7] Graduate students and junior scholars may be forgiven for wondering, if the existence of subjects exercising intentional agency is up for grabs, whether it is worth staying in graduate school or studying history at all. Regrettably, critical theory produced no replacement for the problematic "law and" theory it had undermined.

The "law and" theory survives, in part by default, and in part because of the capaciousness of the conjunctive metaphor. It has long allowed all manner of claims about the natures of law and history, and about the insights one might gain from studying law as part of other domains of human activity. The pragmatic usefulness of the conjunction papers over abiding doubts about the continuing intellectual coherence of the framework that encompasses so much sociolegal historical work. Careful writers know that the word "and" can hide all manner of sins of argumentation, vagueness, or ambiguity. Usually, an assumed shared cultural context gives meaning to the linking of two words by "and." For instance,

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6. Norman W. Spaulding, *The Historical Consciousness of the Resistant Subject*, 1 U.C. IRVINE L. REV. 677, 685 (2011); *see* HAYDEN WHITE, THE CONTENT OF THE FORM: NARRATIVE DISCOURSE AND HISTORICAL REPRESENTATION 12–14 (1987).

7. Ritu Birla, *Law as Economy: Convention, Corporation, Currency*, 1 U.C. IRVINE L. REV. 1015, 1036 (2011).

one familiar with Anglo-American culture knows what is meant when "toast" and "marmalade" are linked by "and" in the same sentence; others may not see the necessary connection between them. Thus, the linking of two words by "and" can seem implausible ("law and plastics") or controversial ("law and papal infallibility"), depending on the cultural context.

Aware of the difficulty of making claims about the relationship between law and society in the past or in the present, we still work away, trying to avoid making, or carefully hedging, claims about the relationship between law and whatever follows the ampersand. We say that the economy/society "shapes" law, or law "influences" the economy/society, or that law and the economy/society are "mutually constitutive." Legal historians have shown that all three propositions are surely true in some sense, but that precision and certainty about the exact nature of, reasons for, or processes by which the one "has an impact on" the other are elusive. Indeed, the propositions are sometimes so elusive as to make one wonder whether anything can, or should, be said about the causal relationship between "law" (whatever that means) and "society" (whatever that means). If one is to abjure making any kind of causal claims at all, and to forswear the use of certain words and phrases ("caused," "influenced," "had an impact on," "led to," "resulted in," etc.), one needs a new perspective on the enterprise. To the extent that history generally, and legal history in particular, invites or demands clear and verifiable claims about causal relationships between this and that (for example, that the creation of a right of landowners to divert water from a stream was motivated by a particular vision of the benefits of economic development,[8] and led to a particular set of outcomes) a prodigious amount of work by a generation of scholars has made us aware that this approach to legal history, termed "evolutionary functionalism,"[9] has serious conceptual limitations. These limitations were pointed out many times over the last twenty-five years, and yet legal historians still work away at writing about the past, even in the absence of a grand theory about why or how one should go about it. Of course, it is perfectly possible, and indeed very common, to write first-rate history uninformed by a grand theory. But if we want to pause now and again to think about our practice, we can spare time for a little theorizing about relationships between law and whatever follows the ampersand.

The papers in this volume responded to an invitation to consider legal history through a lens other than that provided by the "law and society" or "law and social history" frameworks. Authors were invited to try dispensing with theory built from the conjunctive metaphors of "law and," and instead reach for different metaphors. Instead of parsing relations between distinct domains of activity,

8. *See* MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780–1860 34–53 (1977).

9. *See* Robert W. Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57, 59 (1984).

between law and what lies "outside" of it, the objective of historical research about law might be to imagine them as the same domain: "*law as* . . . ." The conveners deliberately extended the invitation not only to scholars of law and history, but also to those whose primary intellectual or disciplinary home lies in politics, theory, rhetoric, and anthropology. Each of these fields has experienced its own historical turn in the last generation, and each has had a lively and penetrating discourse about law that produced ideas and works that are influential to historians and to lawyers.

