Foreword: The Arrival of Critical Historicism

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This Symposium registers a significant event: the recognition of "critical history" as a category of intellectual practice relevant to law, an accredited envoy from Other Genres to the City of Law.

Why is this news? After all, lawyers have recognized history for centuries and put it to work in argument, justification, and rationalization. Most of the ways in which lawyers use history are, however, not "critical" in any plausible sense of the term. For lawyers the past is primarily a source of authority—if we interpret it correctly, it will tell us how to conduct ourselves now. History is not only a source of authority but of legitimacy: It reassures us that what we do now flows continuously out of our past, out of precedents, traditions, fidelity to statutory and Constitutional texts and meanings.

In drawing upon historical experience for authority and legitimacy, lawyers address the past in both static and dynamic modes. In the static modes, they treat the past as existing on a timeless horizontal plane with the present: Past texts and practices are to be read exactly in their times as they are in ours, or exactly in our times as in theirs. In the dynamic modes, lawyers recognize historical change but establish connections between past and present through stories that integrate them into a reassuring narrative of continuity. In American legal practice, the dynamic modes usually draw upon narratives of recovery, progress ("Whig history"), or teleology. A narrative of recovery, often accompanied by a jeremiad lamenting recent lapses and corruptions, is one in which the legal system is seen as ready to be guided to recover the purity of its original principles. By contrast, a narrative of progress is one in which the legal system is seen as obeying a long-term process of historical transformation—e.g. from feudalism to liberal capitalism, status to contract, subordination to equality. Finally, a teleological narrative is one which shows legal forms working themselves pure over time to reveal their core of immanent principle.

Some arguments within these conventional legal modes are necessarily "critical" arguments in the sense that they seek to destroy the authority and legitimacy of long-standing legal practices, precedents or interpretations. Think, for example, of the American Revolutionary lawyers' sweeping denunciation of the great bulk of English legal achievement as a corruption of the

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ancient Saxon Constitution by the "canon and feudal law."[1] For that matter, think of present-day conservative originalists' condemnation of practically all Constitutional case law from John Marshall onward as a judicial usurpation of the powers of majorities.[2] Less dramatically, lawyers speak critically whenever they argue that some long-standing legal practice, precedent or interpretation should no longer be followed because changed circumstances or values have rendered it obsolete.[3] But such critical moves are usually made within the safety of a larger discourse that reassures us that we are part of a process of historical becoming that preserves continuity with the good parts of the past while purging or shedding the bad parts.

So what then is the "critical history," whose arrival in the legal field this Symposium celebrates? I would say it is any approach to the past that produces disturbances in the field—that inverts or scrambles familiar narratives of stasis, recovery or progress; anything that advances rival perspectives (such of those as the losers rather than the winners) for surveying developments, or that posits 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.

Exposure to critical historicism is like living in another country. Anyone who lives in a foreign culture can always find ways of doing so that confirm and reinforce preformed beliefs and identities. In Bangkok, you can stay at the Hilton and eat only at McDonalds. You can look in the foreign culture for all the signs that seem to make it identical to one's own—finding "self-interested rational calculation," or "racism and patriarchy" everywhere. Or you can look instead for the differences that identify its otherness, the "pre-modern," barbaric or alien qualities that your own culture has defined itself in opposition to, or alternatively has claimed to have safely buried in its discarded past. But after longer exposure such strategies of self-confirmation tend to wear thin: seeing that people take utterly for granted things you find exotic, starts to unsettle your idea of what it is to be a real, human, ordinary person, and gets you thinking about contingency and constructed identity—all the influences that must have gone into the making of the culture that made you.

Virtually all history as practiced by modern historians turns out to be critical to some degree if introduced into legal discourse, because its purposes and working assumptions so often conflict with those of lawyers. The essays in this Symposium, especially those of William Fisher and Jack Rakove, point out some of these conflicts.[4] Lawyers are monists, historians are pluralists—i.e.,

1. *See, e.g.*, 1 John Adams, A Dissertation on the Canon and the Feudal Law, Nos. 1-4, *in* PAPERS OF JOHN ADAMS 111, 111-28 (Robert J. Taylor, Mary-Jo Kline & Gregg L. Lint eds., 1977).

2. *See, e.g.*, ROBERT BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 20-28 (1990).

