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Causation, Legal History, and Legal Doctrine

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INTRODUCTION

To ask about the "opportunities for law's intellectual history" is, to my mind, to ask about the relationship between two disciplines, law and history. True, that interpretation is not compulsory since the conference organizers have wisely not specified what such opportunities should be *for*. So perhaps the field of legal intellectual history could serve as a guinea pig for some new method of bibliographical classification to replace the Dewey Decimal System. That would be an "opportunity" of sorts. Presumably, though, the aim is to stimulate thought and debate about how law's intellectual history may prove relevant to, and useful for thinking about, the kinds of questions with which scholars are currently concerned. And since the organizers and most of the participants in the conference are law professors, and since the conference itself took place in a law school and its proceedings are being published in a law review, I interpret the description of the conference to mean something like "opportunities for showing why the intellectual history of law is relevant to, or useful for, our thinking about law," where "law" is understood to refer not only to legal doctrine, but also more broadly to "legal practice" or "legal thought" or "legal theory" or, perhaps, "the kinds of things law professors care about and talk about."

With this assumption about the purpose of the conference in mind, I offer this Paper as a friendly criticism of what I perceive to be a trend in legal history. The trend to which I refer is legal historians' increasing reluctance to offer causal explanations of past events.[1] Such reluctance is

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1. *See* John Henry Schlegel, Commentary, *Philosophical Inquiry and Historical Practice*, 101 VA. L. REV. 1197, 1198 (2015) (observing that historians "once had causes, but causation has fallen a bit out of style"); Christopher Tomlins & John Comaroff, *"Law As . . .": Theory and Practice in Legal History*, 1 U.C.

understandable because the concept of "cause" is a notoriously elusive one. It is elusive both because the concept is used to refer to different kinds of relations between events or states of affairs and because, even if one is precise about which relation one means to pick out, it may be difficult to say with certainty of any two events or states of affairs that they in fact stand in such a relation to each other. One cannot, after all, see, feel, hear, or touch causes. Still, I worry that if legal historians give up any effort to offer causal explanations of legal rules, concepts, categories, theories, relations, distinctions, practices or understandings (let's just call these "legal practices or understandings"), they threaten to undermine one of the chief ways in which they (properly, in my view) have traditionally understood intellectual history to be relevant to law, namely as the basis for *critique* of current practice. My aim is thus to show why histories that try to remain agnostic as to the driving causal forces in their accounts are either insufficiently critical, insufficiently historical, or both.

Before doing so, however, let me add a little more flesh to my suggestion that legal historians are at risk of undermining their own ambitions. Consider an example drawn from a recent symposium on legal history, entitled *"Law As . . .": Theory and Method in Legal History*, which took place at U.C. Irvine in 2010.[2] In their Foreword to the symposium issue, Catherine Fisk and Robert Gordon explain that a common feature of the papers presented there is that the question of whether law is "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."[3] Efforts to "explain causation," the

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IRVINE L. REV. 1039, 1043 (2011) (describing a form of historical practice they label "complex accumulation," which is "postmodernist" and which "repudiates causal explanation" on the ground that "it eschews the idea that consensus can be established on a means of disciplining evidence").

2. Symposium, *"Law As . . .": Theory and Method in Legal History*, 1 U.C. IRVINE L. REV. 519 (2011).

3. Catherine L. Fisk & Robert W. Gordon, *Foreword: "Law As . . .": Theory and Method in Legal History*, 1 U.C. IRVINE L. REV. 519, 525 (2011). I should

authors observe, are mostly absent from the papers.[4] And yet, on the very same page, the authors remark that a "critical stance" seems to be "the unanimous theoretical commitment of these scholars."[5]

The question I mean to raise is this: how much critical bite can an historical account really have without making (inherently controversial) claims about which things caused which other things? The answer depends on how exactly history might be used to critique current legal practices or understandings. So let us take a look at a few such possible uses.

