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# Some Final Observations on Legal Intellectual History

Robert W. Gordon  
*Stanford Law School*

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## Some Final Observations on Legal Intellectual History

ROBERT W. GORDON†

This has been an incredibly rich array of papers and themes. I am not going to try to sum up all the points that have been made and restate all the points into the form of motions that we could all vote on and adopt or reject. All I feel able to do is to provoke further discussion among us on top of the discussions we've had already. All I will try is just to identify a few themes that ran through our discussions.

In a conference like this there is always at some point the necessary jump to abstraction, where issues of definition, theory and method come to the fore. This Conference was no exception; and of course there's nothing wrong with that because basic questions of theory and method, although ultimately unanswerable, are like the beasts of the jungle in the dark. They are always lurking out there threatening to sabotage everything that we do. I personally know many people who have derailed their own careers because they felt unable to answer these larger questions of theory and method and were diverted into some other field entirely. Others, perhaps sensibly, keep their heads down and on the immediate road ahead, so as to avoid being paralyzed by the unanswerable.

What is intellectual history? Is it the history of intellectuals? Or is it the history of anybody who has an idea and who utters that idea or anybody who is influenced by that idea or for that matter acts on the basis of that idea? One thing that we all seem to be fairly clear about is that we shouldn't limit intellectual history to high falutin' theorizers, the high mandarins of the system, the philosophers or several steps down from philosophers, the producers of legal thought, or producers of legal doctrine or writers of treatises. We are interested in intellectuals in the vernacular, people who are

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† Professor of Law, Stanford Law School.

arguing, justifying, categorizing, and often simply describing history.

If you do law, at some point people are going to ask you, "What is law?" and ask you to distinguish law from non-legal phenomena. Usually, this is not a productive endeavor because one just has to be clear at the outset what your working conceptions are going to be for a particular project—what you are going to describe as law and what you are not going to describe as law. If you are a believer, as many of us are, in notions of legal pluralism, then you believe that there are plural sovereigns in society and they all make some kind of law. "What is law?" is a question much like "Who is an intellectual?" You are going to come across folks who, simply by enacting a custom, or adapting or modifying one—like Laura Edwards's women and slaves, people with little official legal personality making claims of right with respect to textiles—are acting as law makers of a particular community.

So sometimes we just have to distinguish what level and order of law we are talking about. If you get very strict about restricting law to law made and enforced by state officials, then you would face challenges such as one I used to hear as a law teacher: "But that's not law!" What were you talking about to elicit such a question? You might have been talking about tax. Or you were talking about policy-making lobbyists who come to a legislature with draft legislation and somebody says, "That's not law!" Of course, it proposes to be law, it wants to be law. Again, I think if one can for a particular project try to settle these definitional and conceptual issues with some stipulations at the beginning I think one avoids a lot of problems.

Capitalism is another matter entirely. Many have tried to define capitalism and perished at the attempt. It is an extremely difficult enterprise—particularly if one attempts to come up with fairly precise technical definitions that don't reflect the purpose for which people are using the term because they are usually using it as a big contested cloudy cluster concept in which private owners of property or rights holders of some sort in property make basic decisions about how to combine and/or allocate, goods and services in an economy. It's clear that capitalism in this sense is consistent

with a wide variety of both cultural and governmental schemes. Sometimes capitalism in this sense exists as, for example, it did in China for a long time or in other communities which were in many ways authoritarian states. Even in such states there are communities of traders who are creating markets and trading there in what are by any reasonable definition capitalist markets. Other people use capitalism in a much more global sense. They talk about a whole system of social relations that exists on a society-wide or global level and I think that's probably the more conventional sense in which people talk about capitalism, as in the phrase "under capitalism"—the Marxist notion that there are certain kinds of underlying modes of production which in turn determine relations of production, these result in the social system we know of as capitalism.

In that sense what kind of concept is "capitalism"? Many of the papers here take a lot of care to try to take this very general notion apart and to reduce its determining capacity in order to specify very concretely for very particular historical locations and situations the modes and varieties of capitalism, including the modes and varieties in which capitalist relations are embedded within nation states (or legal systems or global politics) that condition and constrain and regulate their operations. It's impossible to imagine what a pure capitalist society would be like, meaning a society of markets without legal enforcement, "order without law." There's never really been such a thing. It exists only in libertarian fantasy and there's something a little endearing about these libertarian fantasies, the lengths to which they will go to try and specify in as few statements as possible the operations of these societies—and some of them are quite successful! They substitute protection gangs that you can pay for police protection; they substitute similar rackets for property protection. Critical historians or political economists try to generalize these moves: to show that capitalist markets can thrive in a wide variety of legal arrangements, from societies without much in the way of centralized state capacity, which leave regulation of property relations and management of risks to clans or trades or extended kinship or religious cooperatives, to societies with very strong bureaucratic states which operate to subsidize ventures, socialize risks, and regulate harms. Such insights

as often as not serve a political project. By disassembling the component parts of particular forms of capitalism we try to eliminate the sense of the determinacy of current arrangements—the illusion that some set of social formations we are willing to call capitalism is inevitable and always takes a single global determining form. The method is to show that all the little pieces of a capitalism have been put together through historically contingent sets of local initiatives. Markets are “embedded” in particular local practices and institutions. (At this Conference, we saw, Chris Desan, Ajay Mehrotra, and Ed Purcell deploying versions of this method.)<sup>1</sup> It makes the whole thing seem so much more manageable and changeable—alternate paths not taken are exposed by historical inquiry. Even if you can’t now take the path that you didn’t take back then because it’s too late, the depiction of alternative tracks suggests possibilities for similar variations on our present condition.

