

How Autonomous Is Law?

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Abstract

Socio-legal scholars forever debate whether law is the product of internally constructed rules, procedures, and rationales or an effect of external social forces and interests. Traditionally, the debate pitted formalists who defended law's actual autonomy against instrumentalists who claimed law was a creature of exogenous circumstance. The debate was transformed in the later twentieth century, first by fundamental refinements in Marxist theory that produced structuralist accounts of law's *relative* autonomy, then by poststructuralist innovations in critical theory which held that all discourses (including law) were epistemically autonomous. Parallel formulations claimed not only that law was autonomous but also that law was in fact constitutive of the very social circumstances once held to determine its development. This article reviews the highlights of the debate while adopting a perspective outside it. It treats the autonomy question as relational—if law is autonomous it must still be autonomous in relation to something—and asks in relation to what? All sides in the debate assume the answer is society, so the article asks how the social became law's relational other and what other relationalities might be brought into play.

HOW AUTONOMOUS IS LAW?

To treat the extent of law's autonomy as a question of scholarly significance is to identify law (whether doctrine, rule bundle, or institution; discipline or expertise; discourse, knowledge practice, or communicative system) as a relational phenomenon. That is, the autonomy question presumes that in whatever form law is made manifest, it necessarily subsists (*a*) in relation to some other phenomenon or phenomena, from which (*b*) it is to some determinable degree (which may vary from completely to hardly at all) distinguishable.

Although relationality does not foreclose any particular quantum of distinction, even the position that law is wholly autonomous (most closely associated with formalist jurisprudential traditions generated within the legal system) remains relational.¹ Autonomy is not solipsism (Cotterrell 1993, p. 175). Law cannot erase (or be erased by) the world. Nor does relationality as such presume any particular other. That said, the meaning and character we ascribe to law will necessarily vary according to the relations we identify as relevant, the others that we recognize, and our ways of characterizing them.

Since the late nineteenth century, in modern Western scholarship, law's conventional other has been society and its cognates: the economy, politics (see, e.g., Jhering 1913; Pound 1923, pp. 10–11). Collectively, society-polity-economy identifies an ordered or formed realm of human action (the social) in relation to which law stands and in which law participates. By the 1960s, scholarly inquiry into law across numerous academic disciplines—jurisprudence, the social sciences, history—had congealed to form a field of study, law and society, predicated on this convention and dedicated to a dense ex-

amination, empirical and theoretical, of the terms of law's standing vis-à-vis the social. Exponents of socio-legal studies expected their work to produce formulations of law's overall meaning in relation to social organization and hence to determine law's significance for modern society. Over time, and in successive iterations and variations, their efforts produced two pairs of statements of law's standing that may be summarized as follows: first, the proposition that law's intellectual and systemic development proceeds according to a logic, procedure, and rationale of its own (law is autonomous of the social world in relation to which it stands), versus the contrary proposition that law reflects, is determined by, or can be reduced to the social order or formation in relation to which it stands (law is not autonomous); second, the proposition that law's standing in relation to the social is characterized by a gap (a nonspecific quantum of difference) between self-expressed law (law in books) and socially expressed law (law in action) and that this gap is socially dysfunctional, versus the contrary proposition that in signifying law's standing for itself in relation to society the gap or quantum of difference between books and action is not dysfunctional but, rather, legitimating (Silbey 2005 is helpful general background to all these points). Each pair of opposed statements can be restated from a diversity of political-theoretical standpoints. A liberal or pluralist theory of law, for example, might translate oppositions between autonomy and reflexivity and between imputed dysfunctionality and functionality into statements about conditions for law's effectiveness; it might proceed to canvass the desirability or possibility of gap closing, the relative merits of different gap-closing strategies, and so forth. A socialist or Marxist theory of law might translate the same oppositions into the proposition that in each case observable outcomes might be expressed as constants signifying a structural position [such as the relative autonomy of law (see below)] or function [such as the propagation of hegemony (see, e.g., Hay 1975; Genovese 1972,

¹For a recent account of law's autonomy that locates the question in its traditional jurisprudential realm (parsing modalities of legal reasoning and procedure across the course of the twentieth century), see Bix 2003.

pp. 25–49)] that both determines and explains law’s overall social role.

Much of the scholarship identified with the early law and society field approached both law and the social as observable phenomena produced and reproduced in the ceaseless play of human intention and activity (Teubner 1989, pp. 730–32; Levine 1990, pp. 73–75; Tomlins 2000, pp. 946–59). Law’s autonomy question, hence, was initially conceived of in institutional or behavioral terms. Innovation in social theory (structuralism, poststructuralism, critical theory, autopoiesis) has produced other representations of both law and the social—as components of a complex whole, as discourses, as knowledge practices, as communication systems—that have reconceived the autonomy question in ideological and, latterly, epistemic terms. The most uncompromising of these innovations, autopoiesis, renders law a closed (self-referential, autoreproductive) system. Epistemological innovation has not, however, disposed of relationality, nor even of the social as such. Even in the case of autopoiesis, exponents are reluctant to surrender the impulse to locate law in relation to exogenous circumstance (Teubner 1989, pp. 746–52; Nelken 2006a, p. 599).

This review traces law’s autonomy question across time, highlighting the socio-legal debates, particularly in the sociology and history of law, that I consider most important to the autonomy question’s conceptual evolution. The review also considers the utility of the autonomy question itself. The latter discussion has two aspects. One aspect considers whether formulation of the question as one of autonomy misstates law’s relationality. An autonomy paradigm parses relationships between the social and the legal as if they were discrete objects, but numbers of scholars have increasingly attended to the ways in which the social and the legal penetrate and constitute each other. The legal is as much social as the social is legal. We encounter, that is, a move away from an autonomy paradigm of law’s relationality toward a *mutuality* paradigm: Law and society simul-

taneously contextualize, absorb, and are absorbed into each other (see, e.g., Silbey 2005, pp. 358–61; Riles 2006).

The second aspect considers the significance and meaning of this move. Here again there are two possible directions to follow. One might examine the move abstractly, as an innovation in socio-legal theory, and ask what its restatement of relationality is likely to achieve. Now that much leading socio-legal scholarship has adopted the mutuality paradigm, how will our explanation of the relationality of law and the social alter? Or, avoiding abstraction, one might pursue significance and meaning in a rather different inflection. The intellectual move, from autonomy to mutuality, actually acknowledges and expresses a temporal move, from one historically located modality of social-legal relationality (separation) to another (penetration). That is, rather than a changed way of thinking—a rethinking of a familiar, if knotty, conceptual problem—the emergence of the mutuality paradigm is a conceptual consequence of a material change in the terms of social-legal relationality that has rendered the current historical expression of relationality distinct from the previous one. A conjunctural shift has occurred. Legal actions have become more visibly and directly instrumental to the achievement of specific outcomes. As a result, our thinking about them changes.

Once we add temporality, we can consider still further dimensions of relationality. For example, instead of treating the social as if it were law’s constant relational other, we might ask how it became so, when, and what it displaced in so becoming. We can ask whether it might cease to be. We can ask what other relationalities (or expressions of relationality) might be useful to us and how we might investigate them. We can ask, for example, whether law is autonomous of justice, or of memory.