I. IMPEACHING ARGUMENTS

One very concrete form of historical critique is the use of history to undermine the precedential authority of a particular court decision by showing that the court that decided it was motivated by improper considerations, irrelevant to the issue at hand. I'll refer to such an argument as an "impeaching argument" because it makes a claim about what it takes to "impeach" a court precedent or (put another way) to erode its legal authority.[6] The claim is that when a court decides a case on the basis of such improper considerations, that fact undermines or impeaches its precedential status because it shows that the background assumption that justifies our practice of deferring to past court decisions as a general matter—namely, that past courts have applied the relevant legal principles in good faith—does not hold in a particular case. If historical evidence about the context in which the case was decided reveals that a particular court was motivated by something else entirely, then we no longer have good reason to treat its judgment as authoritative.

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perhaps note that Professor Gordon says in a footnote that his contribution to this Paper took the form of "a few editorial suggestions." *Id.* at 519 n.**.

4. *Id*. at 525.

5. *Id.*

6. I discuss this kind of argument at greater length in Charles L. Barzun, *Impeaching Precedent*, 80 U. CHI. L. REV. 1625 (2013).

Of course, any actual impeaching argument must make a controversial judgment about what such "proper considerations" include and exclude. Do they include, for instance, the social, political, or economic consequences of the decision? But right now we are concerned only with the kind of reasoning that impeaching arguments involve, and that reasoning is sound as long as there exist *some* factors that are properly relevant to a court's decision, and others that are not.[7]

An example may help illustrate the point. In the 1996 case of *Seminole Tribe of Florida v. Florida*, the Supreme Court considered whether the Eleventh Amendment prohibited Congress from authorizing federal courts to hear suits brought against a state by one of its own citizens.[8] In holding that the Amendment did bar Congress from abrogating state sovereign immunity in this way, the Court placed considerable weight on its 1890 decision, *Hans v. Louisiana*, which had offered an expansive interpretation of the Eleventh Amendment.[9] In dissent, Justice Souter argued, with two other justices joining him, that *Hans* should not be given precedential weight because the *Hans* Court only gave the interpretation of the Eleventh Amendment it did because it feared it could not enforce its judgments in the post-Reconstruction South.[10] Citing the work of historians, Justice Souter described the political circumstances in which *Hans* arose and concluded that "history explains, but does not honor, *Hans*."[11]

This kind of historical argument is controversial. Chief Justice Rehnquist denounced Souter's explanation of *Hans* on the ground that it did a "disservice to the Court's traditional method of adjudication."[12] But it is controversial

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7. For instance, I suspect most would agree that it would be improper for a judge to decide a case a certain way because she would profit financially from doing so.

8. 517 U.S. 44, 53 (1996).

9. *Id.* at 54, 64, 76 (relying on approach taken in Hans v. Louisiana, 134 U.S. 1 (1890)).

10. *Id.* at 100, 118-23 (Souter, J., dissenting).

11. *Id.* at 122.

12. *Id.* at 68-69 (majority opinion).

precisely because it is perceived to be a threat to the legitimacy of its target. In other words, such an historical argument appears to be an effective *critique* of a legal authority or set of authorities.

Still, the logic of impeaching arguments depends on the assumption that it is possible to discover *why* courts have decided cases the way they did. That is, developing such an argument requires making claims about what best explains a given court decision. It is only because the historical evidence suggests that what *really* caused the *Hans* Court to decide the case the way it did was its concern for the Court's institutional power (not because it thought its reading of the Eleventh Amendment was the best one) that we can draw the inference that its precedential authority has been impeached. So an historical account is powerless to level this kind of critique unless it is willing to take sides, in this particular case, on the question of whether it was the Court's application of the legal principles themselves, or instead various social or political factors, that determined the outcome.[13]

II. GENEALOGIES

Now it might be objected that when legal historians talk of "critical" history, they do not have this kind of critique in mind. In his classic article *Critical Legal Histories*, Professor Robert Gordon argued that even historical approaches that emphasize the causal importance of factors outside legal materials in explaining legal phenomena—whether those factors are social, political, or economic—are in some ways still in the grip of what he called the "evolutionary-functionalist" view of American legal history.[14] That is because they still wrongly assume that one can identify social "needs" or "interests" independent of the legal structures that in part constitute those interests.[15] Thus, under this view, truly critical history is deeper and broader than the

13. *Cf.* Fisk & Gordon, *supra* note 3, at 525.