The invitation was answered in many richly imaginative ways. The articles in this symposium conceptualize law variously as text, peace, politics, silence, claims, justice, consciousness, resistance and that which is resisted, drama, tragedy, enchantment, sacred ritual, spectacle, allegory, war, empire, the Crown, money, economy, and more. Law is imagined *as* these things, and, importantly, as antithesis. The wealth of possibilities and the subtleties in the way that law is imagined in these pages and, we suspect, can be imagined by others, were among the greatest surprises at the symposium and remain among the greatest joys of reading the papers in this collection. That wealth of ideas, with its promise of generating more ideas in the future, explains the conveners' insistence on the ellipses in the symposium title: "Law As . . . ." The ellipses began as a hopeful invitation to consider what law is if it is not half of a conjunction. The conveners had no idea what might follow "law as . . . ." Now that we know what these symposium participants imagined law as on this occasion, we insist on the ellipses as a statement of principle: law can and should be imagined as many things, including but by no means limited to those suggested here. The invitation continues to you, the reader, to imagine "law as . . . ."

Inevitably, for most of us, whether we see ourselves as scholars of both history and law, scholars of history who happen to study law, scholars of law who happen to study history, scholars in some other discipline entirely who happen to study history and law, or scholars who are resistant to disciplinary categorization altogether, these disciplines will always be something of a binary. The cognitive map inscribed in the brain of those teaching or trained in most contemporary universities invites thinking about law and history separately and as needing a conjunction. We use many conjunctions besides the ubiquitous ampersand; the most common linguistic feature to link the concepts may be "inter-" (interdisciplinary, intertwining, interaction, intersection, interpretation). Whatever the terminology, perhaps the most common and most significant methodological and theoretical insight of these works, and the enduring insight of the "law and" framework, is the importance of *context* in the study of law. Without knowing about context we can know little about law, but we should be careful in how we think about the relationship between context and law. We should remember to think about context as law and law as context. Most broadly, "as . . ." reminds and invites creative consciousness about our work.

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One of the advantages of legal history as compared to, say, jurisprudence, is the flexibility it offers scholars to see the many faces of law rather than having to characterize the nature of law as being all one thing or all another. While the discussion that follows highlights five distinct themes that unite some papers and distinguish others, there are at least as many theoretical and methodological themes that unite them all. For the sake of brevity, we identify three. First, the big and, by now, tedious theoretical problem (Is law ideological superstructure or is it foundational? Is it something mostly determined by external social change or itself a cause?) that vexed so much of legal history for a generation has been dismissed, just as one might dismiss the debate over whether the chicken preceded the egg. Law constitutes society and society constitutes law; as Birla says, legal historians see law as *embedded* in all else about human existence[10] and, as many have noted, a great deal of human existence is embedded in law. Second, grand, unidirectional theories of causation or efforts to explain causation are absent. Legal history is not trying to be an empirical social science aiming to identify a series of variables and use the past as an experiment to prove that one or two variables produced particular effects. Teleological theories are out, but so are theories that insist all is irreducibly particular, contingent, and complex. Narrative arc matters and, thus, it is important to explain that somebody did something to, with, or for someone else, for identifiable reasons and with identifiable consequences. Contingency and complexity remain—one would have to be arrogant, deluded, or ignorant of a quarter century's critical theory to believe that any historical event worth writing about was indisputably the product of only one or two prior events or phenomena; however, the contingency and complexity have to be pushed aside enough to tell a story that a reasonably literate reader can follow. Third, all the papers bear the imprint of the critical theory and critical histories of the last generation. It seems fair to say that a critical stance, with occasional aspirations to the redemptive possibilities of critical history, seems to be the unanimous theoretical commitment of these scholars, even as their methodologies vary widely.

Ironically, given the universal embrace of the idea that history should be critical in any of the many ways in which legal histories can be critical, there was somewhat less critical engagement with the theories that underlie the canonical works than one might have expected from an invitation to rethink the theory and method of legal history. No one wanted to storm the citadel of Hurstian, Friedmanian, Horwitzian, Hartogian, or Tomlinsian history even as they have, by

10. Birla, *supra* note 7, at 1020.

their methods, chosen other paths for their work.[11] This is no surprise, given the respectfulness and modesty with which all the papers staked their theoretical and methodological claims. For good or ill, we have no manifesto for the next wave of sociolegal history. It is not that the conference conveners tried to suppress revolution; indeed, they almost tried to provoke it. While some of the most eminent and influential scholars were present, the conveners selected papers that gave precedence to some of those whom they thought might be characterized as "up-and-comers" or newer voices. With both the old guard and new wave present, some might have imagined a lively debate as the new generation tried to stake its intellectual claim by differentiating itself from the canonical works. When some of the presentations referred to old frameworks and intellectual exhaustion in the field, the conveners invited the hurling of a few bricks by suggesting, as noted above, that perhaps it was time for radical reorientation of the field of sociolegal history. Yet, what we have in the pages that follow are ruminations and invitations to future work, not a sharp break with the past or a call to arms for future scholars. During the conference someone even remarked, with a tinge of disappointment, that no one had tossed a grenade or tried to incite an uprising. For those, including the conveners, who may have arrived at the conference with the hopes of seeing an ancien régime toppled, the Revolution will have to wait.