3. *See, e.g.*, Brown v. Board of Educ., 347 U.S. 483, 492-93 (1954) (overturning *Plessy v. Ferguson*'s interpretation of Fourteenth Amendment that allowed states to establish "separate but equal" education for the black and white races obsolete because significance of schooling had changed).

4. *See generally* William W. Fisher III, *Texts and Contexts: The Application of American Legal History of the Methodologies or Intellectual History*, 49 STAN. L. REV. 1065 (1997); Jack N. Rakove, *Origins of Judicial Review: A Plea for a New Subject*, 49 STAN. L. REV. 1031 (1997).

lawyers want to recover a single authoritative meaning from a past act or practice, while historians look for plural, contested, or ambiguous meanings. Lawyers are overtly presentist: They want to bring past practices into the present to serve present purposes, whereas historians regard naked presentism as a sin. "What the historian is interested in is a dead past; a past unlike the present. The *differentia* of the historical past lies in its very disparity from what is contemporary."[5]

Historians committed to contextualizing past practices will, as Fisher says, emphasize all the ways in which their meaning depends upon the material conditions, symbolic systems and tacit assumptions in which they were embedded. For example: "Liberty" in the eighteenth century presupposed a world in which slaves or indentured or household servants and women would perform the menial tasks that freed gentleman for participation in politics or the pursuit of new economic opportunities; a liberty of the few premised on the subordination of the many. At the same time, "liberty" presupposed more, rather than less, equality than the present, because of the roughly equal distribution of property among the politically enfranchised. This republican equality prevented corruption of the weak by the domination of the strong. Finally, "liberty" in that time had no connotations of what was later to come, an abstract generalized freedom to do as one wills. Instead, "liberty" was distinguished from "license"; liberty was both subject to and constituted by legal restraints.[6]

Lawyers are concerned to find continuities between past and present, while historians employing what Fisher describes as "contextual" or "structuralist" approaches will emphasize discontinuous breaks, great epistemic shifts in the ways in which social actors construct their worlds.[7]

Lawyers have a standard and at least initially quite plausible response to critics who oppose contextualized, pluralized, discontinuous interpretations of past texts to the lawyers' presentist interpretations: We lawyers are driven by different purposes than historians; our job is to bring the past into the present and to turn it to present purposes; this task is no less important and legitimate than the historian's task, and it necessarily employs different criteria and methods. A particularly strong form of this argument has recently been made by John Reid, who is concerned to protect early-modern lawyers from historians' charges that they "invented" a "fictitious" or "mythic" ancient Saxon Constitution as the repository of English liberties.[8] Reid wants sharply to distinguish the lawyers' enterprises from those of historians, particularly modern histori-

5. MICHAEL OAKESHOTT, EXPERIENCE AND ITS MODES 106 (photo. reprint 1966) (1933).

6. On eighteenth-century "liberty," see generally EDMUND S. MORGAN, AMERICAN SLAVERY, AMERICAN FREEDOM: THE ORDEAL IN COLONIAL VIRGINIA 295-387 (1975); JOHN PHILLIP REID, THE CONCEPT OF LIBERTY IN THE AGE OF THE AMERICAN REVOLUTION (1988); GORDON WOOD, THE RADICALISM OF THE AMERICAN REVOLUTION (1992).

7. Fisher, *supra* note 4, at 1067-68 (defining the contextual and structuralist approaches).

8. John Phillip Reid, *The Jurisprudence of Liberty: The Ancient Constitution in the Legal Historiography of the Seventeenth and Eighteenth Centuries*, *in* THE ROOTS OF LIBERTY: MAGNA CARTA, ANCIENT CONSTITUTION, AND THE ANGLO-AMERICAN TRADITION OF RULE OF LAW 147, 158 (Ellis Sandoz ed., 1993).

ans; the lawyers, he says, were doing a different kind of history, "forensic" history for use in legal argument:

> The forensic historian . . . searches the past for material applicable to a current issue. The purpose of the advocate, unlike that of the historian, is to use the past for the elucidation of the present, to solve some contemporary problem or, most often, to carry an argument. It is the past put in the service of winning the case at bar.[9]

Of course at some level Reid's response must be right, or the past could never be invoked for practical use in contemporary political or legal debate; and it is almost impossible to imagine political or legal debate without its invocation. *Every* legal text is a historical artifact that must be brought into the present in order to be applied; every time it is applied it must be wrenched from its prior context and put to novel uses, often uses wholly unsuspected by its framers. Every important political or legal argument is an argument for either changing, preserving or recovering something in the past, which in turn relies on a narrative account of what has been and what has (or has not) changed and why. We often make arguments like this: "Once families stayed (did not stay) together and fathers took care (did not take care) of children; now as a result of the countercultural values promoted by courts, the media and new class intellectuals (social dislocations and consumerist ethics promoted by capitalism), family values have (have not) been undermined."