14. *See* Robert W. Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57, 67-68 (1984).

15. *Id.* at 102-04.

impeaching argument described above because it shows the way in which our most basic legal categories and distinctions (e.g. that between "public" and "private" realms) are both the product of, and themselves give rise to, political and ideological struggles among different groups.[16]

But we are still left with the same question: wherein lies the critical bite? By what line of reasoning does the historical account offered undermine or challenge the status quo? Maybe the critique lies in revealing how many of the concepts we commonly employ in our everyday lives and whose meanings sometimes seem obvious and uncontroversial—terms like "husband," "wife," "owner," or "tenant"—are in fact legal terms of art whose implications are politically contestable—and are actually contested.[17] Perhaps so, but there is nothing distinctively *historical* about this kind of critique. Presumably, the legal historian wants to argue that the past or origins of today's legal practices and understandings are in some way relevant to how we should think about them today. But how, exactly?

The most common answer is that historical accounts expose the *contingency* of the unexamined assumptions of legal practice. Once one sees how particular events and circumstances led to today's practices and understandings, which to us seem so utterly normal and natural, we see that in fact they were far from inevitable.[18] The point of such accounts is thus to show that things could have been otherwise.[19]

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16. *See id.* at 99, 101.

17. *See id.* at 103 (observing that "among the first words one might use to identify the various people in an office would likely be words connoting legal status: 'That's the owner over there.'").

18. *See id.* at 71 (criticizing the tendency of evolutionary functionalist historical accounts to "start explaining the whole contingent miscellany of contemporary social practices (especially the nasty ones) as the *natural* outcome of the 'modernization process'").

19. *See* Jessica K. Lowe, *Radicalism's Legacy: American Legal History Since 1998* (Univ. Va. Pub. Law & Legal Theory, Research Paper No. 2014-64, Nov. 2014) (endorsing the view "that contingency, is one of the major gifts that history has to offer law: the reminder that things don't have to look the way they do, that there have been many options, many possibilities").

Here it is worth distinguishing between two implications that the revelation of such historical contingency might carry. The first, weaker implication is just that human choices—not large, impersonal historical forces—determine the course of history. This alone is sufficient to counter a strong claim of historical determinism because it asserts that present understandings were not literally inevitable.[20] And for just that reason, it does entail making a causal judgment. Specifically, it asserts that human will or choice plays a causal role in history[21]—hardly a vacuous claim since the existence of genuine human agency is strongly contested in some quarters. But this implication of contingency is still weak in the sense that it does not alone give any reason to doubt the value, or question the legitimacy, of the contemporary practice in question. The defender of the practice may always respond to such demonstrations of the contingency of its current shape by saying, in effect, "So what?"

For that reason, critical historians often hope that demonstrating contingency will carry a stronger implication. They want to say of some contemporary practice or understanding not just that it was not *necessary* that it took the shape it did but that we have reason to consider it suspect or illegitimate in some way. And such an inference is only warranted if the best defense of the practice depends on it having been developed for *good* reasons. In other words, the critique's target must be the view that we should *trust* the historical processes that led to some practice—perhaps because they were democratically legitimate, or that they involved free and open debate, or that they were the products of good-faith experimentation and trial-and-error, or that

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20. *See* Gordon, *supra* note 14, at 70 (criticizing evolutionary functionalist history on the ground that its "working assumptions misleadingly objectify history, making highly contingent developments appear to have been necessary").

21. *See, e.g.*, Risa Lauren Goluboff, *"Let Economic Equality Take Care of Itself": The NAACP, Labor Litigation, and the Making of Civil Rights in the 1940s*, 52 UCLA L. REV. 1393, 1486 (2005) ("The civil rights doctrine we have today, the doctrine born in education cases and grown into an anticlassification rule, was not inevitable. It was chosen.").

they reflected the wisdom of those who understood what is True and Right.

