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## Legal History and Legal Scholarship

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# LEGAL HISTORY AND LEGAL SCHOLARSHIP

STUART BANNER\*

I wish to suggest that the legal history written today is similar in one important respect to today's most highly esteemed forms of conventional legal scholarship, and that this similarity is paradoxically the reason for the familiar gulf between the two. By conventional legal scholarship, I mean work appearing in law reviews that falls comfortably within the disciplinary conventions of academic law, work that does not purport to straddle the boundary between law and some other academic discipline. As I will make clear below, much of this work is not conventional in any other sense. My comparison of this sort of legal scholarship with legal history is not intended to disparage either mode of writing, or to imply that the gulf between them ought to be bridged. I aim only to describe a seldom-noticed by-product of the disciplinary self-conceptions of academic law and history, and to provide an explanation for it.

It has often been argued that history can destabilize both legal practice and the academic style, often considered a bit old-fashioned today, that resembles practice most closely. The dominant mode of argument in both genres asserts a simple continuity with the past, in the form of an appeal to the authority of texts written by people whose words and whose concerns did not differ significantly from our own. History, or at least history written according to the conventions of late twentieth century professional historians, with an emphasis on the ways in which the past differed from the present—history as an account of the pastness of the past, as the standard expression goes—enormously complicates the task of legal argument. If the texts that constitute today's legal authority were written by people who used words differently from the way we use them today, who thought differently than the way we think today, and who were themselves no less divided than people today, the past no longer speaks with a single authoritative voice. It can no longer serve as a safe harbor, as a source of answers to the questions that are contentious today, once one discovers that the questions were not really the same yesterday, and the answers were given in a form that requires the suppression of dissenting views and even then substantial translation before yielding current meaning. All this is familiar ground.<sup>1</sup>

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1. If any one person is responsible, it's Robert Gordon, particularly in Robert W. Gordon, *The Past as Authority and as Social Critic: Stabilizing and Destabilizing Functions of History in Legal Argument*, in *THE HISTORIC TURN IN THE HUMAN SCIENCES* 339-78 (Terrence J. McDonald ed.,

Less noticed has been the relationship between this style of history and the most highly esteemed forms of today's conventional legal scholarship, which in one crucial respect don't resemble legal practice. Most of what currently appears in the top law reviews is not interdisciplinary to any meaningful extent, but it includes more than old-style precedent-based doctrinal arguments. This sort of scholarship, unlike legal practice, asserts a radical *break* with the past.

In one version, the state of the world has changed in some major respect requiring a corresponding change in the law, the details of which are then provided by the author. In another version, the law itself has been subtly changing in ways not yet fully recognized by actors within the legal system. The author, the first to identify the change, then brings the legal community's beliefs about the law into line with the law itself. In a third version (which may also be thought of as an expanded version of the first or second), a set of changes either in the world or in the law requires a reconceptualization of an entire field of law, a new paradigm that better explains decision-makers' pattern of behavior and better guides future decisions.

These forms of writing are explicitly normative, and are explicitly premised on the belief that existing legal authorities, or existing interpretations of those authorities, have become inadequate. If legal argument emphasizes tradition, legal scholarship has come to prize novelty. A successful legal argument stresses how today's situation fits comfortably within the framework provided by the past; a successful law review article stresses the opposite. Few legal academic careers in the last two decades have been built upon arguing that the law is just fine and ought not to be changed.

The disciplinary self-conceptions of academic law and academic history thus both emphasize the difference between the past and the present. It is almost certainly not coincidental that both also serve to legitimate the professional identity, and simple existence, of both academic communities. In one direction, the more the past differs from the present, the more a would-be historian needs years of specialized training to grasp it. If the past was just like the present, anyone in the present would be equally well-equipped to write history. In the other direction, the more the present differs

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1996), and Robert W. Gordon, *Historicism in Legal Scholarship*, 90 YALE L.J. 1017 (1981), and to a lesser extent Robert W. Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57 (1984), although these articles are of course about much more. On the most practically significant aspect of this question, the difficulty courts have had in using history, see CHARLES A. MILLER, *THE SUPREME COURT AND THE USES OF HISTORY* (Simon & Schuster, 1972) (1969); John Phillip Reid, *Law and History*, 27 LOY. L.A. L. REV. 193 (1993); Alfred H. Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 SUP. CT. REV. 119.

from the past, the greater the need for a class of legal scholars, poised midway between the university and the profession, to propose changes in the law. If the present was just like the past, there would be far less need to look critically at the law and think of how it might be improved.