LAW’S AUTONOMY QUESTION

Were one to seek a convenient point of entry into the law and society field’s discussion

of the autonomy question, the scholarship of the early 1970s would be the place to start—not because that scholarship first posed the question but because, after a hiatus, it raised the question anew. In the wake of realism, twentieth-century law had attempted to reinvent itself as “a practical science” more interested in “working assumptions” and “tractable” matters than “fundamental questions about the social, political, and economic functions of the legal order” (Trubek 1972b, p. 1; Trubek 1990, pp. 21–22). It had bred a liberal ideology of legalism—pragmatic and professional management of social change by legal elites and institutions wielding a kit of techniques in the name of powerful but vague ideals of “freedom” and “equality” (Trubek 1990, pp. 8–9; see also Posner 1987, pp. 763–66). But if, in the Warren Court’s United States, legalism had expressed an expansive optimism about the ease with which law might be pressed into reformist service, by the end of the 1960s law was in crisis. The problems that legalism had addressed had proven intractable; legalism’s working assumptions did not work. After all, it seemed, law knew little of society, and what it did know did not help (Mazor 1972). An early law and society metaphor—law as dependent variable “acted upon by other social forces more often than acting upon them” (Hurst 1950, p. 4)—suggested one explanation of law’s problems (law’s normative promise drowned in an ocean of contending interests) but offered no scientific means to assess (or repair) its shortcomings. Some scholarship turned to systematic empirical investigation—“impact, compliance, legal effectiveness . . . the effects of law on society at large” (Feeley 1976, p. 497). In other words, gap analysis. Others identified the field’s task differently, as requiring the formulation of “a social theory of law” that would meet the demands of the age by “fram[ing] explicit and concise questions on the relationship between law and social life” (Trubek 1972b, p. 1). A sense of flux and competition for direc-

tion in socio-legal studies characterized the decade.²

Trubek’s social theory of law recovered themes from late-nineteenth-century thought about law that, he argued, had since lain largely neglected. At its center was Max Weber. Weber’s great achievement, Trubek argued, was his comparative sociology of the emergence of modern industrial capitalism (but cf. Cotterrell 1993, p. 183), a project that had required him to identify the particular conditions that favored capitalism’s first emergence and success in Europe rather than elsewhere. Law bulked large. Although he shunned reflexive accounts of the relationship between legal phenomena and economic forces, Weber nonetheless recognized the pivotal contribution that European legal systems had made to an environment conducive to the rise of capitalism. His account of those legal systems stressed their self-determination. As Trubek (1972a, p. 724) summarizes, “The European state separated law from other aspects of political activity. Specialized professional or ‘status’ groups of lawyers existed. Legal rules were consciously fashioned and rulemaking was relatively free of direct interference from religious influences and from other sources of traditional values. Concrete decisions were based on the application of universal rules, and decisionmaking was not subject to constant political intervention.” In the very formality and rationality of European law, however, lay its stimulus to capitalist development. Uniquely among world economic systems, capitalism—with its dependence on a densely transactional market economy—required a predictable legal environment to succeed. European law coerced compliance with the formal-rational legal order it had

²See, e.g., Feeley (1976, p. 501), contending that “[law] does not capture a constant, identifiable activity, process or set of relationships, around which basic social theory is likely to be formed” (see also Trubek 1977, p. 529; Nonet 1976). Competition for direction in 1970s socio-legal studies extends to how the decade should be remembered; compare Levine (1990), Trubek (1990).

constructed and perfected, ensuring a predictable transactional environment. Formality and rationality, meanwhile, preserved European law's institutions and rules of conduct at a clear remove from the distribution of benefits and costs consequent upon enforcement of the legal order. Formality and rationality thus expressed law's self-determining autonomy, its existence at a remove from self-interested political and/or economic interests; autonomy produced the predictability conducive to capitalist development.

A Weberian social theory of law thus arrives at a statement of modern Western law's autonomy through the pursuit of two complementary inquiries. First, law's legitimacy inheres in law's self-directedness (formal legal rationality), the absence of obeisance to other elements of the social order. Second, law's self-directedness is a condition of the continued stability of that social order. Each is a relational statement: The object of inquiry is the macrostructural relationship of the rise of law to the rise of capitalism. This seems obvious. Weber's stress on law's autonomy was not an attempt to deny a relationship between the two phenomena but to expound it. But the point was not obvious to scholars who considered autonomy and relationality as necessarily antithetical. Thus, virtually at the same moment that Trubek was setting out his prolegomenon to a Weberian social theory of law, Lawrence Friedman embraced the proposition that nothing about law was autonomous. All legal phenomena were determined according to the demands of "economy and society"—external interests and needs. Law should be understood "not as a kingdom unto itself, not as a set of rules and concepts, not as the province of lawyers alone, but as a mirror of society." The legal system "works like a blind, insensate machine" that "does the bidding of those whose hands are on the controls" (Friedman 1973, pp. 10, 14). Throughout his career, Friedman's skepticism of the law's autonomy remained basic to his conception of how socio-legal studies should approach law.

In 2005, cataloging the shared assumptions of socio-legal scholars, he maintained that most were of the opinion that the legal system was "basically not autonomous," possessed at most of only "a little bit of autonomy." An autonomous system was one "that operates under its own rules, that grows, changes, and develops according to its own inner program," but law was obviously imprinted by "the society in which it is imbedded"; that is by "culture, the economy, politics, tradition, and social norms" (Friedman 2005, p. 6).³ One might respond, like Weber, that the self-referential and professionalized structure of "rules, codes, procedures, and decisions" that characterizes modern Western law—its institutional separation from politics, domination by professional elites, rule-boundedness, and so forth—is precisely one that shows the imprint of the particular genus of society (modern, Western) in which it is embedded. Friedman, however, treated the autonomy question as if to describe modern Western law's distinguishing characteristics was simultaneously to deny any relationship between law and the social.

RELATIVE AUTONOMY

These early socio-legal disquisitions upon the autonomy question—Trubek's, Friedman's—were scene setting: In their essentials, the positions espoused have tended to hang around, at least in the U.S. field. A further disquisition that has also hung around (see, e.g., Silbey 2005, pp. 341–44) issued in 1975 from the English social historian Edward (E.P.) Thompson. Thompson's intervention was in its way no less notorious than Friedman's determined advocacy for law's

³ See also Galanter & Edwards (1997, p. 376), holding that "law and society"—along with "other schools and movements of legal thought" that had sprung up in the interim—was marked by "a consensus" that legal activity was not an autonomous realm but "to be explained and understood as the product of exogenous forces."

epiphenomenality, though quite distinct both in substance and context. Essentially, having completed a book (*Whigs and Hunters: The Origin of the Black Act*) that quite unambiguously cohered in its empirical detail with the general contention that legal phenomena were determined relative to economy and society, Thompson became disturbed by the implication and added a conclusion that tacked so violently away from his book's substance as virtually to disown it. Thompson's change of mind arose not from a last-minute anxiety that his own "sour" account of the eighteenth century's legal system was wrong and required qualification—he did not repudiate what he had written—but from concern that his book might be read as lending support to those within the broad range of European Marxist thought against whom he aligned himself, practitioners of "a sophisticated, but (ultimately) highly schematic Marxism"—Althusserian structuralism—that, as he (mistakenly) understood it, treated law as no more than an expression of infrastructural productive forces and relations; that is, that treated law as "an instrument of the *de facto* ruling class" that defines and defends "rulers' claims upon resources and labor-power" and mediates class relations in such a way as to "confirm and consolidate existing class power" (Thompson 1975, pp. 16, 259). Of course, in the body of *Whigs and Hunters* Thompson had just described in considerable detail the rise of an oligarchy that had indeed "employed the law, both instrumentally and ideologically, very much as a modern structural Marxist should expect it to" (Thompson 1975, pp. 260–61).⁴ But, Thompson insisted, the law as such transcended its uses. Certainly, courts, judges, and lawyers might fight to assimilate law to particular class interests; certainly, in the form of "particular rules and sanctions" (ideology, to Thompson) law stood "in a definite and active relationship" to the social. But

in a distinct instantiation that Thompson denoted "simply . . . law," which he expounded definitionally as "its own logic, rules and procedures," the law could not be assimilated to particular interests, nor did it appear to stand in any detectable relation to the social. In this instantiation "simply . . . law" was possessed of "its own characteristics, its own independent history and logic of evolution." It stood on its own as the rule of law—"a genuine forum" within which social and class conflicts might be fought (Thompson 1975, p. 260, 265). "Simply . . . law," then, was law's essence, transcendently autonomous. And as such, it was also, transcendently, "an unqualified human good" (Thompson 1975, pp. 265–66). Like Friedman, but in the opposite direction, Thompson ("simply" . . . "unqualified") had staked out an extreme. More or less at the same time as the American liberal identified the rule of law as naked instrumentalism, at the mercy of interests, the English Marxist took flight to a rather romantic formalism. (For critiques of Thompson's formalism and romanticism, see Merritt 1980, Anderson 1980; see also Horwitz 1977. For a historical critique of the implications of Thompson's general representation of eighteenth-century law and alternative formulations, see Tomlins 1995.)