Thus, for instance, the critic may argue that our private-law doctrines did not develop out of man's increasing awareness of the value of individual autonomy; instead, they were the product of a political and ideological struggle in which some participants had more wealth, power, and knowledge than did others.[22] The point of such accounts is to show that the historical factors that actually led to our current practice are much more sinister—or, at the very least, less well-reasoned—than we had thought. We are thus less justified in placing our trust in their legitimacy or value than we were prior to learning the historical account. We might call this kind of argument a *genealogical* argument.[23]

As I hope can be seen, the logical structure of genealogical arguments is essentially the same as that of the impeaching arguments, discussed above. In both cases, the argument challenges an implicit background assumption that the process by which some practice or understanding was produced was a reliable or healthy one.[24] It purports to show why, instead, that process was corrupted or for some reason untrustworthy. More important, in both cases, the force of the argument depends critically on a causal explanation as to why some event or state of affairs—a Supreme Court decision in the one case, the widespread acceptance of some practice or understanding—came to be.

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22. *See* MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1780–1860 (1977); Gordon, *supra* note 14, at 101 ("Legal forms and practices are political products that arise from the struggles of conflicting social groups that possess very disparate resources of wealth, power, status, knowledge, access to armed force, and organizational capability.").

23. For the most famous example of such an argument—indeed, the one that probably gave "genealogy" its current, critical connotation—see Friedrich Nietszche, 10 THE WORKS OF FRIEDRICH NIETZSCHE: A GENEALOGY OF MORALS 35 (Alexander Tille ed., William A. Hausemann trans., 1897) (arguing that the dominant Judeo-Christian morality of Nietzsche's day was the product of a "slave-revolt in morality" fueled by the *resentment* which the weak felt toward the powerful).

24. Needless to say, such arguments also depend on some normative judgment about what makes an historical process reliable or healthy.

And that is true even of those critical legal historical accounts that purport to show the way in which the ideological struggles mentioned above have both caused and been constrained by legal practices and understandings.[25] Without that causal explanation as to why our social visions have been limited, redirected, or warped, the critique loses all force. Hence, even if the "critical stance" endorsed by many legal historians refers to this deeper or broader form of critique, it still requires the historian to make claims about which ideas, institutions, individuals or groups are most causally responsible for making the historical phenomena under examination what it is today.

But of course, not all historical accounts, not even all critical ones, mean to offer genealogical arguments. So one might object that I still have too narrow a view of what form critical historical accounts might take. So let us look at two other possibilities.

III. STORIES

The first of these possibilities is that writing history is just about offering a new or different narrative. Go to a legal-history workshop these days, and you will hear lots of talk of stories: "People typically say that X is all about Y, but in the story I'm telling, Z looms large"; "As I see it, your story is about A, B and C, whereas in Joe's story, D, E, and F are salient." Some of the early critical legal histories were quite explicit in targeting a specific story about modern Western history, which they saw as dominant. In Professor Gordon's words, this was a narrative of the "gradual recession of error before the advance of commerce, liberty, and science—an advance modestly but invaluably assisted by ever more efficiently adaptive technologies of law."[26] According to

25. *See, e.g.*, Gordon, *supra* note 14, at 70 n.35 (observing, in discussing postwar attitudes about labor-capital relations, that "[c]ritical historians treat th[e] more or less unexamined background assumption of a relationship of social necessity (efficient production requires legal forms preserving managerial prerogatives) as an ideological practice that helped to produce social necessity because it suppressed alternative methods of governing production as unthinkable or unrealistic") (emphasis omitted).

26. *Id.* at 96.

Professor Gordon, critical historians offered competing, more pessimistic stories, such as Professor Horwitz's account of nineteenth-century private law, in which the "dark side of capitalist development" was made more visible and brought to light.[27]

There is nothing wrong with stories, and it may be that (as the word itself suggests) without some kind of narrative structure, history ceases to be history. But even if so, we must again ask, in what way might a story offer a *critique*? We have already considered one possibility: genealogies are certainly one kind of story—about how wicked, dumb, or arbitrary forces (whether ideas or people or something else) produced some seemingly "natural" state of affairs. But as we've seen, such stories very much depend on offering causal explanations. Are there stories that do not do so and yet still offer potent critiques of current practices or understandings?