Now that hopeful notion I think is somewhat dissipated by Karl Polanyi’s thesis that although capitalism may be—and actually is—a set of quite particular arrangements, constituted by quite particular customary practices and legal regulations and so very variable across place and time from one place to another, *nonetheless*, people come to think of that particularity as a global determining force and that the collective reification of all of these contingent local historical practices into a giant big thing, a naturalized and objective-seeming process or force, eventually transforms society.

Probably many of you know the wonderful book by Bill Reddy about labor relations in the French textile trade.<sup>2</sup> Without sentimentalizing them, Reddy shows how the labor relations are initially conceived of by many of these producers

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1. Christine Desan, *The Market Itself as Insider Trading* (Sept. 27, 2014) (unpublished manuscript), <http://baldycenter.info/conferences/opportunities-for-laws-intellectual-history/cle.html>; see also Ajay K. Mehrotra, *A Bridge Between: Law and the New Intellectual Histories of Capitalism*, 64 BUFF. L. REV. 1 (2016); Edward A. Purcell, Jr., *Capitalism and Risk: Concepts, Consequences, and Ideologies*, 64 BUFF. L. REV. 23 (2016).

2. WILLIAM REDDY, *THE RISE OF MARKET CULTURE: THE TEXTILE TRADE AND FRENCH SOCIETY, 1750–1900* (1987).

as quasi-familial (this is in line with Rebecca Rix's work)<sup>3</sup>—their paternal relations, their communal relations, are part of the domain of the *patron*. It's not quite clear how it happens in this account, but essentially what happens, to cut a long story short, is that market theorizing takes over. You start actually to think of your laborer as a commodity, as a factor input to production, and so that you should substitute for it. And, if you should always look for cheaper sources, you should substitute technology if that's cheaper, and, of course, most importantly (this is a sort of quasi-Marxist treatment) you cease to think of the laborers as people under your care, as members of your family or community; you commoditize them. All this is like a feedback effect of the reification of all of these local practices into a global determining force. At this Conference we heard of similar processes by which economists' ways of thinking about the economy, as being composed of the factors of land, capital and labor, become abstracted into thinking about risk.

We also saw intellectual and cultural and political and social historians trying to resist the totalizing force of the mega concept. Bureaucracy is not the uniform Weberian phenomenon that we are familiar with. It's not the kind of inevitable governing form of modernity any more than capitalism is the inevitable economic form, but a set of variable arrangements constituted in different ways. Nick Parrillo has just written an enormous book about how American bureaucracy really isn't at all like European bureaucracy.<sup>4</sup> The people are not recruited the same way, they are not paid the same way, they don't follow the Weberian rules. Somebody might point out, "Well yeah, but it's still called bureaucracy, right?" But that insight seems typical of the special contributions historians of law and legal culture can make to debates about what constitutes the institutions and experience of modernity.

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3. Rebecca A. Rix, *Popular Culture: Opportunities for an Intellectual History of Transactional Lawmaking* (Oct. 10, 2014) (unpublished manuscript), <http://baldycenter.info/conferences/opportunities-for-laws-intellectual-history/cle.html>.

4. NICHOLAS R. PARRILLO, *AGAINST THE PROFIT MOTIVE: THE SALARY REVOLUTION IN AMERICAN GOVERNMENT, 1780–1940* (2013).

Another and similar contribution is the substitution of some kinds of legal pluralism for legal centralism, challenging the view of law as emanating from the center and spreading out to various peripheries and eventually colonizing them. Laura Edwards has written a book which describes a set of local customary legal arrangements in the post-Revolutionary Carolinas which don't derive from or answer to the authority nor are derivative of centrally produced institutions or doctrine, which are not top-down, but which over time *become* top down, as lawyers bring them into a hierarchy of authority.<sup>5</sup> Then in her paper for this Conference, Laura talks to us about very local regimes of claiming and trading, of customary rights to things, these textiles—textiles as possessions which can be claimed by people who have no formal-legal rights to possess, textiles that are tradeable by people who have no rights to trade, possessions that are patrimony but also are currency.<sup>6</sup> Interestingly enough, even in Laura's narrative there is present a threat that legal centralism is going to come along and extirpate all of these cultural local practices. She didn't really say this—probably she wouldn't defend it; she shouldn't be asked to—but multiple law-making sovereigns existing side by side in society is the usual nature of things, not a pre-modern aberration which has been eliminated by the spread of capitalism and central law. If anything, I think these sovereigns have proliferated with the rise of private governance and new normative law-making communities which have been secreted in the interstices of the modern state.