Such was Thompson's zeal to bag structural Marxism that he ended up caricaturing the target the better to hit it. The European Marxists in opposition to whose structuralism Thompson wrote—theorists such as Louis Althusser and Nicos Poulantzas—were (simply) not the reductionists that Thompson made them out to be. The position that Althusserian structuralism developed was that of law's relative autonomy: relative, that is, to demands emanating from the social. Althusser's project completely retheorized orthodox (Third International) Marxist understandings of economic "base" (infrastructure) and superstructure in a fashion that was decisively noninstrumental. As Jessop summarizes it, Althusserian structuralism held that a mode of production (a society) was "a

⁴Or rather, as Thompson imagined a modern structural Marxist would expect. The difference is not unimportant.

complex structured whole” comprising “several relatively autonomous regions” (the economic, the juridico-political, the ideological) that conditioned each other. Thus, in the Althusserian project the economic was determinative only to the extent that society’s infrastructure comprises relations of production that must somehow be reproduced if the structured whole is to continue overall. How those relations were actually reproduced at any given moment depended upon practices within the several different regions, none of them per se dominant, and on the relationships persisting among them. Thus, “the Althusserian approach tends to be perfunctory in its treatment of economic determination . . . and to focus on the specific properties of the several regions as if they were autonomous” (Jessop 1980, pp. 341–42). In terminology no doubt alien to Thompson’s English ear,⁵ Althusser theorized superstructure as an assemblage of diverse state apparatuses, some repressive (police, courts, prisons, army) that functioned in the last instance by violence, others ideological (schools, churches, trade unions, media, the law) that functioned by persuasion. Althusser’s ideological state apparatuses were dispersed and differentiated; they did not secure particular class interests but rather were sites of struggle between classes for control. In Althusserian terms, courts could be repressive, but as an ideological state apparatus law itself was relatively autonomous of the demands of infrastructural productive relations and forces, an apparatus for control of which the ruling class constantly fought. The implications of the Althusserian approach for law were further clarified, Jessop (1980, pp. 342, 351–61) notes, in the work of Nicos Poulantzas, whose focus was “the autonomization and effectivity of law and the dominance of juridical ideology in bourgeois soci-

eties.” Indeed, it was Poulantzas (1973, 1978) more than any other Althusserian theorist who developed most fully the relative autonomy critique of reductionist Marxist theories of the state. These were the theorists that Thompson represented as incapable of distinguishing between “arbitrary power and the rule of law” (Thompson 1975, p. 266).

In fact, Thompson’s polemic (perhaps this was its purpose) obscured how closely, on certain points, his own formulations reproduced Althusserian formulations. Thompson claimed as his own the insight that “the rules and categories of law penetrate every level of society,” that law contributes to self-definition and identity. “Productive relations themselves” he observed “are, in part, only meaningful in terms of their definitions at law” (Thompson 1975, p. 267; 1978, p. 96). But this departs in no real particular from Poulantzas’s insistence upon understanding the specific place and function of law in the reproduction of specific modes of production, his Althusserian identification of ideology as an autonomous region in which relations of production were reproduced and in which law interpellated agents of production in isolation, on its own terms, forming their social relations (Jessop 1980, p. 352).⁶ Thompson rejected structuralist theory as “a desperate error of intellectual abstraction,” but his alternative was imprecise—in the sentence quoted above, for example, what exactly is the measure of “in part”?—and contradictory. For although Thompson posed as impassioned defender of empirical history, when his own history showed (“again and again,” as he noted) that “the actuality of the law’s operation in class-divided societies” belied its rhetoric, he rejected that too. Having lambasted relative autonomy as reductionism in disguise, the only place he had left to himself was normative romance—the rule of

⁵One encounters in Thompson’s smug ridicule of Althusser (see, e.g., Thompson 1978, pp. 90–103) a signal instance of what Teubner (1989, p. 1) calls the “Jabberwocky” technique.

⁶That is, law addresses itself, peremptorily, to a subject to whom, in the act of interpellation, it ascribes certain powers and capacities, thus producing and reproducing the subject as an effect of itself.

law as unqualified good (Thompson, 1975, pp. 266, 267).⁷

In 1977, about the same time Thompson was flailing at Althusser, a distinct strain of relative autonomy analysis briefly won more thoughtful attention in U.S. socio-legal circles. The occasion was an exchange between David Trubek and Isaac Balbus over the latter's *Dialectics of Legal Repression* (Balbus 1973). *Dialectics* was an attempt at a Marxist analysis of the behavior of the U.S. criminal justice system during the ghetto riots of the late 1960s and more generally of the role of law in capitalist society. Noting that, despite the pressures induced by the riots, due process norms and procedures were not sacrificed to an exclusive concentration on repressive order maintenance, Balbus hypothesized that formal legal rationality—which he defined as compliance with norms and procedures—was no less important to capitalist society's viability than the brute suppression of disorder, in that adherence to legality maintained the legitimacy of the general political and economic system. Trubek (1977) responded that Balbus had in effect applied Weber's concept of formal legal rationality to empirically specific instances of law in action without realizing that formal legal rationality expressed a general condition (legal autonomy) that was incompatible, at least in Trubek's view, with a Marxist analysis of law in capitalist society. Challenged by Trubek to explain the relationship between legal form (governance according to the rule of law) and capitalism in specifically Marxist terms, Balbus de-

veloped a restatement of relative autonomy (Balbus 1977) that hewed closely to the (non-Althusserian) capital logic school of Marxist theory.

The goal of capital logic Marxism “is to derive the *form* of the capitalist state from the nature of capital” and to examine “the complex system of mediations” whereby state activity creates the prerequisites for capitalist accumulation (Jessop 1980, p. 343, emphasis in original). In its application to law, capital logic theory owes most to the pre-World War II Soviet jurist Evgeny [Eugen] Pashukanis, who, as Jessop recounts, “tried to derive the specific historical form of bourgeois law and its associated state from the essential qualities of commodity circulation under capitalism” (on Pashukanis, see also Cotterrell 1993, pp. 181–82). Pashukanis's starting point, Jessop (1980, pp. 343–44) continues,

is Marx's observation in [*Das Kapital*] that commodities cannot themselves go to market and perform exchanges in their own right: they must be committed to circulation through the intervention of subjects who enter into voluntary contractual relations in their capacities as owners of those commodities. Thus Marx concludes that the economic relation between commodities must be complemented by a juridical relation between willful subjects [reference omitted]. Pashukanis likewise traces the emergence of the legal subject as the bearer of rights to the emergence of the commodity as a bearer of exchange value and argues that the logic of juridical concepts corresponds to the logic of the social relations of commodity-producing society. . . . Thus, while the pre-capitalist legal subject was a concrete individual with specific customary privileges, the legal subject of bourgeois society is the universal abstract bearer of all manner of claims. The kernel of the legal subject is the commodity owner but the formal attributes of freedom and equality rooted in the economic sphere are readily generalized to other areas of civil society and the state.

⁷One should not leave this account assuming I think Althusserian structuralism is beyond criticism. I do not. It tends both to the static and the abstract, as indeed Thompson (1978) argued in *The Poverty of Theory*. In Althusser's own hands, at least, it is not as hostile to historical work as Thompson claimed, although it is certainly hostile to historicism, of which Thompson's own work was by no means free. Unfortunately, virtually everything that might otherwise be useful in *The Poverty of Theory* has to be absorbed while trying to ignore an unusually tiresome dose of Thompsonian vituperation and self-indulgence. For far more appropriate appraisal and critique of Althusser, see Callinicos (2004), Elliott (1987).

Balbus's (1977) essay "Commodity Form and Legal Form" followed the road Pashukanis had taken a half century earlier. Its most significant achievement, perhaps, was to restate Pashukanis in terms that established a point of contact, and hence terms of distinction, between Marxist theories of the legal form and orthodox U.S. debates (see Bix 2003) that had traditionally canvassed the opposition between law's self-determination (formalism) and other-determination (instrumentalism). Instrumentalists and formalists, Balbus argued, embraced the same logic: For both, analysis of law's relation to society under capitalism could be advanced by empirical inquiry into whether or not law was a creature (instrument) of the will of powerful social actors. Instrumentalist hypotheses would be satisfied by evidence of law's responsiveness to the will of the socially powerful; formalist hypotheses would be satisfied by evidence of law's lack of responsiveness, its exhibition of tendencies to develop in response to its own internal dynamics. If one accepted the instrumentalist-formalist continuum, the scholar's only option was to approach the autonomy question as a broker, establishing some empirically determinable point of compromise or balance between formalist autonomy and instrumentalist nonautonomy (that is, the point where law, in Friedman's terms, exhibited its "little bit" of autonomy). But law's autonomy from the preferences of particular social actors could never establish law's systemic autonomy.