One way these stories might do so is by showing that the relevant cast of characters is other than what people have assumed. The emergence of civil rights law in the mid-twentieth century, for instance, is not really about nine Justices divining rights embedded in the Constitution (or even about those same Justices advancing a liberal-progressive political agenda). It is instead about the many civil-rights lawyers, working for the NAACP and other organizations, who decided which cases to bring and which ones not to bring.[28] If true, this story suggests that today we may be too focused on the Supreme Court as the primary source of constitutional law when in fact it is the lawyers working "on the ground" who generate many of the legal ideas that eventually get instantiated as part of constitutional doctrine. In this way, a particular narrative about the development of civil-rights law serves as a kind of critique of current attitudes, though not exactly a genealogical one.

That is true, but as this example illustrates, what sense can be given to the phrases "the story is *about* . . ." or the "*relevant* cast of characters" other than causal ones? If the Supreme Court had a sufficiently clear and specific vision of

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27. *Id.* at 96-97.

28. *See, e.g.*, Goluboff, *supra* note 21.

exactly which rights required constitutional protection, perhaps it did not matter which cases were brought before the Court because they would have found a way to issue the rules they envisioned, regardless. Whether this bit of historical speculation is right, or even plausible, is not the point. Rather, the point is that if the above historical narrative described is not flatly inconsistent with it, then its critical edge is considerably dulled: the workings of lawyers would be shown to have been relatively inconsequential in how things turned out, so why should we think things are different now? And yet if the narrative does entail that the speculation is false, then that means it *is* making a causal argument about what mattered to the outcome.

Another way an historical narrative might be used to criticize existing legal practices or understandings is by showing that while those practices might have served a useful function once, they no longer do so today because circumstances have changed. Although at one point, for instance, the most important threats to free speech may have appeared to come from governmental suppression of political speech, these days the more serious threat comes from corporate control over the media, which has the power to shut out other voices entirely. Thus, because a still-dominant theory of free speech, which grounds its protection on its value for democracy, was developed with this older concern in mind and is less effective at guarding against the current threat, it should now be abandoned in favor of an autonomy-based theory.[29]

The first thing to note about this argument is that it is not really critical in the way that critical legal historians originally aimed to be. Indeed, arguments of this sort seem to

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29. *See* MARK A. GRABER, TRANSFORMING FREE SPEECH: THE AMBIGUOUS LEGACY OF CIVIL LIBERTARIANISM (1991). I've altered Professor Graber's argument slightly to make it a better candidate for this kind of argument. In reality, his argument is more of a genealogical one since he suggests that the main reason why progressive legal theorists developed the democratic theory of free speech was that they were loathe (for political reasons) to base its defense on an individual-rights theory that smacked of the *Lochner* doctrine they had spent such energy criticizing. *See* Charles L. Barzun, *Politics or Principle? Zechariah Chafee and the Social Interest in Free Speech*, 2007 BYU L. REV. 259, 269-71 (summarizing Graber's argument).

assume precisely the view that Professor Gordon attacked as "evolutionary functionalism," namely the view that legal rules developed in response to social needs.[30] No surprise, then, that, as already noted, it is a form of historical argument that courts standardly employ when overturning their own precedent.[31] But the more important point is that this kind of argument still requires offering causal explanations—albeit of a teleological sort.[32] The democratic theory of free speech only developed when it did and in the way that it did because courts, policymakers, or citizens (for our purposes here, it does not matter which) had a particular understanding of what the most dire threats to free speech were and shaped the law in line with that understanding.

No doubt there are many other kinds of historical narratives as well, but the examples above are sufficient to illustrate the general point that any such narrative must make causal claims—even if only implicit ones—about which actions produced which consequences. Consider the following story: "One day, Jane went to school. During recess, John bit Jane. Jane cried. The teacher asked John to apologize, which he did. John and Jane then became friends." Even this simple story makes a number of implicit causal claims—that Jane cried *because* she was in pain from John's bite; that the teacher asked John to apologize *because* he bit Jane; that John apologized *because* the teacher asked him to; and that the two children are friends *because* of John's apology. The lesson is obvious but important. Without making causal judgments about what connects discrete events, history would literally be "one damned thing after another" without any coherent narrative at all.

