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Doctor Duxbury's Cure: Or, A Note on Legal Historiography

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I will begin with an event. It takes the form of an emblem of that process of losing which constitutes and reconstitutes the past. Under the rubric of memory, a late Renaissance treatise on codes of conduct, *The Ladies Calling*, offered practical advice for widows in the following terms:

> [The] Remains are of three sorts, his body, his memory and his children. . . .
>
> The more valuable Kindness . . . , is that to his Memory, endeavoring to embalm that, keep it from perishing; and by this innocent Magic . . . she may converse with the dead, represent him so to her own thoughts, that his life may still be repeated to her: and as in a broken Mirror the refraction multiplies the Images, so by his dissolution every hour presents distinct Ideas of him; so that she sees him the oftner, for his being hid from her Eyes.[1]

Memory remains; it is the technique which may yet cure the widow of her loss by instituting innumerable images of that which has passed, by providing a vision or reordering of the past that will include the absence of the husband and so detach the widow from her loss.[2]

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[1] RICHARD ALLESTREE, THE LADIES CALLING 68-69 (London 1673) (orthography modernized). Those interested in pursuing Allestree's views on mourning can refer to the posthumously published RICHARD ALLESTREE, THE WHOLE DUTY OF MOURNING, AND THE GREAT CONCERN OF PREPARING OUR SELVES FOR DEATH, PRACTICALLY CONSIDERED (London, J. Back 1695).

[2] *See* SIGMUND FREUD, *Mourning and Melancholia*, *in* 14 THE STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD 243, 244 (James Strachey et al. eds. & trans., 1957):

> In what, now, does the work which mourning performs consist? I do not think there is anything far-fetched in presenting it in the following way. Reality-testing has shown that the loved object no longer exists, and it proceeds to demand that all libido shall be withdrawn from its attachments to that object. . . . Each single one of the memories and expectations in which the libido is bound to the object is brought up and hyper-cathected, and detachment of the libido is accomplished . . . . [W]hen the work of the mourning is completed the ego becomes free and uninhibited again.

For a critical appraisal of Freud's thesis which coincides with the advice of *The Ladies Calling*, see JEAN LAPLANCHE, SEDUCTION, TRANSLATION, DRIVES 172-73 (1992):

> Everything rests here upon the notion of detachment (*Losung*) which Freud, in an entirely inadequate understanding, considers as the liberating severing of a bond with the object, and not as an *analysis*. Upon the fabric of my existence, woven

Memory is here the process through which history is instituted. It is multiple, varying, purposive; it is the most powerful and the most social of the species of thought; it is unconscious in its effects and yet active as either therapy or domination of an invisible or lost cause. Retrospection is a kind of sorcery that imagines, invents, and reinvents those losses that mark survival or that constitute, in its most ancient sense, the image of contemporary identity as person, institution, collectivity, or law. Memory, in its many forms, both lives on and sends on. To cite further advice for widows, the anonymous author of *The Lawes Resolutions of Womens Rights* suggests less reverently that

> Time must play the Physician, and I will helpe him a little: Why mourne you so, you that be widowes? Consider how long you have beene in subjection under the predominance of parents, of your husbands, now you be free in libertie, and free *proprii juris* at your owne Law . . . .[3]

The object of the widow's memory is conceived explicitly as absence. The past is precisely non-presence or discontinuity; the past is passed by virtue of absence, by dint of disappearance.[4] In this aspect the widow looks back upon her husband's fate—upon death as that which hides, renders obscure, or removes from view. The first feature or emblem of historical method that this Article will invoke is thus that of the exteriority and silence of the past. The widow looks back upon a body now absent, silent, and beyond recuperation. The object of memory and by implication the writing of history is directed in this aspect to the creation of an internal exteriority or separation: the historical care or concern is not so much with "what happened" but with the event of death and the silence or distance it engenders for those who live on or those who live now. The object of memory is not the corpse, nor is it the state or the various signs of being dead or discon-

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> with the web of the other (now lost), loss causes me to perform an unravelling, a painful meditation. But each thread, although I indeed separate it off from the whole, is not broken as Freud claimed. It is, on the contrary, over-invested, contemplated separately, reintegrated into its history and beyond this history in common, of the couple for instance, reintegrated into a more inclusive and much longer history.