If the pastness of the past is destabilizing to legal practice, it should be quite comforting to this kind of legal scholarship. The message that the past is not a source of answers, that our disputes today cannot sensibly be resolved with reference to the past, is exactly the point that serves as the fundamental tacit assumption underlying legal scholarship. This cozy relationship has been reflected to some degree in law reviews over the past decade or so. In the areas of law that have probably changed the most since the nineteenth century, race and gender relations, law professor-historians (no pejorative term—I am one too) have been at work. The law of slavery, for instance, looms larger in the legal academic community than it has at any time since slavery existed.<sup>2</sup> The legal system's treatment of women in the nineteenth century has likewise received considerable attention in law reviews.<sup>3</sup> One obvious implication of this work taken as a whole is that we ought not to look to the past for authority. If attitudes toward race and gender relations among lawmakers have changed so much, for instance, the original intent of the drafters and ratifiers of the Fourteenth Amendment becomes a much less attractive source for formulating current Equal Protection doctrine.

The turn toward history in recent constitutional theorizing provides another example of the congruence between academic law and history in their understanding of the essential difference between past and present.<sup>4</sup> Most of this scholarship emphasizes change between some point in the past and the present, whether to assert that conditions have changed enough to vitiate a simple originalism,<sup>5</sup> or to situate the Constitution within a context of thought manifestly different from our own,<sup>6</sup> or—with the greatest fanfare—

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2. See, e.g., Symposium, *Bondage, Freedom & the Constitution: The New Slavery Scholarship and its Impact on Law and Legal Historiography, Part I*, 17 CARDOZO L. REV. 1685 (1996); Symposium, *Bondage, Freedom & the Constitution: The New Slavery Scholarship and its Impact on Law and Legal Historiography, Part II*, 18 CARDOZO L. REV. 263 (1996); Symposium, *The Law of Slavery*, 68 CHI.-KENT L. REV. 1009 (1993).

3. See, e.g., Jane E. Larson, "Even a Worm Will Turn at Last": Rape Reform in Late Nineteenth-Century America, 9 YALE J.L. & HUMAN. 1 (1997); Reva B. Siegel, *Home as Work: The First Woman's Rights Claims Concerning Wives' Household Labor, 1850-1880*, 103 YALE L.J. 1073 (1994).

4. See Jack N. Rakove, *Fidelity Through History (or To It)*, 65 FORDHAM L. REV. 1587 (1997); Martin S. Flaherty, *History "Lite" in Modern American Constitutionalism*, 95 COLUM. L. REV. 523 (1995); William E. Nelson, *History and Neutrality in Constitutional Adjudication*, 72 VA. L. REV. 1237 (1986).

5. See, e.g., BRUCE A. ACKERMAN, *WE THE PEOPLE* (1991).

6. See, e.g., Michael Kent Curtis, *The 1837 Killing of Elijah Lovejoy by an Anti-Abolition Mob:*

to recapture a putative republicanism we have lost.<sup>7</sup> The point again is that the past is a foreign country (although in constitutional theory, unlike in the modes of legal scholarship discussed in the previous paragraph, it is often a country these writers hope we will revisit). Constitutional theory has been able to embrace a particular kind of history, the history of the complexes of thought lying behind the words used in clauses of the Constitution, because that history feeds directly into the originalism that has been on the ascendant since the early 1980s. (To put it more starkly, if originalism was *not* an accepted mode of constitutional interpretation, constitutional theory could never have turned to history. History would loom no larger in constitutional law than in, say, the law of torts.) When history, as written in the style of historians, has been put in the service of constitutional interpretation in this manner, the results sometimes have been spectacularly successful in debunking assumptions that were once standard among constitutional lawyers. Recent work on the context of the Fifth Amendment's Takings Clause, for instance, has turned up an eighteenth century state quite aggressive in regulating land use, to the consternation of such regulation's opponents.<sup>8</sup>

With the exception of constitutional theory, however, there is a clear limit to the extent to which this congruence—the similarity in the way academic law and history treat the relationship between present and past—is going to generate or even influence conventional legal scholarship. If the lesson is that the past offers no guidance as to what the law should be today, and if the primary purpose of legal scholarship is to generate normative legal arguments, the ultimate outcome will be to assure law professors that there is no need to consult history before they write. History becomes neither destabilizing nor comforting. It simply disappears from view. Where legal practice, and old-style doctrinal scholarship, necessarily entail some acceptance of the past, and thus inevitably involve the practitioner in the enterprise of history, the same is not true of the newer legal scholarship. History becomes a bit like painting, or gardening—it's nice that people do it,

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*Free Speech, Mobs, Republican Government, and the Privileges of American Citizens*, 44 UCLA L. REV. 1109 (1997); Akhil Reed Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 COLUM. L. REV. 457 (1994).