The formulation that *to the degree that the law does not respond directly to the demands of powerful social actors it is autonomous, in the sense that it functions and develops according to its own internal dynamics* omits the possibility that the law is not autonomous from, but rather articulates with and must be explained by, the systemic requirements of capitalism precisely because it does not respond directly to the demands of these actors (Balbus 1977, p. 572, emphasis in original).

Balbus proposed that the latter possibility was demonstrable once one transcended the "common conceptual terrain" of the instrumentalist-formalist continuum for the "wholly different theoretical terrain" of capital logic Marxism's version of relative autonomy (Balbus 1977, p. 572–73).⁸

Following Pashukanis, Balbus argued that the relationship between law and capitalism was conceptually systemic: The very form of law (exchange of people) was homologous—correspondent—with the form of capitalism (exchange of commodities). The homology of legal form and commodity form lay in their reproduction of the same logic of equivalence: "[I]n a capitalist mode of production, products take on the form of individual commodities"; in the legal form that corresponds to a capitalist mode of production, human beings "take on the form of individual citizens" (Balbus 1977, p. 575). Commodities and citizens obeyed the same productive logic: In each case, they had been abstracted from specific, real substances (products, persons) and rendered what, in fact, they could not be—equals. In each case, the attribution of equality rendered the commodity, the citizen, exchangeable with its equivalents—other commodities, other citizens—through the operation of dedicated transactional media: markets and law. Balbus expressed the homology of capitalist society's transactional media (law, markets) in the capital logic school's terminology of prerequisites for accumulation.

In Balbus's rendition, then, relative autonomy was not structuralist, in the Althusserian

⁸It is worth noting that orthodox jurisprudential discourse has picked up and uses the terminology of relative autonomy, but in ways that have no relationship to Althusserian or capital logic Marxism. For example, when Bix (2003, p. 985) finds that "a *relatively* autonomous discipline of law may be defensible" (emphasis in original), he means a discipline that is "somewhat" autonomous, that treats legal reasoning as distinctive but not absolutely distinct—"a particular application of moral and political reasoning, rather than entirely abstracted from such reasoning." It is important to distinguish this conventional vocabulary from the structural or logical precision essayed in the original Marxist theorization.

sense, but essentialist—an expression of correspondent logics of capital and law.

The homology between the legal form and the commodity form guarantees both that the legal form, like the commodity form, functions and develops autonomously from the preferences of social actors *and* that it does *not* function and develop autonomously from the system in which these social actors participate. Stated otherwise, the autonomy of the Law from the preferences of even the most powerful social actors (the members of the capitalist class) is not an obstacle to, but rather a prerequisite for, the capacity of the Law to contribute to the reproduction of the overall conditions that make capitalism possible, and thus its capacity to serve the interests of capital as a *class* (Balbus 1977, p. 585, emphasis in original).

Balbus's theorization of law's relative autonomy was not intended as a substitute for empirical investigation. His goal, he insisted, was reunification of structure with history. In this light, he noted, self-critically, that his theorization was if anything already outdated: The historical moment of competitive capitalism that informed it was over, creating conditions for a new and different homology and requiring investigation of the transition from one to the next.⁹ (I return to this question later in the review.) Yet because it was theorized precisely as a transcendent relationship, capital logic's relative autonomy was difficult to realize in empirical work. More immediately, Marxist theories of law, never particularly influential in the United States, would be further marginalized in the rise of Critical Legal Studies (CLS) (see, e.g., Gordon 1982). For both reasons, though elegant, Balbus's formulation did not prove particularly influential.

⁹For a similar but more urgent depiction and analysis of a crisis of familiar concepts arising at a moment of radical historical decomposition, see Santos (1985, pp. 299–302).

REFINING AND REJECTING RELATIVE AUTONOMY (EUROPE)

Outside the United States, socio-legal investigation of the autonomy question continued to occur in conceptual and methodological terms suggested by, or at least extrapolated from, debates within European Marxism. One important innovation that built on Poulantzas's (1973, 1978) constitutive analysis of law, for example, was undertaken during the 1980s by scholars like Anthony Woodiwiss, whose objective was to theorize relative autonomy in a manner that rendered it decisively open to empirical work, deployable in attempts to answer "specific historical questions" (Woodiwiss 1990a, p. 7). Starting from Marxist theory's convergence upon relative autonomy as descriptive of a broadly structural relationship between law and capitalist society, Woodiwiss attempted a further and more rigorous specification of autonomy's relativity at any given moment by turning to Foucault. Relative autonomy, he argued, inhered not in the structural relationship between law and society but in the particularities of legal discourse. For Woodiwiss, what was law at any given moment was determined by legal discourse's own rules of formation. Law's relationship to economy, as to any social process, was hence decisively mediated by the particularities and anomalies of its own process of creation. Intrinsic to that process and the basis of law's autonomy, Woodiwiss (1990a, p. 10) argued, was a foundational and constitutive impulse to "consistency." Consistency was legal discourse's guiding sign, it was "the prime discursively produced object of law" (Woodiwiss 1985, p. 68). It was the foundation upon which was built law's potent "background ideology-effect" of legitimation in relation to the social formation of which it is part. Precisely to enjoy social authority as a modality of rule, however, legal discourse had also to remain consistent with "the principles structuring the dominant or hegemonic discourses" abroad in society

at large. This was “the most important criterion against which its consistency . . . is judged” (Woodiwiss 1990a, p. 11). Here, that is, lay the relativity of law’s autonomy.

Understanding law as a compound of discourses and their practices, Woodiwiss argued, enabled one to investigate with some precision how law produces its effects, both foreground (specific outcomes) and background (ideology). Recalling Poulantzas, law “interpellates the subjects it addresses in such a way that they will be law-abiding” (Woodiwiss 1985, p. 72). It positions subjects relative to one another as its discourses prescribe. Subject positions “are constituted by the rights and duties that define them and therefore determine the relations that can or should exist between them”—husband/wife, employer/employee, and so forth. Subject positions are also simultaneously and independently constituted in other discourses with which law seeks consistency, but which may also interpellate subjects differently. When disciplinary equilibria achieved in one discourse, or among discourses, break down, they become the object of reinforcement in others. In law, reinforcement is performed by transpositioning—changing the position of the subject (from wife to civil respondent, for example; from employee to criminal defendant)—potentially effecting “a transformation of rights, duties and therefore relations” (Woodiwiss 1985, p. 73). As a medium of transpositioning, law enjoys autonomy—its transpositional capacities are not exercised functionally, according to the needs of capital, but according to the dictates of its own intrinsic technology as a discourse (its particular tactics, its power effects); nor is law necessarily *the* transpositioning discourse: One can imagine many other discourses with transpositional capacities. However, “conditions appropriate to the securing of capitalist production and exchange may strongly suggest an affinity with legalistic forms” (Woodiwiss 1985, p. 73). Moreover, in that affinity lies an ultimate (and restated) relationality. “In the same way that a particular legal system as an

ideological and political element represents a condition of the existence of the economy, then so too economic, as well as other political and ideological elements represent the conditions of existence of the legal system. For this reason one has to look beyond the law if one wishes to understand fully such juridical signifiers as constitutions, statutes, juristic arguments, and such disciplinary effects as decisions to proceed or not, degrees of enforcement and even judgments themselves” (Woodiwiss 1985, p. 75; see also Woodiwiss 1990b, p. 120; on transpositioning, see also Hunt 1992, p. 31).