For a discussion of the Freudian conception of mourning or internal separation as a cure for loss, see *infra* notes 91-93 and accompanying text.

[3] THE LAWES RESOLUTIONS OF WOMENS RIGHTS 232 (London, John More 1632) (orthography modernized). For a discussion of that text, see Peter Goodrich, *Gynaetopia: Feminine Genealogies of Common Law*, 20 J.L. & SOC'Y 276 (1993).

[4] *See* JEAN BAUDRILLARD, THE EVIL DEMON OF IMAGES 39 (1987) ("[T]he idea is that the disappearance is of something is never objective, never final—it always involves a sort of challenge, a questioning, and consequently an act of seduction."); PAUL VIRILIO, THE AESTHETICS OF DISAPPEARANCE (1991).

tinued. The object of memory is the recollection of disappearance, the deciphering of the myths, emblems, and clues,[5] the relics, ruins, or remains of the passage of that which passed on.[6] The mode of historical writing, in other words, is both cryptic and creative; it reminisces and it reinvents. Unable to restore the past as physical presence, the widow must engage in a pathological reflection upon the signs of one absent, and so recuperate her own health by means of multiple and momentary refractions of her loss. She sees her husband more often by virtue of his dissolution: death makes the widow free. The exteriority of the past, its existence only in texts, ruins, and other sedimented or imaginary remains, is the site of the power of historical writing, namely, that it gives speech to that which is silent or deciphers an "other" that would not otherwise be read. One can note finally in this respect that on any model or by any method, the writing of history is engaged, either therapeutically or politically, both with its subject, the widow who remembers or the historian who writes, and with its object, the departed husband or the imagined past.

The second element in the widow's memory is the difference that death—in the curious modern ideolect, "passing on"—constitutes. The widow is charged with a duty of kindness or an ethic of historical care. She should love her husband; she should love his remains. The object of memory is difference in the sense that what the widow is charged with loving or at least fondly nurturing *in memoriam* is not the husband, but something else, something multiple and dispersed, something created through a certain magic of memory or sorcery of thought, a lost object or fractured presence, a mask, image, or legitimate hallucination. Death, which as an event is the metaphor through which history takes place, is not an absolute. It does not disperse completely nor does it institute a total difference; rather it transforms or changes the subject into an object.[7] Death is classically a mask, an imprint or vestige, a different and more extreme form of absence. The task of memory is to think the difference that death makes, while at the same time thinking differently by virtue of the recognition of death, of absence, of a finitude that will always return. And for the widow, the issue is not simply to love something different—the memory of her husband—but also to love differently by vir-

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5 On decipherment as historical method, see CARLO GINZBURG, *Clues: Roots of an Evidential Paradigm*, *in* MYTHS, EMBLEMS, CLUES 96 (John & Anne C. Tedeschi trans., 1990).

6 For an excellent discussion of the theme of passage, see SUSAN BUCK-MORSS, THE DIALECTICS OF SEEING 159-201 (1989).

7 *See* 1 GEORGES BATAILLE, THE ACCURSED SHARE: AN ESSAY ON GENERAL ECONOMY 53-55 (Robert Hurley trans., 1991) (discussing sacrifice); *see also* GEORGES BATAILLE, THÉORIE DE LA RELIGION (1973).

tue of the remains, the memory of that which or he who has passed. The difference of the object of memory—its absence, its silence, its dissolution—inspires, demands, or instigates a different kind of kindness, care, or love. The widow is charged with augmenting and multiplying the images of her husband; she is exhorted to make of the dead body something more and something more varied than the former extant body: death in a sense becomes him, just as mourning becomes the law.

The final feature of the widow's duty and of the task of historicism more broadly is proprietary and political. The role of memory is set out in the form of instructions directed to widows. *The Ladies Calling* is the Gentleman's dictate of good form or of well-mannered and honorable bereavement. Recollection is not innocent for the simple reason that memory is emotive, and is directed both to the separation of the subject from death and also to the capture or possession of the territory, the meaning, or text, which death opens up. The exteriority, the silence, and the difference of the object or other—the heterology that constitutes the past—has in modern terms been a variegated manner of invoking the project of mastery of history's dominion. The method of writing history has been the elaboration of a technique for incorporating and possessing or subjugating the past. Through the writing of history, the exteriority, silence, and alterity of the past can be given a positive construction and absorbed in a curious and unconscious manner into the project of delaying, deferring, or denying the meaningless fate that awaits as forgetting. The past is heteronomous; it cannot have meaning; it can only have meanings in the same sense that humans have purposes and thereby take control of the contingency that obsesses memory and obscures the productive force of meaning:

> Historiography tends to prove that the site of its production can encompass the past: it is an odd procedure that posits death, a breakage everywhere reiterated in discourse, and that yet denies loss by appropriating to the present the privilege of recapitulating the past as a form of knowledge. A labor of death and a labor against death.[8]

The widow takes charge of her husband's remains; the historian slowly learns, because all historical writing is slow, that the memory of the past is the prerogative and dominion of the present. Memory recalls, and in the act of recollection is forced or fated to recognize the

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[8] MICHEL DE CERTEAU, THE WRITING OF HISTORY 5 (Tom Conley trans., 1988); *see also* WALTER BENJAMIN, THE ORIGIN OF GERMAN TRAGIC DRAMA (John Osborne trans., Verso paperback ed. 1985).

temporal horizon of all being, the past that defers and is deferred in every presence.

Like the widow's memory of her husband depicted in *The Ladies Calling*, legal retrospection multiplies the images of the past. The broken mirror both multiplies and disperses; it is a visual Babel, a baroque *folie du voir*;[9] it deconstructs; it supplements; it tears apart so as to set one past against another. Recollection threatens the history and specifically the power of the institution by indicating not only its contingency but also its multiplicity: it denies the unity of culture and law through the exemplification of the multiplicity of those laws. Legal humanism, historicism, or simply the law's recollection of its past deconstructs and has always deconstructed professional pretensions to universality and to positivization: "the discipline is disputatious because it rests on nothing more complete than a collection of fragments, reports, tenuous pieces themselves representing uncertain conjectures and incomplete divinations."[10] Although that remark is taken from the French jurist Hotman, similar sentiments were regularly though less eloquently expressed by humanistic critics of English law: law existed only in the recollection of particular cases, half-heard reports of antecedent judgments,[11] in the "dreams of sergeants and counsellors,"[12] in "digressions . . . [and] imaginations,"[13] in a law "in vast volumes confusedly scattered and utterly undigested . . . ."[14]

It is scarcely an exaggeration to depict the common law and its belief in precedent as essentially recollective except that such a characterization would attribute too great a degree of self-consciousness to a tradition that basks in "indefinite time,"[15] that denies the validity of or the need for history,[16] and that believes, somatically rather than

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9 The expression is taken from CHRISTINE BUCI-GLUCKSMANN, LA FOLIE DU VOIR: DE L'ESTHÉTIQUE BAROQUE (1986). See also her extended discussion of historical writing in CHRISTINE BUCI-GLUCKSMANN, LA RAISON BAROQUE: DE BAUDELAIRE À BENJAMIN (1984).

10 FRANÇOIS HOTMAN, ANTITRIBONIAN OU DISCOURS D'UN GRAND ET RENOMMÉ JURISCONSULTE DE NOSTRE TEMPS. SUR L'ESTUDE DES LOIX, FAIT PAR L'ADUIS DE FEU MONSIEUR DE L'HOSPITAL CHANCELIER DE FRANCE EN L'AN 1567, at 134 (1567).

11 2 THE REPORTS OF SIR JOHN SPELMAN 159-61 (J.H. Baker ed., 1978).

12 ABRAHAM FRAUNCE, THE LAWIERS LOGIKE EXEMPLIFYING THE PRÆCEPTS OF LOGIKE BY THE PRACTISE OF THE COMMON LAWE fol. 89a (London, William How 1588) (spelling and orthography modernized).

13 *Id.* at fol. 119a.

14 *Id.* at vi.

15 The notion of indefinite time comes from JOHN FAVOUR, ANTIQUITIE TRIUMPHING OVER NOVELTIE 35 (London, Richard Field 1619) ("*Antiquitie hath no bounds, no limits*, it signifieth the age of indefinite time.") (orthography modernized). For commentary, see Peter Goodrich, *Poor Illiterate Reason: History, Nationalism and Common Law*, 1 SOC. & LEGAL STUD. 7 (1992).