The legal-historical methods reflected in these papers are ones that make a virtue of pluralism, bricolage, multiple perspectives, and diverse sources. The conventional sources of legal history—judicial opinions, statutes, treatises, lawyer's pleadings and other writings, and court records of trials and testimony—appear here alongside conventional sources of intellectual and social history—theorists' and historians' books and articles, news accounts, advertisements for rayon,[12] and John Reed's account of Pancho Villa in Mexico.[13] One need not choose between top-down and bottom-up approaches, or between (as one of us once put it and Kunal Parker echoes[14]) internal and external legal histories. The mix of theory and narrative differs from one paper to the next, as it should, but everyone is still reading texts and examining images from the past and trying to construct a story out of them.

What we do have, however, is a commitment to conscious and careful

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11. *See, e.g.*, LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW (1973); HENDRIK HARTOG, MAN AND WIFE IN AMERICA (2000); HORWITZ, *supra* note 8; JAMES WILLARD HURST, LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH-CENTURY UNITED STATES (1956); CHRISTOPHER L. TOMLINS, LAW, LABOR AND IDEOLOGY IN THE EARLY AMERICAN REPUBLIC (1993).

12. Barbara Young Welke, *Owning Hazard, A Tragedy*, 1 U.C. IRVINE L. REV. 693, 696–97 (2011).

13. John Fabian Witt, *The Dismal History of the Laws of War*, 1 U.C. IRVINE L. REV. 895 (2011) (citing JOHN REED, INSURGENT MEXICO 142 (1914)).

14. Kunal M. Parker, *Law "In" and "As" History: The Common Law in the American Polity, 1790–1900*, 1 U.C. IRVINE L. REV. 587 (2011).

scrutiny of the past. We have the joys of our practice. Archives are often fun, yet when we emerge from them, as Hartog said at the conference, we find ourselves living in historiographic time in which we struggle against past interpretations or against the absence of interpretations, and we feel the anxiety of influence and the fear of too little influence. In each of these papers we have an author bringing awareness to the why and how of studying the law's past.

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In the remaining pages of this Foreword, we weave together the symposium articles by identifying five different conceptions of the nature of law. The articles appear in an order that is intended to highlight the claims they make about what the authors see "law as . . . ."

"Law as . . ." the Language of Social Relations

Several of the papers advocate the importance of a quality of law that emphasizes its communicative aspect. Communication, of course, presupposes social relations and law is the medium through which people communicate with each other about social order. We have texts (Wilf), speech acts (Constable), local social relations conceptualized as "the peace" (Edwards), jurisprudential theories of positive law that "transform law into a product of science" in the sense of reason (Berkowitz), and law as irreducibly both and neither politics in history (Parker). All of these treat law as a particular and particularly indefinable form of human engagement with the others.

Wilf's article appears first in the symposium because it most squarely addresses the crucial and obvious question of theory and method: legal history is, in the most basic sense, the records we study (most of which are texts) and what we write about them (since most legal history scholarship is delivered in the form of a text). Except for relatively recent history, which can be studied through oral exchange or through watching films or listening to recordings, and except for those circumstances in which legal history requires study of objects (on this Goodrich's paper has interesting things to say), the method of legal history is to read texts. Wilf reminds us that legal historians tend to fetishize texts and, riffing on Derrida,[15] suggests that a variant of archive fever, which Wilf calls *mal de texte*, may be an occupational hazard.[16] What distinguishes sociolegal history from the (oft-derided) form of legal history that consists of reading *only* cases and statutes, is its eclecticism about what kinds of texts should be read and, more importantly,

15. JACQUES DERRIDA, ARCHIVE FEVER: A FREUDIAN IMPRESSION 91 (Eric Prenowitz trans., 1996).

16. Wilf, *supra* note 5, at 549.