Woodiwiss’s resort to discourse analysis restated relative autonomy in poststructuralist terms, but it did not abandon socio-legal studies’ traditional commitment to look outside. Niklas Luhmann, in contrast, pressed the Foucauldian episteme to an entirely self-referential conclusion. Law was one among a proliferation of self-contained epistemic subsystems into which modern society had fragmented, each of which “recursively produce their own elements from the network of their elements” (Teubner 1989, p. 736). Law’s complete autonomy (autopoiesis) was simply “fateful necessity” (see Nelken 2006a, p. 599). Even then the question remained to what extent and in what fashion distinct self-referential subsystems might interact (couple): In what form did (could) knowledge flow from one to another? Divorced completely from a social conceptualized as observable and real—for each epistemic subsystem constructed its own social reality as an effect of discourse—autopoietic autonomous law still remained relational insofar as it enjoyed cognitive contact with other epistemic subsystems. “The simultaneous dependence on and independence from other social discourses is the reason why modern law is permanently oscillating between positions of cognitive autonomy and heteronomy” (Teubner 1989, p. 730). Permanent oscillation is far from relative autonomy but still expresses a desire to establish cross-border terms for a relationship between law and a social other—whether that

other is material or discursive (Nelken, 2006a, p. 599).¹⁰

REFINING AND REJECTING RELATIVE AUTONOMY (UNITED STATES)

In the United States, law's autonomy question followed a somewhat distinct trajectory.¹¹ One may summarize its arc by reference to Forbath's (1991) prefatory discussion of the theoretical position informing his *Law and the Shaping of the American Labor Movement*. Forbath's stated concern should by now be familiar: to determine "how far the legal order has had an autonomous role in social and political development." It was posed as a challenge to the view (also by now familiar) that law was derivative, an epiphenomenon reflective of a more fundamental social and economic reality. We have seen that European theorists from Althusser onward had already proposed innumerable challenges to the concept of law as epiphenomenon. Nevertheless, Forbath argued to his largely American audience that

¹⁰Marianna Valverde has responded skeptically to autopoiesis in terms that in fact extend to the entirety of the autonomy question. The hard divisions among epistemic subsystems that autopoiesis proposes are not reproduced in the way knowledge actually is used by lawyers and judges. As an attempt to theorize law's borders, autopoiesis, like Bourdieu's theorization of the legal field, like the different varieties of Marxist relative autonomy theory, is static. Borders can be mapped pragmatically, but mapping should always be dynamic: One should resist "structures [that] exist only in the imagination of researchers who cannot cope with the flux of life" (Valverde 2006b, p. 593). Valverde instead embraces "problematization"—that is, rather than approach law holistically (e.g., as a determinable field), one should concentrate on the diversity of strategies, practices, and objectives that emerge at specific conjunctures and attempt to determine the problematics—that is, the modes of problematization or relations of power and knowledge—that, at those conjunctures, inspire and produce this or that strategy and objective. As an instance of problematization put into effect, see Valverde (2006a).

¹¹Alternatively, one might say that the autonomy question followed the same trajectory but employed a distinct conceptual apparatus, one characteristic of which was largely failure to engage, or even to recognize affinities or debates, with European theorizing. An important exception is Heller (1984).

the epiphenomenal understanding of law remained ascendant in modern social thought and was characteristic of socio-legal scholarship, which he held was inattentive to law's "relatively independent power to shape social life" (Forbath 1991, pp. ix–x; Forbath managed this by treating epiphenomenal and superstructural as synonyms). What relative independence meant—whether it was intended to convey a conceptual inflection distinct from relative autonomy—was unclear: Forbath did not locate relative independence vis-à-vis any extant body of theory, structural or otherwise. But that was not his purpose. His book, rather, explored the idea, which he credited to CLS scholarship, that law was "constitutive" of the social (Forbath 1991, p. x).

In Forbath's argument, law was constitutive in two aspects. First, law (courts, the judges who presided over them, the law they made) created the material order of constraints and inducements that shaped all social action. Second, law set the ideological and cultural context in which actors encountered, comprehended, and reacted to those material constraints and inducements. "The language of the law, along with other discourses of the powerful, lays down the very terms within which subordinate groups are able to experience the world and articulate their aspirations" (Forbath 1991, pp. xi, 170). Both aspects identified law as the key agency of domination. Law, not "deeper forces," shaped social action and social movements. Yet in law's constitutive capacities, Forbath detected a certain double-edgedness. The instantiations of law's autonomy—its language and meanings—were open-ended and mutable. Common law "ambiguities" and the U.S. Constitution's "recessive radical strains" rendered American law sufficiently indeterminate as to grant even those whom law most thoroughly subordinated opportunities to seize and convert it to their own uses (Forbath 1991, p. 172). Both because it was a shaper of social movements and because it might be seized by them and itself reshaped, law became a decisive terrain for social

struggle. There is a whiff of Thompsonian romance here, but only a whiff: Opportunity was located in indeterminacy, not in some exalted higher meaning one day to become manifest.

As Forbath noted, in their U.S. articulation the arguments for law's constitutive character—and for its indeterminacy—had been developed principally under the banner of CLS. An outgrowth of the law and society movement, CLS scholarship represented a critique of law and society's instrumentalist tendencies (see, e.g., Tushnet 1977) but was also a law school-based reaction to law and society's core research practices, notably the ascription of objective meaning through positivist social scientific inquiry. "The method Critical scholars employ stresses the study of appellate cases and other indicia of legal doctrine, but overlooks 'empirical' evidence of the social 'impact' of law or the behavior of legal actors" (Trubek 1984, p. 576). In the CLS project, law's virtual autonomy as institutional formation, profession, discipline, and discourse became the point of departure; internal critique was the chosen strategy. Arguments for law's constitutive capacities were shaped accordingly.

One will encounter CLS's version of both the constitutive and indeterminacy arguments in sophisticated and accessible expression in the work of Robert W. Gordon, notably in his justly famous and influential *Stanford Law Review* essay "Critical Legal Histories" (Gordon 1984).¹² "Critical Legal Histories" is some-

thing of a tour de force. Gordon assimilates the totality of prior socio-legal theorizing (from the mid-nineteenth century onward) to a single template or orthodoxy; rejects the template; and offers in its place a completely transcendent critical constitutive alternative. Gordon christens the template "evolutionary functionalism." Evolutionary functionalism is the dominant and enduring account of the relationship between legal and social change embraced in one form or another in enlightened opinion since the early nineteenth century. It is distinguished by five signature propositions: (1) Law and society are separate social categories that can be described without recourse to each other but are related by a variety of causal mechanisms; (2) societies have needs; (3) there is an objective, determined, progressive social evolutionary path; (4) legal systems should be described and explained in terms of their functional responsiveness to social needs; (5) the legal system adapts to changing social needs (Gordon 1984, pp. 59–65). The essay, inevitably, demolishes evolutionary functionalism and hence all prior socio-legal theorizing; then it demolishes prior "partial" critiques of evolutionary functionalism, which retain too much loyalty to the essentials of the template to avoid its taint; and finally it erects CLS's constitutive alternative on the newly vacant lot.

The autonomy question is, obviously, deeply implicated in this exercise. Gordon takes law's autonomy—"long-run structural characteristics that make legal practices outlast short-term swings in political pressure"—very seriously (Gordon 1984, p. 89; see also Gordon & Nelson 1988).¹³ In fact, it is precisely the obstinate historical evidence of "the autonomy problem"—that is, "the fact that legal norms and practices aren't completely

¹²Forbath (1991, p. x) identifies Gordon as a leading U.S. critic of the superstructural view of law, but this is, I think, a little misleading in that Gordon (1984, p. 4) actually disavows any intention to engage with "the interesting controversies among Marxist historians and theorists." Doing so would require "introduction to a lot of specialized concepts and jargon," for which an American audience would (as Teubner 1989 would also note) have neither use nor patience. Gordon remarks that U.S. debates occur in a kind of magnificently indifferent parallel universe: "[T]hese controversies have counterparts in the literature of American legal scholarship [, but] they are almost never referred to in that literature." Having disclaimed any intention to engage with Marxist theorizing, Gordon does in fact offer occasional generalized and largely dismissive snapshot characterizations of various Marxisms throughout "Critical Legal

Histories." Collectively, these justify the conclusion that in Gordon's world, as in Forbath's, superstructure is indeed just another word for epiphenomenon.