16 Most famously, see SIR EDWARD COKE, REPORTS pt. III sig. B v a (London, Rivington

explicitly, in the continuity or presence, the positivized and permanent form of contemporary law.[17] To love the common law in either its Anglican or American manifestations is to believe in the recollection of precedent, to value and to multiply the remains of common law, to recall endlessly the past and the precedents, the plural jurisdictions, and the many substantive forms of oral memory and of unwritten law. To love the common law is to believe not in its reason but in its capacity to change, its historic ability to become other, to pass on. This conception of the power of common law and of the plurality of its reasons allows the distinction between positivized and dynamic jurisprudences.[18] At a more mundane level it allows the practical distinction between a "labile *ratio*"[19] or logic of the supplement, of signification as interpretation, and the science of legal norms or formalism against which so much of twentieth century American jurisprudence has reacted.

BIOGRAPHY AND HISTORY

There is no more fluent expositor of the narrative of modern American jurisprudence than Neil Duxbury. There is no keener chronicler of the dramas and evolution of American legal thought. Few have equalled either the encyclopedic quality of his vision or the bibliophilic splendor of his archival references.[20] There is an indubitable balm to the flow of his histories, a sense of security in the re-

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1611/1777) (stating that legal records "are of that authority that they need not the aid of any historian"). For another pertinent example, see EDWARD, LORD BISHOP OF WORCESTER [STILLINGFLEET], ECCLESIASTICAL CASES RELATING TO THE DUTIES AND RIGHTS OF THE PAROCHIAL CLERGY, STATED AND RESOLVED ACCORDING TO THE PRINCIPLES OF CONSCIENCE AND LAW 329 (London, J.H. 1698) [hereinafter STILLINGFLEET] ("*Littleton* saith, *That Time out of Memory of Man, is said to give Right, because no Proof can be brought beyond it.* And this he calls *Prescription at Common Law* . . . .") (orthography modernized). For a comparable French example, see also ANTOINE HOTMAN, TRAITÉ DE LA LOY SALIQUE (1616).

17 RICHARD HOOKER, OF THE LAWES OF ECCLESIASTICALL POLITIE (London, John Windet 1593-1597) is the most important English work expounding this view. *See also* STILLINGFLEET, *supra* note 16, at 334-35. In contemporary terms, see FRANÇOIS EWALD, L'ÉTAT PROVIDENCE (1986); Arthur J. Jacobson, *Hegel's Legal Plenum*, 10 CARDOZO L. REV. 877 (1989).

18 On which, see Arthur J. Jacobson, *The Idolatry of Rules: Writing Law According to Moses, with Reference to Other Jurisprudences*, 11 CARDOZO L. REV. 1079 (1990), especially the discussion at 1125-32.

19 IAN MACLEAN, INTERPRETATION AND MEANING IN THE RENAISSANCE 153 (1992).

20 Duxbury's footnotes are magnificently copious. In addition to containing archival and bibliographic references, they are the occasion also of esoteric anecdotes and cuttings from his extensive correspondence. More generally on the phenomenon and uses of the footnote, see J. M. Balkin, *The Footnote*, 83 NW. U. L. REV. 275 (1989); *see also* JON WIENER, PROFESSORS, POLITICS AND POP 339-47 (1991).

straint and good sense that limits history to the collective representation of what individuals have done. Character and temperament, personality and allegiance, are the primary figures of Duxbury's accounts of the past.[21] He offers in many respects a portraiture of the "greats," good and bad, a prosopography of the twentieth century in the texts of American juristic scholarship. The list, to adumbrate only the major articles, proceeds with ever-increasing velocity of publication through the "reactionary conservatism" of Thurman Arnold,[22] the "constricted conception" of Robert Hale,[23] the despair of Jerome Frank,[24] the other side of Oliver Wendell Holmes,[25] the intemperate and unsuccessful Fred Rodell,[26] through a collective portrait of legal realism[27] and a critical commentary on the policy science of Lasswell and McDougal,[28] to lesser commentaries upon Roberto Unger,[29] Judge Posner,[30] Morton Horowitz,[31] and critical legal scholarship.[32] The research into the major figures of American legal thought is meticulous, the detail precise, and the substantive interpre-

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21 Such concern with the subject, if not with the logic of ad hominem argumentation, is the theme of a symposium in the *University of Colorado Law Review*. *See Postmodernism and Law: A Symposium*, 62 U. COLO. L. REV. 439 (1991).