Do the rule of law—thought of as the bringing of social relations under the control of centrally produced and theorized and rationalized law—and legal doctrine—another kind of reified thing—produce an artificially imposed order that masquerades as a real determining force, and that therefore, as Cynthia Nicoletti suggested at our Conference,<sup>7</sup>

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5. LAURA F. EDWARDS, *THE PEOPLE AND THEIR PEACE: LEGAL CULTURE AND THE TRANSFORMATION OF INEQUALITY IN THE POST-REVOLUTIONARY SOUTH* (2009).

6. Laura F. Edwards, *Textiles: Popular Culture and the Law*, 64 *BUFF. L. REV.* 193 (2016).

7. Cynthia Nicoletti, *Writing the Social History of Legal Doctrine*, 64 *BUFF. L. REV.* 121 (2016).

may actually operate as a force in the lives of the lawyers and judges and people who believe in it? Do people come to believe that property is only what law says it is, that a harm is only real if the law recognizes it as a harm, that an action is morally justified if the law says you can do the act so long as you pay for it or its benefits outweigh its costs, and that rule-following is a greater good than doing particularized justice? Is the autonomy of law the kind of social construct whose force varies over time and within various legal fields? Some argue, as Chris Tomlins did at our Conference,<sup>8</sup> that the integrating concepts that used to hold together doctrines as systems have disintegrated in our own disenchanted age, so nothing is left but the rubble of past modes, selectively invoked and reinvigorated.

Generally, historians like to point to the local and customary and they like to resist the grand narrative, particularly the grand narrative of modernization. I put a lot of work myself into resisting the grand narrative of modernization, but some of the contributions to our Conference actually take rather a different point of view. We have Chris Desan's small private club of law makers in the Chicago exchange who are definitely engaged in a kind of top-down law-making, having arrogated to themselves the authority to define rules that through their trading can set prices for [salaries of] buyers of commodities all over America and indeed in many instances all over the world.<sup>9</sup> So hers is very much a story of the kind that Duncan Kennedy tells in his *Three Globalizations of Legal Thought*<sup>10</sup>—in which modes of lawmaking begin in relatively concentrated centers of elites and then spread out and become part of the common discourse of society generally.

One emphasis which you would expect from a group of historians of course is historicism. Every time we try to generalize categories across time we are met with the question: well, are we talking about the same things? When

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8. Christopher Tomlins, *Organic Poise? Capitalism as Law*, 64 BUFF. L. REV. 61 (2016).

9. Desan, *supra* note 1.

10. Duncan Kennedy, *Three Globalizations of Law and Legal Thought: 1850–2000*, in *THE NEW LAW AND ECONOMIC DEVELOPMENT* (David M. Trubek & Alvaro Santos eds., 2006).



we talk about, say, bureaucracy or legal doctrine in 1850 is that the same thing as bureaucracy in 1950? Clearly it's not. Does it have enough in common so we can talk legitimately about it as if it were? Is there any way to avoid doing that? If people want to make statements about causality or comparative statements across societies, are such generalizations possible, given all of the local and temporal variations that are at work, that are so painstaking to point out? I remember once when I was giving the usual sort of disaggregating paper somewhere, Roberto Unger said to me something to the effect of, "You are a dangerous person; you are making comparative history impossible!" I said, "Well, that's a heavy responsibility." (Think of all those jobs lost. Comparative history departments—almost unbearable.) But I see what he meant.

Again, Chris Tomlins is, I think, very disturbed by all of this because, like other historians, legal historians read Clifford Geertz and said, "Look, what we've been doing all along is 'thick description,' which is not the same thing as constructing social-science models of causation, but is a legitimate and valuable activity." So we did more of it. Just as when historians read Thomas Kuhn and said, "This story of thought-structures, idea-clusters for explaining and making sense of experience, dissolving and reforming over time, this too is familiar. It's also what we do." At our Conference there were many suggestions that maybe we have been over-influenced by these models—that this thick description has taken us to a point where what we produce, these virtuoso descriptions of a set of cultural practices lying in pieces on the ground—is all there is: a miscellaneous jumble of practices that theorists or intellectuals (usually working for ruling elites, but not always, see, e.g., Marxism) have built into a system and attributed determining force. But, when you take it apart, you see the system is an illusion. The disassembled pieces just lie there. So what significance does the historical experience have for us other than the fact that it was? What can you make of our efforts for studying other times and places and for the present day? Does the process of critique, disaggregation, demystification, and historicizing big systems like capitalism, classical legalism, bureaucracy, centralized legal doctrine, lead simply to passivity and paralysis? One would like to think our efforts

would encourage people to believe that innovation will not, contrary to what conservatives (meaning here simply people who want to conserve because they fear change) believe, bring down the whole system of capitalism under the rule of law and with them everything valuable about the conditions of modernity.

Anyway, quite aside from the potential political benefits of the work presented here, it's refreshing and interesting and provocative on a whole order of magnitude above what you're likely to hear at the usual law school workshop. From talking to others there, I was not the only person who came out of that weekend feeling newly puzzled and perplexed about basic issues in our work, but also inspired.



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