¹³Taking law's autonomy seriously was an equally prominent component in Tushnet's (1977) critique of Friedman.

plastic and don't alter every time another set of interests gets its paws on them because they do have some resilience, some long- or medium-term continuity of inner structure" (Gordon 1984, p. 88)—that undermines both evolutionary functionalism and the partial critiques of it that Gordon catalogs. Among those partial critiques is a version of relative autonomy argumentation that Gordon tells us has informed CLS historiography: "[R]elative autonomy means that [legal forms and practices] can't be explained completely by reference to external political/social/economic factors. To some extent they are independent variables in social experience and therefore they require study elaborating their peculiar internal structures with the aim of finding out how those structures feed back upon social life" (Gordon 1984, p. 101). But the statement seems far too brief and its expression too imprecise to serve any purpose other than prelude to its own rejection, which is in fact what comes next. CLS's total critique of the dominant tradition (evolutionary functionalism) requires a complete transcendence of the tradition's "division of the world into social and legal spheres" (Gordon 1984, p. 102). Gordon represents this as a blurring of the law/society distinction (Gordon 1984, p. 102), but as outlined it is more a reversal of the dominant tradition's causal polarities: In the dominant tradition and its partial spin-offs, "the *fundamental* operations of th[e] world originate before law and go forward independently of it; they fashion in general outline (if not in tiny detail) the agendas and limits of legal systems and are beyond the power of law to alter" (Gordon 1984, p. 103, emphasis in original). Total critique produces the opposite: "the notion of the *fundamentally* constitutive character of legal relations on social life" (Gordon 1984, pp. 104, emphasis added). Indeed, it produces the claim that law is constitutive not merely of social life but of all life. For law is constitutive of consciousness itself—human imagination. If, as Roberto Unger (1987, p. 1) has put it, society "is made and imagined," law lies behind both making and imagining, for it is, as

Gordon states elsewhere, a "system of meaning" that "has the effect of making the social world as it is come to seem natural and inevitable" (Gordon 1982, p. 288; 1984, p. 109).

What of the other claim, law's indeterminacy? CLS's strategy of "total critique and transcendence" had its greatest impact on the terrain—legal doctrine, "paradigm structures of [legal] thought"—most familiar to its largely law school–based proponents (Gordon 1984, p. 58, n.3; p. 116). Aware that their stress on law's absolute autonomy and constitutive capacities had the appearance of simply switching from one kind of determinism (say, economic or material) to another (legal), CLS's proponents simultaneously developed the indeterminacy thesis, which proposed "the a priori impossibility of consistency in [legal] signification" (Woodiwiss 1990a, p. 8). That is, critical analysis of doctrine exposed, at least to its own satisfaction, not only the absence of any determining relationship between law (particular rules and processes) and society (particular social practices, structures, or other discourses), but also the absence of any determinate meaning attributable to the rule considered on its own terms, stemming from its own internal contradictions. As a system of meaning, law might make a given world seem natural and inevitable by creating and reinforcing regularities in social practice, but that was a far cry from legal forms actually having lasting determinate effects. Admittedly, there were "plenty of short- and medium-run stable regularities in social life, including regularities in the interpretation and application, in given contexts, of legal rules." But eventually regularities always decomposed, for law was indeterminate "at its core, in its inception" (Gordon 1984, p. 114). For CLS purposes, the indeterminacy thesis was satisfied by producing for every claim of a necessary relationship between a legal rule and a social practice an example of a distinct or inverse relationship. In the last instance, social life did not depend on a particular regime of rules, nor were its regularities the "*necessary* consequences" of that regime. No rule system

could foreclose the possibility of outcomes other than those the rule system seemed to envisage, precisely because the rule system could, at will, be employed to generate any outcome (Gordon 1984, pp. 114–16, 125, emphasis in original).¹⁴

What would determine whether or not such sudden shifts in direction occurred? Politics (Gordon 1984, pp. 118, 125). The answer was intended to be enabling (Gordon 1982, pp. 291–92), but to the extent that relocating contests over rules in politics rather than in law was more than the tactical shift between interchangeable discourses suggested by the CLS mantra that “LAW IS POLITICS” (Schlegel 1984, pp. 410–11), it reintroduced the tendency to legal determinacy that CLS arguments about doctrine had been designed to avoid. Paradigm structures of legal thought that did not determine any particular set of social consequences nevertheless did “determine’ . . . the categories of thought and discourse” for political conflicts (Gordon 1984, p. 118). We have already noted Gordon’s reference to the “long-run structural characteristics that make legal practices *outlast* short-term swings in political pressure” (Gordon 1984, p. 84, emphasis added). If politics becomes the arena where conflicts occur over the production of rules intended to have social consequences, we must still ask what rules (discursive or otherwise) set the terms for conflicts over the production of rules. The answer, it appears, is law’s rules (see Dezalay & Garth

2002, pp. 306, 307, 311; see generally Tomlins 1993, 2000, 2004).

THE SOCIAL: ORIGIN

To this point, I have not given much critical attention to the virtually ubiquitous acceptance of the social as law’s relational other. CLS did not deviate: Even as its emphasis upon law’s constitutive capacities reversed the polarity implied in prior theorizations of the law-society relationship, it still identified itself as a genre of inquiry into the relationship of law with the social (Gordon 1984, pp. 124–25). Autopoietic theory declared law radically self-referential, yet as Nelken (2006a) has observed, the lure of the social exerted a strong pull on even its most faithful exponents in the legal field. Teubner, he argues, “prefers to treat the autopoiesis of the legal system as a matter of degree” and concedes “that law does in some way ‘respond’ to external influences” (Nelken 2006a, p. 599; see also King 1993). Generally, in the realm of law and society, the drive to sociologize law, to situate it in “an empirical social world,” continues apace, converging with modernist commitments to positive law and creating a socio-legal positivism so overwhelming that, Constable (2005, p. 9) muses, “one wonders what else law could possibly be.”

One manifestation of failure to wonder what else law might be was the rise of the *of/by* slogan, which married the constitutive conclusions of critical theory with the externalism of sociologized approaches to produce a kind of all-purpose default statement: that law was at one and the same time constitutive of and constituted by society. On its face, one might take this to be nothing more than a somewhat awkward restatement of structuralist relative autonomy that expressed little of the latter’s attempt at least to specify rigorously what its terms actually meant, what relationality was actually implied. There is indeed something to this: In the socio-legal field, the *of/by* statement often serves more as a preliminary incantation than as a conceptual position that

¹⁴One might ask, pragmatically, how much law’s imputed indeterminacy actually matters in any given instance, given Gordon’s (1984, p. 125) readiness to acknowledge “predictable causal relations” between legal forms and social life in the (undefined) short and medium run. Is law indeterminate only in the last instance? If so, it is interesting to compare CLS’s emphases with the much more famous (and quite different) example of last instance reasoning, Althusserian relative autonomy. We have already seen, as Jessop (1980, pp. 341–42) commented, that “the Althusserian approach tends to be perfunctory” in its treatment of the last instance, focusing on “specific properties.” Despite its own admitted specifics of actual regularities and predictable causal relations, on the other hand, CLS chose to be anything but perfunctory when it came to ultimate indeterminacy.

actually informs analysis. But there is more to it than this. The of/by answer to the autonomy question actually has roots in a venerable and distinctly homespun U.S. research tradition that dates to the early-twentieth-century beginnings of sociological jurisprudence and to the original and foundational distinction that Roscoe Pound then drew between law in books and law in action (Pound 1910, p. 22; Parker 2006, p. 517). This is the tradition that did most in the United States to create the social as law's other and the gap beloved of socio-legal studies. It continues to exert enormous influence on the U.S. socio-legal field a full century later.

Divergence between the law in the books and the law in action, Pound had argued, was not of itself a novel phenomenon. "Law has always been and no doubt will always continue to be, 'in a process of becoming'," always in effect running behind action, or social life (Pound 1910, p. 22). The particular problem as Pound formulated it was that after years of lively innovation across the first three-quarters of the nineteenth century, American juristic thought had ceased to stay abreast of the times: It had settled instead into a condition of stasis—stability—in which it was "incapable of solving new problems or of meeting new situations of vital importance to present-day life" (Pound 1910, p. 22). Pound blamed the divergence on the dominant historical school of American juristic thought, which he argued was rigidly committed to an outdated approach to law "as existing solely to secure liberty," arrived at a priori and applied mechanically. This was "out of accord with current social, economic and philosophical thinking" (Pound 1910, pp. 24, 25–30). Whereas "kindred branches of learning"—philosophy, political science, economics, sociology—had grounded themselves more and more on "the economic and social interpretation" of life, in law the historical school's obtuse "settled habits" had left legal science adrift on the tides of nineteenth-century philosophical idealism. Law, increasingly self-referential, was no longer catching up to action. It was irre-

trievably dead, committed to ideas and patterns of thought that had long "ceased to be vital in other departments of learning" (Pound 1910, p. 25). The result was a yawning chasm between (dead) legal justice and the (living) justice of social life (Pound 1910, pp. 25, 30; on these themes, see also Parker 2006). What conclusion did Pound draw?