7. For commentary on the episode, see LAURA KALMAN, *THE STRANGE CAREER OF LEGAL LIBERALISM* (1996); G. Edward White, *Reflections on the "Republican Revival": Interdisciplinary Scholarship in the Legal Academy*, 6 YALE J.L. & HUMAN. 1 (1994).

8. See, e.g., William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782 (1995); John F. Hart, *Colonial Land Use Law and Its Significance for Modern Takings Doctrine*, 109 HARV. L. REV. 1252 (1996). For a striking bit of consternation, see *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1028 n.15 (1992).

it makes life a little fuller to have it about, but when the time comes to do serious work, one ought not to have it too much on one's mind. That antebellum criminal defendants were not permitted to testify under oath, for instance, is a fact that may be interesting to someone working within the conventional boundaries of criminal procedure, but it is not a fact he is likely to find useful. Whatever form of criminal procedure he prefers, he will prefer it for reasons having nothing to do with the procedure of the past. If his preferred form of procedure is similar to antebellum procedure, he can advocate a return to it; if his is different, he can dismiss antebellum procedure as a relic of a less civilized age. Either way, history enters only after the real work has already been done.

Law in this respect differs fundamentally from some of the other academic disciplines that have also recently rediscovered an affinity with history. When economists or sociologists turn to history, they look to it as a source of data against which to test non-temporally-bound theories. An economist trying to understand why some countries get richer while others stay poor, for instance, has a record of the past performance of various economies that can support or falsify any particular theory. If the theory is, say, that a country grows wealthy by increasing its exports, one can look to historical growth rates and historical export statistics and see how they match up. A sociologist trying to comprehend the formation of class structures, for example, has a similar historical record to examine. In these examples, the past is a warehouse of empirical data—often filtered through the minds of historians and other data-compilers, to be sure, but no less unmediated than most data about the present—that can help construct or falsify a theory with explanatory power in the present.

Our interdisciplinary nomenclature fails to capture this difference. Legal history is a single enterprise—the history of legal institutions, practices, and so on—while some of the other interdisciplinary histories each encompass two very different sorts of enterprises. Economic history can be understood as parallel to legal history, as the history of economic institutions and practices. But it can also be understood as something different, the application of modern-day economic *techniques* or *theory* to historical data.<sup>9</sup> A legal history of nineteenth century American families, for instance, would necessarily be a history of the law governing families, and would take as its building blocks the beliefs about the law that were actually expressed by people living in the nineteenth century. An economic history of nineteenth

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9. See Donald N. McCloskey, *Does the Past Have Useful Economics?*, 14 J. ECON. LITERATURE 434 (1976).

century American families could be written along the same lines, by considering the nineteenth century understanding of family income and expenses. But one could also easily imagine a different sort of economic history, one that omitted any discussion of what people in the nineteenth century believed, and that was instead concerned with what people in the nineteenth century *would have* believed had they been late twentieth century economists with a technical apparatus capable of generating more insight than was available at the time. The same double meaning resides in other interdisciplinary history names. Historical sociology can be the history of whatever phenomena one wishes to include within the realm of sociology, but it can also be the study of all past phenomena by the light of current sociological theory. Legal history, like literary history or art history, lacks this second sense. It is never the study of all past phenomena with the aid of current legal theory or legal techniques. There is no such theory. There are no such techniques.

Legal history is singular because academic law, unlike the disciplines whose histories are double, is generally not concerned with producing knowledge. (I should re-emphasize here that I mean to discuss only highbrow conventional legal scholarship. Interdisciplinary scholarship often differs in this respect.) Where other disciplines tend to be organized efforts to understand the world, by formulating testable hypotheses about the world, conventional legal scholarship is an effort to generate plausible normative propositions about what the world should be like. This sort of enterprise simply cannot give rise to any methodology useful for analyzing the past. If it is capable of producing any theory at all, that theory will be normative rather than explanatory. But a normative theory can neither be tested against historical data nor deployed to gain insight about the past. To the extent that law professors want to understand rather than prescribe, they will always have to borrow their theoretical apparatus from the knowledge-producing disciplines. This is why the borrowing has always been into rather than out of law. Law has nothing to lend.