22 Neil Duxbury, *Some Radicalism About Realism?: Thurman Arnold and the Politics of Modern Jurisprudence*, 10 OXFORD J. LEGAL STUD. 11, 12 (1990).

23 Neil Duxbury, *Robert Hale and the Economy of Legal Force*, 53 MOD. L. REV. 421, 443 (1990).

24 Neil Duxbury, *Jerome Frank and the Legacy of Legal Realism*, 18 J.L. & SOC'Y 175, 198 (1991).

25 Neil Duxbury, *The Birth of Legal Realism and the Myth of Justice Holmes*, 20 ANGLO-AM. L. REV. 81 (1991).

26 Neil Duxbury, *In the Twilight of Legal Realism: Fred Rodell and the Limits of Legal Critique*, 11 OXFORD J. LEGAL STUD. 354 (1991).

27 Neil Duxbury, *The Reinvention of American Legal Realism*, 12 LEGAL STUD. 137 (1992).

28 Neil Duxbury, Policy Science 4 (book forthcoming Oxford Univ. Press 1995) ("The basic purpose of this chapter is to develop a critical intellectual history of the jurisprudence of Lasswell and McDougal.").

29 Neil Duxbury, *Look Back in Unger: A Retrospective Appraisal of Law in Modern Society*, 49 MOD. L. REV. 658 (1986) (reviewing ROBERTO M. UNGER, LAW IN MODERN SOCIETY (1976)).

30 Neil Duxbury, *Pragmatism Without Politics*, 55 MOD. L. REV. 594 (1992) (reviewing RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE (1990)).

31 Neil Duxbury, *The Theory and History of American Law and Politics*, 13 OXFORD J. LEGAL STUD. 249 (1993).

32 In addition to the much-reiterated interstitial point that critical legal studies unwittingly and perhaps unthinkingly repeat the errors of legal realism, see Neil Duxbury, *Deconstruction, History and the Uses of Legal Theory*, 41 N. IR. LEGAL Q. 167 (1990) [hereinafter Duxbury, *Deconstruction*]; Neil Duxbury, *Post-Modern Jurisprudence and its Discontents*, 11 OXFORD J. LEGAL STUD. 589 (1991) [hereinafter Duxbury, *Post-Modern Jurisprudence*]. *See also* Neil Duxbury, *Back to the Middle Ages*, 3 INT'L J. SEMIOTICS OF L. 65-79 (1990) (reviewing PIERRE LEGENDRE, LE DÉSIR POLITIQUE DE DIEU (1988)) [hereinafter Duxbury, *Middle Ages*].

tations so unassuming and so replete with incidence and judgment that it would be impossible to doubt the intellectual rigor, the command, and the equipoise of this expanding corpus of work. It remains possible, however, at the level of method, to argue that Duxbury ducks the issues.

Duxbury is concerned to understand men as the bearers of ideas. The statement of his project is thus often disarmingly direct and markedly common-sensical. At the level of individuals the question is always, "Who was this man?" Thus, Duxbury asks, "Who [w]as Robert Hale?,"[33] a question that is followed by the distinctly unself-conscious observation that "[t]rying to fathom what once made a person tick is the very essence of paradox . . . ."[34] The study of "Arnold's Life"[35] is prefaced by the remark that "[t]his . . . is as much an historical study of Arnold as it is an estimation of his reflections on jurisprudence,"[36] a remark made tenable within Duxbury's analysis by the seeming coincidence of person and reflection, image and mirror. Then, for a final example, we are informed at the outset of the study of Fred Rodell that "[h]ere, I examine the life and work of another 'peripheral' legal realist"[37] and "[m]y first aim is to offer a fairly conventional historical portrait . . . ."[38] By the conclusion of the study, the writer and the written, text and subject, have become inexplicably separate. The enigma, however, is only apparent. History as portraiture is a calendar of vignettes, of interventions and re-creations. The portrait is an emblem of the family and portrays its prototypes or origins. The portrait is an image of individuality but also a mode of preserving and representing legitimacy in the form of genealogy.[39] In a rare historiographical aside, Duxbury argues that "[w]hile, furthermore . . . text-oriented history tells us little about . . . character, we know that the failure of Rodell's critical endeavours owed as much to his temperament and his actions as it did to his writings."[40] This in an article which, in its initial footnote, thanks three named librarians and ten separate archival collections.[41]

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33 Duxbury, *supra* note 23, at 422 (footnote omitted).