Let us look the facts of human conduct in the face. Let us look to economics and sociology and philosophy, and cease to assume that jurisprudence is self-sufficient. It is the work of lawyers to make the law in action conform to the law in the books, not by futile thunderings against popular lawlessness, nor eloquent exhortations to obedience of the written law, but by making the law in the books such that the law in action can conform to it, and providing a speedy, cheap and efficient legal mode of applying it. On no other terms can the two be reconciled. In a conflict between the law in books and the national will there can be but one result (Pound 1910, pp. 35–36).

Pound's conclusion stressed reconciliation with the national will as the means to recover law's legitimacy. This Savigny-esque observation was no great innovation per se (on the German historical school and American jurisprudence, see Tomlins 2004, pp. 352–65; the best account of the historical school of American jurisprudence to date is Parker 2006). Notwithstanding Pound's claims of its obtuse self-sufficiency, late-nineteenth-century American historical jurisprudence had identified a perfectly appropriate context for understanding law, namely custom. As Parker (2006) has argued, custom embodied life—it expressed commonalities of human action and belief in advance of law. In relation to custom, law was always "a little 'behind,' a little 'dead,'" always reforming in an attempt to capture life in law's crystalline form (Parker 2006, p. 486). In comparison with historical jurisprudence, Pound's innovation actually lay in greatly sharpening the differentiation

of the legal from its context in the process of recreating both as realms of specialized expertise or particular knowledge practices—on the one hand, law (revealing the facts of legal conduct); and on the other hand, those “kindred branches of learning”—philosophy, political science, economics, sociology (revealing the facts of human conduct).

As itself a long-established legal category, custom had supplied a context for law formed out of law itself. It was this that Pound dismissed in 1910 as merely a priori (subjecting James Coolidge Carter to a somewhat tortured reading in order to do so: compare Pound 1910, p. 28, with Parker 2006, pp. 505–8). Pound would later allow that custom as an invocation of life was in effect a way station to the social (Pound 1923, p. 68; Parker 2006, pp. 484–85). But historical jurisprudence’s fatal error remained that “it assumed progress as something for which a basis could be found within itself” (Pound 1923, p. 19). Pound’s sociological jurisprudence, in contrast, contextualized law by counterposing it to something other than itself, the social, an exterior human world wherein the “basis for progress” really lay (Wigdor 1974; Willrich 2003, pp. 104–15). Thus, in Pound’s project, studying law meant studying courts, their rules and their decisions, the sphere of the juridical, in light of the social conditions that summoned their attention, and the social consequences of those decisions. But how was this exterior social world to be apprehended? Unlike custom, the social was apprehended by resort to specific professional discourses, or expertises. As Pound says, when one wishes to “look the facts of human conduct in the face,” one actually does so by “look[ing] to economics and sociology and philosophy.” That is, one does not actually “look the facts of human conduct in the face” at all; one looks past them, to the expertises that tell one what they are and what they mean.

Having made the social rather than custom the repository of life (human action) and having sharpened action’s differentiation from books by rendering each sphere the preserve

of distinct expertises, sociological jurisprudence then proceeded to the terms of reconciliation of the juridical with the social, books with action. Constituting them as separate spheres, sociological jurisprudence granted each a distinct reason for being. The juridical existed to react to and regulate “the facts of human conduct.” Having discovered those facts by resort to the expertises that revealed the social, the juridical acted by resort to law, its own expertise. Reconciliation hence meant the creation of discursive consistency, but in the case of law this was work that only lawyers could do—“to make the law in action conform to the law in the books . . . by making the law in the books such that the law in action can conform to it” (Pound 1910, p. 36). Reconciliation itself was conditioned on separation. Pound might contrast the tradition of the nineteenth century, when “we studied law from within,” with modern jurists who studied law “from without” (Pound 1921, p. 212). But sociological jurisprudence did not blur the object of study. Indeed, Pound’s entire career was dedicated to maintaining and defending the legitimacy and inviolability—the autonomy—of the juridical sphere in its relations with the social (Tomlins 2004, pp. 372–75).

THE SOCIAL: DEMISE?

Here in Pound’s nutshell we encounter what, half a century later, would serve as the initiating template for the field of socio-legal studies in the United States: the legal, the social, and the gap between them (Feeley 1976).¹⁵ We have seen how social theories of law—whether

¹⁵ We do not at this point encounter much commentary on Pound’s disquisition upon expertises, with its suggestion that the social is knowable only by expertises (autonomous knowledge systems), and which also may be read to imply that the social only exists in the operations of expertises. In the intervening period, the social had hardened into measurable reality (as demonstrated and cataloged by Galanter & Edwards 1997). It would not be until the 1980s and later, as we have already seen, that poststructuralist sociology of knowledge would return the socio-legal field to a position from which it might inspect the possible implications of Pound’s observations.

Weberian, or Marxist, or generically critical—struggled thereafter to produce formulations of the relations among these three objects of study. It will have been evident from my account that I think Marxist theory has considerable importance in this matter—more, certainly, than many U.S. socio-legal scholars have been willing to acknowledge. Hence the attention given it here. There remains the question of what these various efforts achieved and where matters stand at present.

Marxist responses to the autonomy question—at least those issuing from capital logic theorists—tended to ground representations of law’s relative autonomy on conditions prevalent during the historical moment of competitive capitalism. The transactional correspondence (homology) between legal form and commodity form that Balbus (1977) explored assumed the supremacy of markets. But as we noted, Balbus himself affirmed that in the later twentieth century the historical moment of classic competitive capitalism was long past, and with it the idea of a logical (or for that matter structural) constant: “[T]he development of State-regulated monopoly capitalism has . . . witnessed an erosion of the rule of Law and the emergence of less formalistic, more instrumentalist and technocratic modes of social and political control; the Law as universal political equivalent gradually gives way to a series of relatively ad hoc *techniques* which, by their very nature, recognize specific interests and specific social origins” (Balbus 1977, p. 586, emphasis in original). What is important here is not the specific invocation of state monopoly capitalism as the foundation for a possible new era of analysis; “stamocap” (as Jessop quite delightfully abbreviates it; see Jessup 1980, p. 340) has not offered a particularly subtle Marxist perspective on law. What is important, rather, is the sensitivity underlying Balbus’s conclusion to the possibility that a move in time from one historically located modality of observable social-legal relationality to another (from, say, a transactional modality to a probabilistic or actuarial modality) will render the-

ory appropriate to the first of limited applicability when it comes to explaining the second. The point is simple. Theory exists in a conjuncture. To the extent that it purports to explain its environment, theory is limited by that conjuncture [as Valverde (2006b) underscores in her withering excoriation of sociology’s propensity to produce “static models of social change”]. Although temporal conjunctures may be stable over long stretches, transhistorical statements about what law is should be treated with great caution. Balbus (1977, p. 587) recognizes the importance of reuniting structure and history.

One may examine CLS’s emphasis on blurring the law/society distinction in the same manner. Blurring is offered as a historically transcendent alternative to evolutionary functionalism’s similarly transcendent separation of the legal and the social. The argument gathered strength, however, precisely because it was made in an era of blurring, in which law’s constitutive capacities—as discourse, profession, expertise, technique—were increasingly on display, nationally and internationally, penetrating the social to an extent unparalleled in previous eras (see generally Kagan et al. 2002, Dezalay & Garth 2002).¹⁶ We have already seen, from the brief account of the emergence of sociological jurisprudence, how the distinction between the legal and the social was constituted in a juridical theory precisely at a moment when a separation of the social from the legal was rendered observable in the aggressive theoretical constitution of the social as distinct (Pound 1910, pp. 30–31; Tomlins 2000, pp. 922–23, 925–26). Currently, we observe the erosion of that distinction in contemporary practice and theory. Both evolutionary functionalism and the critical response to it purported to make

¹⁶In Tomlins 2000, I have argued that asserting authority over rule production in the face of rival claims and expertises (sometimes defensively, sometimes aggressively, always with substantive variation in the techniques and discourses of assertion) is a cyclical phenomenon that repeats throughout modern U.S. legal history. See also Tomlins (2004).

transhistorical relational statements in answer to law's autonomy question, but law is not, per se, a phenomenon with constant attributes the nature of which place it and the contexts in which it is located in a constant relationship—instrumental-functional, relatively autonomous of, constitutive of, constituted by. Each relational statement is worthy of serious examination; each may be more or less appropriate at a given moment or to describe a given situation. Approached historically, however, law's relationality is not susceptible to a single theorization (Tomlins 1993, pp. xiii–xiv, 28–34).¹⁷