At this point, one may accuse me of attacking a straw man. No one holds so extreme a view as to insist that an historian should never make any causal judgments of even the basic, commonsensical sort just described. I'll take up this

30. Gordon, *supra* note 14, at 63.

31. *See, e.g.*, State Oil Co. v. Khan, 522 U.S. 3, 20-22 (1997) (justifying its decision to overrule a past decision on the basis of the Court's interest "in recognizing and adapting to changed circumstances and the lessons of accumulated experience").

32. Some deny that teleological arguments are causal arguments at all, but I put that issue aside here.

objection directly below, but it may help diffuse the force of the straw-man allegation somewhat by first considering another kind of history that does not necessarily require making causal claims.

IV. RESTORATIVE PROJECTS

The kind of history I have in mind is one that looks to the past as a source of ideals and inspirations. Such histories may look to some prior era to show that a particular set of ideas, now forgotten, were expressed and taken seriously by society generally, or some subset of it, with the hope that casting such a light might encourage those today to take those ideas seriously as well.[33] Such histories are often coupled with a genealogical story that purports to explain why, despite its intrinsic appeal, the ideas or understandings were nevertheless repressed, obscured, or lost.[34] But they need not be so coupled, and if they are not, such an account does not depend, for its critical force, on any particular set of causal inferences. Instead, the point of such an account is just to say, "here is one way of doing things or thinking about things that some people once highly regarded and perhaps should be so regarded again (in place of our current understandings)."

Again, there is nothing wrong with this kind of history (and some of my own work may be best described in this way), but a couple features of it warrant mention. The first is that it is a far cry from the kind of history that the earlier generation of critical historians sought to offer. Indeed, it is probably most associated in the legal academy these days with constitutional originalism, which itself is seen by many as a conservative, even retrograde, intellectual movement.[35]

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33. Professor Graber's history of free speech theory is, in part (but only in part), a restorative project of what he calls the "conservative libertarian tradition" of free speech. *See* GRABER, *supra* note 29, at 17-50.

34. For example, Professor Graber argues that the conservative libertarian tradition of free speech was consciously buried by political progressives who feared that its association with *Lochner*-style economic rights would jeopardize the progressive political agenda. *See id.* at 12.

35. *See, e.g.*, CASS R. SUNSTEIN, RADICALS IN ROBES: WHY EXTREME RIGHT-WING COURTS ARE WRONG FOR AMERICA, at xiii (2005) (characterizing originalism as

True, this kind of history need not, and is not always, motivated by political conservatism,[36] but it is a quite traditional form of history—one that might be better characterized as an alternative (or even antidote) to critical history, rather than an embodiment of it.

The more important point is that there is nothing inherently *historical* about this use of history—or nothing that makes an idea's existence in the past of special relevance to its value today. As described above, it involves merely presenting an alternative picture of how things could be. Or perhaps I should be more precise: there is nothing inherently historical about this use of history *unless* one ascribes to those who expressed or endorsed the understandings or practices described a special kind of authority—as defenders of originalism do, for instance, to those who drafted or ratified the Constitution. But not only is such deference to the authority of past actors anathema to most modern historians, it would again depend on implicit (causal) judgments about the true motivations of those actors who endorsed the vision. After all, if those motivations turned out to be themselves crassly political, economic, or ideological, deference to their views would be vulnerable to the impeaching or genealogical arguments described above.[37]

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constitutional "fundamentalism," comparing it to religious fundamentalism, and observing that some fundamentalists seem to "approach the Constitution as if it were inspired directly by God").

36. The so-called "republican revival" may be an example of a left-leaning restorative project. *See, e.g.*, Frank Michelman, *Law's Republic*, 97 YALE L.J. 1493, 1494 (1988) (endorsing and defending the "civic-republican strain in political thought that has been identified, traced, and analyzed in much recent writing on history, social and political theory, and American constitutionalism"). For one of the original historical works that inspired this revival, see BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION (1967).