34 *Id.* at 424.

35 Duxbury, *supra* note 22, at 13 (footnote omitted).

36 *Id.* at 12.

37 Duxbury, *supra* note 26, at 355.

38 *Id.*

39 For historical and philosophical elaboration of the concept of genealogy, see PIERRE LEGENDRE, L'INESTIMABLE OBJET DE LA TRANSMISSION: ÉTUDE SUR LE PRINCIPE GÉNÉALOGIQUE EN OCCIDENT (1985). On portraiture, see RICHARD BRILLIANT, PORTRAITURE (1991); DAVID FREEDBERG, THE POWER OF IMAGES 207-20 (1989).

40 Duxbury, *supra* note 26, at 395.

41 *Id.* at 354 n.*.

Whatever Duxbury's motives, he certainly has neither evidence nor representation of either character or temperament outside of texts formal and informal, recorded and written, published and epistolary.

If jurisprudential history is a question of character and of what men do, then paradox is probably properly the emblem of historicity in that these individuals, these blokes, subjects, guys, kinds, tykes, and types, are disappearing forms. It is in a sense false modesty and potentially dissimulation to claim that behind, before, prior to, or outside the texts there are authors, characters, real or realist men whose attributes explain the figures, the arguments, and forms of their texts. Neil Duxbury's history of American jurisprudence is no modest undertaking, however euphemistic its formulation. Where it does not directly concern the paradox of the man, the project is variously formulated, ever more expansively, as corrective. The gathering of information or the research into peripheral figures, misunderstood texts, and their contexts, will disclose the hidden; it will recuperate the neglected, rectify the mythic, lambast the assumed, expose caricature, diagnose inauthenticity, and, more generally, it will construct sense where before there was error, repetition, or unconsciousness. In the end, and it is no modest feat, we will appreciate the significance of both movements and men, contexts and authors, judicial decisions and their jurisprudence. The analysis of process jurisprudence is Duxbury's latest addition to the gallery of jurisprudential figures. It does not simply offer a sensitive contextual reading of Hart and Sacks. Its aim is nothing less than "to make sense of process jurisprudence. What was process jurisprudence about? What was it for?"[42] To extend the sentiment, this "what for" mode of historical jurisprudence not only assigns purposes to institutions, but also poses the question of how either theory or theorist can anticipate or appropriate, foresee or foretell the history of the present. In substance, if only implicitly, the purpose of earlier theories and of earlier movements was invariably and perhaps ironically to predict the forms of present error, to correct contemporary lacunae, or to presage the failures that we moderns or postmoderns represent.

In more formal terminology, the paradox of historical memory is that it highlights the repetitions of the past in the present and of the individual in the group. Specifically, modern history endlessly repeats the figures of individuality, of authors and men of action or deeds. On the surface, Duxbury repeats the observation of repetitions. Robert Hale raised many of the issues of political economy and of the divisions of public and private that critical legal studies has taken up and

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42 Neil Duxbury, *Faith in Reason*, 15 CARDOZO L. REV. 601, 602 (1993).

expanded.[43] Arnold, in his nihilism, his concern with legal education, and his critique of jurisprudence, has been improperly ignored by contemporary legal theory: while critical legal scholars "have tended . . . to overlook Arnold"[44] both through misreading his work and more symptomatically through going continental and cultivating their own sources of theory, it remains to issue the salutary warning that "Arnold's writings on jurisprudence . . . go some way to filling this gap between American Legal Realism and Critical Legal Scholarship."[45] The same is even more evident in the case of Jerome Frank. He was a reformer, a critic, and a deconstructor whose project of reform failed by virtue of its lack of any plausible theory of reconstruction or of any alternative credo: "[m]odern critical critical [sic] legal studies—which, for all its neo-marxist and post-structuralist garb, is basically an attempt to activate the same willingness and desire—now endeavours to succeed where Frank failed."[46] At a more generic level, American legal realism was caricatured by an unsophisticated mid-twentieth century American jurisprudence. Again this raises the spectre of repetition:

> The future direction of American jurisprudence will depend, to at least a small degree, on whether legal theorists continue to conceive of realism in its essentially mid-century, reinvented form, or whether they accept that realism can be excavated, reanimated and reinvented afresh. . . . [R]ealism in the history of American jurisprudence was thoroughly underestimated.[47]

And all this from an Englishman. The examples could be multiplied: there is little new in critical legal studies; there are few novelties in jurisprudence; and, by implication, not only is change unlikely but at a stronger level change is probably undesirable. The same story is told of process jurisprudence; the contemporary jurisprudence; here Ronald Dworkin's, "prompts a definite sense of déjà vu. The distinction between principle and policy, the notion of adjudication as a principled activity, the concern with integrity, the presumption of a rational consensus—these are the hallmarks of process jurisprudence."[48] In castigating repetition, Duxbury paradoxically endorses

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[43] *See* Duxbury, *supra* note 23, at 439-43.

[44] Duxbury, *supra* note 22, at 40.

[45] *Id.* at 41.

[46] Duxbury, *supra* note 24, at 198. For a similar statement of sentiment addressed to critical legal studies, see Duxbury, *Post-Modern Jurisprudence*, *supra* note 32, at 590 ("But once rationalism has been deconstructed, assuming this could ever properly be achieved, the post-modernist project appears to leave itself open to an immense problem: how, after deconstruction, are we to reconstruct modern thought?").

[47] Duxbury, *supra* note 27, at 176-77.

[48] Duxbury, *supra* note 42, at 700.

its inevitability.

The reasons for such a paradox are not particularly obscure. A philosophy of history, either explicit or tacit, which seeks "intellectual foundations,"[49] origins and first instances, is bound to value the historical origin and to privilege the past instance, portrait, or person, as prototype, source, or exemplar. This is not only a faith in the fathers but also a deeper structure of positivization in which recognition (or the refusal to doubt the existing forms of self-evidence) is mistaken for thought.[50] It is also a biographical form of historical writing, a peculiarly English species of historical explanation. Biography eschews the history of ideas in favor of the story of a life either individual or collective. It offers a voyeuristic and surrogate sense of identity and fulfillment. In focusing upon the attributes of the other, it understands character and temperament, beginning and end, by virtue of denying such attributes or personality in itself. The English love biography because it is suggestive of the lives that the reader has not and could not have lived; it is redolent of the identity, purpose, and personality which the author wishes either to simulate or to dissimulate as occasion demands. The biographer's consciousness of the other is expressive of an unconsciousness of self. Such self-abnegation, however, is neither self-conscious nor directed. Whereas, in Foucault's words, "I write to erase my face,"[51] the biographer substitutes a lesser yet potentially more insidious sentiment: "I write not only to deny my face, but also to assume the face or occupy the mask of another." There could be nothing more momentary and exciting than the "maverick,"[52] the intemperate, the ill-mannered, or the parodic,[53] for such characteristics render absolutely clear the exteriority, the alterity, or objectivity of the subject of biographical depiction. At the same time, however, there could be no more inauthentic denial of responsibility, no more manifest injustice nor any greater violence to the other than the claim that historical writing "might be classified as an information-giving exercise . . . [which will provide] those interested in the

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[49] *Id.* at 606.

[50] Such is the peculiar theme of GILLES DELEUZE, DIFFÉRENCE ET RÉPÉTITION (1968). *See also* JACQUES DERRIDA, THE POST CARD: FROM SOCRATES TO FREUD AND BEYOND 4 (Alan Bass trans., 1987) ("[I]t is bad, and I know no other definition of the [sic] bad, it is bad to predestine one's reading, it is always bad to foretell. It is bad . . . no longer to like retracing one's steps.").

[51] MICHEL FOUCAULT, THE ARCHAEOLOGY OF KNOWLEDGE (A.M. Sheridan Smith trans., 1972).

[52] Duxbury, *Deconstruction*, *supra* note 32, at 167-68 (characterizing Rodell as "an out-and-out maverick," and later Allan Hutchinson as "a more modern maverick," a description which is "neither unkind nor inaccurate").