Lawyers find it easiest to invoke this response when their methods or criteria for drawing upon past texts or practices are sharply and formally different from those of other disciplines—like the English rule that lawyers interpreting statutes are to look only at the bare words of the text and to shun extrinsic evidence of context and intent such as legislative debates,[10] or the old "plain meaning" rule excluding evidence of contracting parties' words and acts outside the "four corners" of the written instrument to interpret the meaning of their agreements.[11] Lawyers working under such a formal regime can still argue about what the words meant, but as Fred Schauer points out, arguments merely about words take a very different form from context-dependent arguments about purposes or original intentions.[12] Problems arise the moment lawyers transgress such obviously artificial limits on their modes of inquiry, and start imitating or borrowing from more free-handed modes, such as those of historians: For example, if they start asking what the takings clause "really meant" to the generations that conceived of and argued about and framed and ratified it. At that moment, having expressly adopted the historian's purposes and methods, having blurred genres and created an overlap between fields, they leave open a port of entry to the subversive tendencies of critical history.

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9. *Id.* at 167.

10. *See* JOHN D. CALAMARI & JOSEPH M. PERILLO, THE LAW OF CONTRACTS 166-67 (3d ed. 1987).

11. This method still prevails in British Courts. *See* Charles Nutting, *The Relevance of Legislative Intention Established by Extrinsic Evidence*, *in* 2A SUTHERLAND STATUTORY CONSTRUCTION 689, 689 (5th ed. 1991).

12. *See* FREDERICK SCHAUER, PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND LIFE 218-21 (1991).

In this Symposium, we can see this process of subversion visibly at work in Jack Rakove's essay. Rakove modestly disclaims any critical intentions beyond those implied in the professional historian's commitment to scrutinize sources carefully and take a fresh look at received interpretations.[13] But his essay is potentially very unsettling to the ways in which lawyers habitually see their world. It opens by suggesting that *Marbury v. Madison*, the mythic point of origin for the power of judicial review of legislation, be put in its place as a trivial point on an extended line with larger landmarks coming well before it.[14] More important, Rakove's essay argues that, restored to its original context, federal judicial review is not centrally conceived of as a doctrine of separation of powers, but one of federalism: that judicial review (by state and federal courts) was a device adopted to secure federal supremacy over state action and was only adopted after Madison's preferred device of a Congressional veto had been voted down in the convention.[15] The issue posed by judicial review thus reconceived is not so much a "countermajoritarian difficulty" as modern Constitutional lawyers have seen it,[16] but one of determining which level of government to which the People had parceled out their sovereignty should prevail. Finally, Rakove destabilizes what the usual debates over judicial review take for granted and hold constant, the meaning of the most basic terms of the debate: "legislature" and "court," institutions he describes as undergoing rapid evolution. He asks how the judicial role had got to the point where the judiciary was a plausible candidate for an institutional control device, instead of just a presider over and ratifier of jury decisions.[17] The essay conveys a perspective that is found in all of Rakove's work, notably in his magisterial *Original Meanings*:[18] that legal texts are contingent, fragile, and ambiguous embodiments of momentary political compromises in a rapid flux of perceptions that shift with social actors' experiences and fortunes; that no sooner are words launched upon the world in legal form that they help to set in motion consequences that cause them to be reevaluated and reinterpreted.[19] Once we are presented with this fluid swirl of multiple, sharply contested and rapidly refigured meanings, the notion that we can pluck one faction's construct from a single instant in time, and pronounce it to be for all time, "The Original Meaning" is made to look completely absurd.

But it would be very misleading to leave the impression that the difference between conventional and critical legal histories is that orthodox lawyers invent continuities for present purposes, while critical historians make the past discontinuous by contextualizing it. For one thing, historians' practice is of course as

13. *See* Rakove, *supra* note 4, at 1031-34.

14. *See id.* at 1041.