Current scholarship, both empirical and theoretical, appears to be responding both to the resurgence of the legal that, I have argued, marks the current (post-1970s) conjuncture, and to its expression—not the routines of underlying forces but the specificities of the manner in which the legal and the social penetrate, form, plunge into each other. New Legal Realism (Erlanger et al. 2005, Gulati & Nielsen 2006, Garth 2006) represents a “postmodern” socio-legal studies, which recognizes that “the reciprocal, recursive nature of the interaction between law, experience and culture makes it impervious to analysis by any particular theory” and attempts a kinship of the dynamic and the structural through situated, context-sensitive em-

pirical research (McEvoy 2005, p. 437). Of some considerable significance is New Legal Realism's denial of transcendent explanatory ambition, its explicit situation of itself in “the character of our experience at this historical moment,” and its characterization of other explanatory traditions in the field in like terms (McEvoy 2005, p. 448, and see pp. 434, 443). New Police Science (Dubber & Valverde 2006) is a genre of research distinct in substance—to the extent that its object of study can be stated simply, “governance” or “rule” is as good as any—but not in its judicious apprehension of the limits of theory (science) and its emphasis on situated empirical inquiry. New Police Science approaches police on the broadest governmental-legal terrain, local and international, “in terms of the circumstances in which it [police] is produced, the actions that signify its presence, the locales in which it occurs, and the modalities by which it rules” (Tomlins 2006, p. 254). New work in the tradition of Bourdieuvian sociology that examines the role of law and lawyers in the production of postwar Europe stresses “the blurriness and fuzziness of law and politics” as conventional domains of analysis and chooses instead to reconstruct lawyers' and jurists' strategies with such specificity as to be virtually an exercise in the prosopography of particular historical-geographic conjunctures (Cohen et al. 2007; for a distinct example, see Dezalay & Garth 2008). Valverde's emphasis on dynamic problematization is distinct in that she rejects all static (structural) models of motion (including Bourdieu's) and their “underlying social forces” in favor of “surfaces and the means by which law achieves its ‘truth effects’” (Valverde 2006b, p. 592, 593; Nelken 2006b, p. 572). But as discussed above, socio-legal studies itself appears to be shifting its attention from “deeper social forces” to the instance. Hunt's (1992) mobilization of “transpositioning” and “structural coupling” is distinct again, but represents yet another response to the same conjunctural interpenetration of law and the social. It is a means to approach linkages and interdependencies

¹⁷Of course, merely placing law in historical time does not really get one much further as long as historical time is conceived of as homogenous and continuous—as modern history seems inclined to think of it. We should instead consider historical time as a diversity of distinct temporalities whose conjunctions are problematic. For example, Althusser argues that different levels of the complex social whole have entirely different historical temporalities. “We have to assign to each level a *peculiar time*, relatively autonomous and hence relatively independent, even in its dependence, of the ‘times’ of the other levels” (Althusser & Balibar 1979, p. 99 and generally pp. 91–118). Benjamin treats “the continuum of history” as the creation of bourgeois historicism, which “contents itself with establishing a causal connection between various moments in history . . . telling the sequence of events like the beads of a rosary.” To this he contrasts historical materialism's “constellation” of past and present (Benjamin 1968 [1940], pp. 261–63). I explore these ideas in Tomlins (2008).

of law and the social that is relatively indifferent to older questions of general directionality and causality—the autonomy question—favoring instead investigation of particular uses and representations of law (as discourse, profession, expertise, technique) at particular conjunctures. “We should not assume either that law dominates or incorporates other discursive and institutional practices, or, conversely, that law is subsumed by other disciplinary discourses or practices. Directionality and causality must always be questions of specific historical and contextual investigation” (Hunt 1992, p. 31).

CONCLUSION: A HISTORICAL SPECULATION

All this notwithstanding, the conjunctures that current and recent socio-legal research explore remain to a considerable extent relationally fixated on the social as other. As Constable (1994, p. 588 and, generally, pp. 572–90) remarks,

for philosophers and researchers, for those who accept sociological knowledge as the truth about law and for those who live in a society that accepts such truths, law becomes what sociology knows it to be: the norms (in their double sense) of a population; the management of risks and interests; the policies enforced by officials in the context of belief in the justice of state violence or, in other words, positive law. Sociology—whether as science or as interpretation, as law or as philosophy—speaks the truths of positive law in the language of belief and appearance, the language of “legitimacy,” “values,” “norms,” “distribution,” and “policy.”

I have questioned that fixation here by asking when the social became law’s relational other (and answered: the beginning of the twentieth century) and by asking what it displaced in so becoming (and answered: custom). One might, in conclusion, push the matter a little further by asking whether the social could

cease to be law’s designated relational other, whether there are other relationalities that are worth investigating.

I suggest two: justice and memory. As befits the moment, they inflect (plunge into) each other.

Justice is, of course, a familiar if elusive relational other to law. It is what law is supposed to pursue. In a tradition earlier than ours, Constable (2005, p. 14) notes, “law issued from justice.” In the early twentieth century, justice became restated in the terms of sociology as social justice and contrasted to an effete legal justice that could reconstitute itself as just only to the extent that it became socially (that is sociologically) effective (Pound 1910, and see generally Willrich 2003). The possibility of its recovery in different form is the point made in Constable’s most recent work, which teaches two lessons. First, when it comes to characterizing modern law, the socio-legal positivism (sociologized law) that Pound pioneered makes perfect sense. It is a way of conceiving law that indeed reveals modern law. Unfortunately, it cannot conceive of law, or reveal it, on any other terms (although for the outline of a suggestion, see Nonet 1976). So although socio-legal positivism indubitably identifies the kind of law that contemporary law is, other ways of conceiving law are necessary if we are to reveal the other kinds of law that contemporary law might also be (Constable 2005). For her part, Constable suggests that approaching modern law’s silences rather than its effects identifies and holds open the ways that law might also be justice.

Constable (2005, p. 12) proceeds historically, invoking memory, “recall[ing] to modern law possibilities that already will have been.” Throughout this review, I have shown that history furnishes standpoints on law’s relationality. Here at the end, however, we encounter a practice of history that departs significantly from the practices with which we have become familiar, for these—“history as practiced by modern historians” (Gordon 1997, p. 1024)—express a contained past, an

empirically social, sociologized world, temporally severed from the present, deeply vulnerable as such to Valverde's critique of social science in that they too create "static models of motion" from which historians construct narratives that parse and reparse an always contained and severed past (as on display, for example, in modern historians' obsession with organizing historical time into periods). A historical practice that purposefully recalls into the present what already will have been breaches both containment and severance. It implies nonmodernist conclusions about the extent and limits of historical time in which, for example, that which already will have been continues to be present to us as a specter (Derrida 1994); or incognito, until recognized by one who will recall it (Constable 2005); or dormant, until its eruption into the present insists upon our recognition (Benjamin 1968 [1940], p. 255).

In history, the essential relationality is that of past and present. Memory is their connective tissue. Modernity has (quite literally) disciplined memory. It produces and reproduces the past as inert by giving it over to an expertise—professional historical practice—to study at will but always to reproduce as severed from the present in much the same fashion as Pound severed law from custom and gave it over to a new sociological expertise. These disciplinary developments oc-

curred at the same time and were driven by the same processes for the same reasons. They overlapped.

But the conjuncture that produced them has decomposed, and with it recognition of the terms of their boundedness—that is, of socio-legality's autonomy question on the one hand and of history's severance of past and present on the other—has dawned. Hence, the opportunity exists to which Constable adverts: to discover in law's interstices a new relationality for law, a nonsociologized (live) justice. Hence also, the opportunity exists to discover, for the present, a nonsociologized (live) past. Their connection? As Marx reminds us, the creation of our modern social formation entailed forgetting: "[T]he memory of use-value . . . become[s] entirely extinguished in th[e] incarnation of exchange value"; the recreation of individuals as equal citizens entails forgetting all the ways in which they are qualitatively distinct: "the qualitatively different *contents* of the needs of subjects as well as the qualitatively different activities and structures of social relationships in which they participate" (Balbus 1977, pp. 574, 576, emphasis in original; for other explorations of the connection, see Valverde 1999, Tomlins 2007). Memory conditions the possibilities for retrieval of a nonsociologized justice. Here are relationalities for law that free spirits might choose to explore.

DISCLOSURE STATEMENT

The author is not aware of any biases that might be perceived as affecting the objectivity of this review.

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