37. *See, e.g.*, Michael Klarman, The Constitution as a Coup Against Public Opinion (unpublished manuscript) (on file with author) (arguing that "[t]he compromises undertaken in Philadelphia also illustrate the extent to which the Constitution was a product of clashing interests—not dispassionate political philosophizing").

V. LEGAL HISTORY AND LAW

It is now time to take up directly the objection suggested above that I am attacking a straw man. For it may be that what legal historians resist is not so much making causal arguments about why certain historical actors took the actions they did, or what consequences those actions produced; rather, what they resist is making *general* claims about what the causal forces in history are in the way that various social sciences sometimes aspire to do.[38] Hence, the authors of the Foreword quoted above acknowledge that it "is important to explain that somebody did something to, with, or for someone else, for identifiable reasons and with identifiable consequences."[39] What they nevertheless maintain is that "[l]egal 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."[40] Under this view, what legal historians refuse is not the demand to offer causal explanations as such but rather the demand that they adopt a particular theory of causal explanation according to which to explain something is to show that it was dictated by general laws.[41]

If that is the concern, then it is a well justified one, and I take the objection to be decisive. For it seems to me that just this difference—between, on the one hand, looking to the historical context of a particular decision in order to explain why it came out the way it did and, on the other, explaining it by reference to some kind of background generalization—does seem to mark at least one (if not *the*) important

38. *See* Gordon, *supra* note 14, at 75 (describing the hope that "we will be able to generalize convincingly and fairly abstractly about what social conditions will produce what legal responses and what effects upon society those responses will have in their turn," but then observing that "it's fair to say that on the whole such statements of regularity in legal-social relations don't stand up very well to historical criticism").

39. Fisk & Gordon, *supra* note 3, at 525.

40. *Id.*

41. The locus classicus here is Carl G. Hempel, *The Function of General Laws in History*, 39 J. PHIL. 35, 37 (1942) ("A set of events can be said to have caused the event to be explained only if general laws can be indicated which connect 'causes' and 'effect' . . . .").

difference between the assumptions and methods of history and those of the empirical social sciences. Thus, in my view, legal historians, like all historians, do well to resist the assumption that there are deterministic forces at work—whether of a social, economic, evolutionary, or neurobiological sort—that leave no room whatsoever for genuine human agency to play a role in how history proceeds. And that is true even if, as suggested above, the prevailing view among scholars in some other academic disciplines is that such an assumption is false.

But in closing, let me offer two observations about where this leaves us. The first is just to emphasize the importance of keeping distinct the two kinds of concerns about causation distinguished above. Historians frequently talk of the importance of "context" in understanding the past, and they sometimes describe their work as offering "thick descriptions."[42] And for the reasons just stated, such focus on the particulars of the historical case seem to me well founded. But one point of this Paper has been to call attention to the fact that it is not at all obvious how learning the "context" of some set of legal understandings or practices bears on how we should evaluate it.[43] There are indeed ways it might bear on such an evaluation, and I have discussed a few of them in an effort to highlight some of the assumptions on which they depend. But merely describing the social, economic, or political environment within which a practice arose is not enough on its own to make a persuasive critique (or endorsement) of it. Any further critical judgment depends on

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42. *See, e.g.*, Fisk & Gordon, *supra* note 3, at 524 ("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.") (emphasis omitted); Lowe, *supra* note 19 ("[I]f history offers contingency to law, it also offers concreteness, contexts for texts and arguments, as well as the concerns of those who made them."); *see also* Gordon, *supra* note 14, at 125 (suggesting that one of the aims of critical history is to offer "thickly described accounts of how law has been imbricated in and has helped to structure the most routine practices of social life").