15. *See id.* at 1046.

16. See Alexander Bickel's famous formulation, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 16-23 (1962).

17. *See* Rakove, *supra* note 4, at 1050-63.

18. JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION (1996).

19. *See generally id.*

present-minded in its own ways as that of lawyers and judges in theirs.[20] For another, more immediately germane to present purposes, orthodox lawyers are also committed, only more selectively, to establishing discontinuities as well. One of the main uses of history in legal argument is to relegate the bad parts of history, the parts we no longer want or need—the past of slavery and legalized subordination of women, for example—to a thoroughly dead past that is over and done with. In response to this use of history, a critical historicism reveals traces of such pasts continuing pervasively into the present. Such a response is Reva Siegel's article for this Symposium.[21] Siegel describes a kind of legal regime that aims at "preservation through transformation," a regime that discredits and consigns to the scrap-heap of history older justifications for status inequality, while inventing new ones.[22] At the end of the nineteenth century, courts that could no longer justify a husband's beating his wife or appropriating all the joint earnings of their marriage to himself as incidents of his rights of mastery over her, argued instead that the legal system could not intervene (to protect the wife) in the private domain of love and affection.[23] Courts deprived of the rationale for racial subordination that blacks were whites' natural inferiors, fashioned distinctions between "civil," "political," and "social" rights that left decisions to segregate the races in the social sphere (education, marriage, association in public places) to the states. In recent times, after the "social rights" rationale for apartheid has collapsed, the courts have begun to reason that the evil of race discrimination consists in the state's "discriminatory *purpose*"—a criterion that makes it hard for plaintiffs to challenge facially-neutral governmental and social practices that in actual effect help to perpetuate racial inequality, but (ironically) makes it easy to challenge affirmative-action measures.[24] As courts devise the new rationales, they invent fictional pedigrees for them in history and tradition by arguing, for example, that the evil of slavery and segregation lay not in their being systemic social practices that subordinated the black race, but in their purposely race-based classifications, violations of the norm of color-blindness. Siegel's essay in critical historicism demolishes these fictive continuities; but at the same time reveals deeper and more disturbing continuities—continuing practices of gender and racial subordination, justified by historically familiar and frequently resorted to modes of nominally reformist legal rhetoric, which justify the traces of the bad past by inventing new reasons for leaving them undisturbed. *Plessy v. Ferguson*[25] is not dead but lives on, as the doctrine of discriminatory purpose.

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20. Peter Novick provides dramatically concrete and detailed evidence for this truism by showing how current concerns have influenced the agenda and the interpretations of historians over the course of the last century. *See* PETER NOVICK, THAT NOBLE DREAM: THE "OBJECTIVITY" QUESTION AND THE AMERICAN HISTORICAL PROFESSION (1988).

21. *See* Reva Seigel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111 (1997).

22. *Id.* at 1113.

23. *See id.* at 1118.

24. *Id.* at 1130-31.

25. 163 U.S. 537 (1896).

The kind of challenge that Rakove's and Siegel's work exemplifies is multiplied and generalized in the marvelously informative and eye-opening essays of William Fisher and of Guyora Binder and Robert Weisberg, which together describe a rich cornucopia, a veritable Whole Earth Catalogue, of novel approaches to law that are critical in the ways I've been using the term. Most critical history bearing on law, as Fisher points out, employs the approach of contextualization.[26] But the authors point to growing bodies of critical work in other modes as well, among them structuralist, textualist and New Historicist forms of history and cultural criticism, and provide detailed illustrations of how they can be and have been applied to produce dramatic reinterpretations of phenomena in the legal field. What is common to many of these approaches is that they treat law—meaning not just legal texts but legal instruments, processes, rituals, interactions, discourses—as cultural artifacts, imaginative constructs, historically contingent and perpetually contested and renegotiated. In these modes law becomes "the means by which we continuously refashion society and one of the media in which we represent and critique what we have fashioned."[27] The insights of the work that these essays present (some of it the authors' own) are far too various and intricate for me to try to summarize here. Let me just say, Read these essays: You will not find anywhere else a more lucid and powerful account of what may well be the most exciting work currently being done on law.

26. *See* Fisher, *supra* note 4, at 1076.

27. Guyora Binder & Robert Weisberg, *Cultural Criticism of Law*, 49 STAN. L. REV. 1149, 1219 (1997).