As long as legal history and legal scholarship are written as they are, the former is unlikely to have much of an influence on the latter. The prime effect of legal history on legal scholarship will continue to be the familiar one of demonstrating the contingency of legal concepts and categories tacitly presumed to be ahistorical. Histories of the construction of racial categories and gender roles, for instance, may open some eyes. By now, however, this function may be largely played out, as almost everyone within the academy these days, of whatever political stripe, already sees the social construction of all sorts of roles, categories, and ideas. One senses supporters of status quos beginning to argue: well yes, we see that our categories are contingent, but of

course that means so are yours, and we still like ours better.

This gulf between legal history and highbrow conventional legal scholarship is not a necessary feature of either enterprise. Future changes in either legal history or legal scholarship could bring the two closer together. The kind of legal history that would have the greatest impact on legal scholarship as currently practiced would, ironically, be history that emphasizes the *presentness* of the past. With due recognition of the inevitable differences between past and present, there are always similarities as well. Many of the issues faced by lawmakers haven't changed all that much over the years, and much of what is argued today was argued in identical terms by people with identical motives in the past. History conceived this way has often been written quite poorly, often by lawyers, but there is no reason why it could not be written well. This sort of history might produce insights genuinely useful in constructing normative arguments. The stock of arguments for and against capital punishment available to lawmakers in the early nineteenth century, for instance, is by and large the same as that put to use today, but there are some that have dropped out over the past two centuries, and there are others that have been added. A comparison of the two time periods could provide advocates on either side with variations long since forgotten, or with reasons for abandoning arguments currently in use.<sup>10</sup> Awareness of the similarities between arguments made in the past and the present should even destabilize legal scholarship to the extent that it forces current writers to realize, when appropriate, the banality of their own work. A person who discovers that his great new thought has already been thought by others, often more clearly and with less jargon, ought to become a little more humble. At the very least, one might see fewer annoying claims of novelty upon each reinvention of the wheel.

This sort of history, emphasizing the similarity of past and present, is written, of course, and when it is done well it seems to capture the imagination of readers, including both historians and law professors, precisely because it explicitly connects to issues of current concern. Much of the work of E.P. Thompson, for instance, falls within this category.<sup>11</sup> Good examples within American legal history are the local Commonwealth studies of the 1940s, and William Novak's recent retelling of the same story on a national scale, books that demonstrate the pervasiveness of government

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10. See RICHARD J. EVANS, *RITUALS OF RETRIBUTION: CAPITAL PUNISHMENT IN GERMANY 1600-1987* (1996); V.A.C. GATRELL, *THE HANGING TREE: EXECUTION AND THE ENGLISH PEOPLE 1770-1868* (1994).

11. See, e.g., E.P. THOMPSON, *THE MAKING OF THE ENGLISH WORKING CLASS* (Random House 1966) (1963).

regulation in the nineteenth century, with the avowed aim of facilitating regulation in the present by demolishing the myth that pervasive regulation is a phenomenon recently engrafted onto a tradition of *laissez-faire*.<sup>12</sup> But such is not the mainstream.

One could also imagine change in the other direction, one emphasizing the pastness of the present, a Burkean reorientation of legal academic culture in which tradition is valued for its own sake, as the repository of the collected wisdom of the past. (This was of course the reigning mode of legal scholarship for the several centuries before the twentieth, and it is still the dominant style of legal practice, at least in terms of the rhetoric used by courts and lawyers trying to influence them.) For such a culture, the close examination of the details of the past would be enormously valuable.

But neither of these changes is likely to happen, at least not soon. Legal historians and law professors have more pressing concerns than gaining one another as an audience. For the legal historians, every law professor gained most likely represents at least one historian lost; for the law professors, every historian gained surely represents several fellow law professors lost. Each change, moreover, would undermine part of the justification for the existence of its respective discipline. Law professors and historians would become less easily distinguishable from lawyers. The sharp separation of past from present serves us too well.

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12. See OSCAR HANDLIN & MARY FLUG HANDLIN, *COMMONWEALTH: A STUDY OF THE ROLE OF GOVERNMENT IN THE AMERICAN ECONOMY: MASSACHUSETTS, 1774-1861* (1947); LOUIS HARTZ, *ECONOMIC POLICY AND DEMOCRATIC THOUGHT: PENNSYLVANIA, 1776-1860* (1948); JAMES NEAL PRIMM, *ECONOMIC POLICY IN THE DEVELOPMENT OF A WESTERN STATE: MISSOURI, 1820-1860* (1954); WILLIAM J. NOVAK, *THE PEOPLE'S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA* (1996).