43. *Cf.* Nicola Lacey, *Jurisprudence, History, and the Institutional Quality of Law*, 101 VA. L. REV. 919, 925 (2015) (stressing the importance of context for understanding jurisprudential theories, but acknowledging that we may "struggle to articulate the distinctively jurisprudential significance" of the influence of H. L. A. Hart's political and cultural context on his thought).

inherently controversial judgments about what made (or didn't make)[44] a causal difference to how things went in a given context.[45] So while historians are obviously free (and should be encouraged) to offer thick *descriptions* of some time-and-place for the sake of broadening our experience of the world, if they want to offer effective critiques of a set of legal practices and understandings, they must go beyond description and offer *explanations*—or, at the very least (to use Geertz's own preferred term) "diagnoses"—of those practices and understandings.[46]

The second point is more about law than history. Legal historians often criticize the use of history by lawyers, judges, and legal scholars as "law-office history."[47] Sometimes that term is just used to describe shoddy research, anachronistic reasoning, or strategic cherry-picking from historical materials.[48] So understood, the label is no doubt sometimes fairly applied, but it amounts to little more than a charge of poor historical scholarship—one that could be leveled against some historians as well. Other times, though, the suggestion seems to be something deeper—that when courts invoke history, they are engaged in a fundamentally different sort of inquiry—one that is about rationalizing the past, rather than discovering the truth about it. Hence, the organizers of this conference suggest in their preparatory materials that legal doctrine may not be a topic of interest to "historians of the

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44. The critical force in historians' efforts to expose the inherent contradictions in some area of legal doctrine lies in the suggestion that such contradictions prove that application of the relevant legal sources did *not* causally determine how courts resolved cases in that area. *See, e.g.*, Duncan Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFF. L. REV. 205 (1979); *see also* Gordon, *supra* note 14, at 115 ("The common thread of these histories is the observation that the contradiction makes available for the decision of every case matched pairs of arguments that are perfectly plausible within the logic of the system but that cut in exactly opposite directions.").

45. And again, it also depends on a normative judgment about what a proper, reliable, or healthy kind of historical development would look like.

46. CLIFFORD GEERTZ, *Thick Description: Toward an Interpretive Theory of Culture*, *in* THE INTERPRETATION OF CULTURES 3, 27 (2000 ed. 2000).

47. Jack M. Balkin & Sanford Levinson, *Law and the Humanities: An Uneasy Relationship*, 18 YALE J.L. & HUMAN. 155, 165 (2006).

48. *See id.*

sort who rightly eschew *lawyers' history as not history at all*."[49]

Ironically, the same view is endorsed by lawyers who hope to shield law from historical forms of criticism. One can see it in the Chief Justice's suggestion that Justice Souter's explanation of the Court's decision in *Hans v. Louisiana* did a "disservice to the Court's traditional method of adjudication."[50] And three decades ago, Ronald Dworkin responded to the genealogical arguments of critical legal historians by suggesting that they offered arguments of the wrong sort; they offered only "genetic[ ]" arguments, whereas what was required were "interpretive" arguments that aimed to put past legal materials in the best light.[51]

Now I think this view of law and legal reasoning is mistaken. There is, it seems to me, a deep and important affinity between legal and historical forms of reasoning and argument. Explanatory narratives and restoration projects of the sort described above already play roles in courtroom rhetoric and lawyerly argument, whether at trial or in appellate opinions. And impeaching and genealogical arguments, though less common in actual court practice, share with traditional legal reasoning the assumption that certain historical figures or historical processes, for one reason or another, purport to be *authoritative*. Finally, there is a long tradition in the common law of privileging concrete and particular judgments over abstract and general ones. For these reasons, critical legal history has the potential to influence legal practices and understandings and even to constitute what legal doctrine *is*.

But this is not the place to defend that large claim. The point here is simply to suggest that when historians treat lawyers' use of history as not really history at all, they are playing into the hands of those who would dismiss historical arguments as irrelevant to the concerns of courts and lawyers. That is, when historians accept the view (to

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49. E-mail from John Henry Schlegel, Professor and Floyd H. and Hilda L. Hurst Faculty Scholar, SUNY Buffalo Law School, to author (Nov. 3, 2013, 8:52 PM) (on file with author).

50. Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 68-69 (1996).

51. RONALD DWORKIN, LAW'S EMPIRE 273 (1986).

summarize crudely) that historians explain while lawyers rationalize, they contribute to the diminishing significance of history to judicial decision-making. And that diminishment approaches a vanishing point when historians no longer even see themselves as actually *explaining* how we got to where we are.