[53] On parody, see Duxbury, *Post-Modern Jurisprudence*, *supra* note 32, at 589.

subject with a new card to add to their collection."[54] This is a peculiarly English and specifically legalistic form of denial. The jurist is here the child, as Nietzsche remarked,[55] of the filing clerk; he invents systems of storage, procedures of notation that claim indifference and even ennui in the face of their subject matter. There are so many cards but so few ideas, so much unconsciousness and yet so little dreaming. It almost beggars belief that a historian so skilled, so eloquent, so critical, and so precise in portraying the development of modern American legal thought could deny that the archivist or the index-compiler, the filing clerk or the curator, the custodian or the warden brings collation to records, concordance to fragments, and more generally, order to chaos. This history of information and of networks and card-indexes introduces a specific form of order and custody. It will preserve individual and collective lives. Even where the object of concern is corporate or institutional, the collective history is catalogued under the multiple and successive forms of individualities. Collective history or historiographic explanation comes gradually to take on the qualities, the dissimulation, and the imperialistic ethics, the projected common sense, of the individual and its cycle of infancy, maturity, death, and recollection. Thus process jurisprudence begins as a "stirring,"[56] matures, and then evolves as a "collective thought"[57] or group biography. It is not without irony that the great moments of process jurisprudence are tied to theories of origin or source, to a prehistory, a parallel birth, a text, its harbingers and its repetitions.

Again exhorting American jurisprudence to greater and better efforts, Duxbury remarks in another context that "we must recognize the value of candour, . . . we must strive to describe, as accurately, as clearly and as honestly as we can, all that we struggle to see."[58] For the empiricist tradition of English historiography it is possible to see people, but ideas or concepts are invisible, inaccessible, and, in the

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54 Duxbury, *supra* note 26, at 355.

55 FRIEDRICH NIETZSCHE, THE JOYFUL WISDOM 288 (Thomas Common trans., 1964), *reprinted in* 10 THE COMPLETE WORKS OF FRIEDRICH NIETZSCHE (Oscar Levy ed., 1964) (stating of the philological tradition:

> [t]here are philosophers who are at bottom nothing but systematising brains—the formal part of the paternal function has become its essence to them. The talent for classifications, for tables of categories, betrays something; it is not for nothing that a person is the child of his parents. The son of a lawyer will also have to be a lawyer as investigator . . . .

(translation modified by author)).

56 Duxbury, *supra* note 42, at 607.

57 *Id.* at 603-04 (citing Henry M. Hart, Jr., *The Supreme Court, 1958 Term—Foreword: The Time Chart of the Justices*, 73 HARV. L. REV. 84, 100 (1959)).

58 Duxbury, *supra* note 26, at 395 (footnote omitted).

end, are therefore deemed nonexistent. If, as I suspect, ideas cannot be seen, then faith in reason is for Duxbury a faith in the reasonable man. Here, however, is an obvious paradox: candor or the struggle to see things as honestly as we can is predicated upon the belief that the visibility of the person gives access to the invisibility of her ideas. Not only is faith an invisible or non-demonstrable technique of reading, but the object of the faith was always a concept that had neither face nor even a name that could be spoken. Faith in reason or in the foundation of any system—reason, politics, cartography, or law—in its opposite is the singular theme of post-Hegelian metaphysics:[59] identity is dependent upon difference, reason upon faith, law upon ethics, deliberation (judgment) upon politics. If, however, ideas are in essence speculative abstractions or arcane and opaque uses of language, then an English metaphysics would attach the idea to the person rather than the person to the idea, in an order of causation which sees the person, speaker, individual type, or author as the first and motive cause of the language that follows. Within this logocentric form of representation,[60] it is again the person or the group which must be described, and this, in resounding terms, is what happens in the unfolding of process. The question of "what for?," and the parallel demand that it be described in candid, unblinking, and accurate terms so that in critical fashion we can determine what it was really for, produces the most evasive of objects.

Scholars who presumably may lack either candor, honesty, or the ability to look have "stripped" process jurisprudence of its nuances. They have rationalized its history while "[c]ommentators have been content to lump names and works and themes together and hold them up as representative of some vaguely conceived process 'school.' "[61] The history of process must thus be "charted" again, nuances must be restored, complexity and change recognized, plurality admitted, and the jurisprudential ground of the tradition laid bare for all to see. The difficulties of this candid project are openly and disarmingly admitted: "the intellectual foundations of process jurisprudence are difficult to

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59 For elaboration, see JACQUES DERRIDA, GLAS (John P. Leavey, Jr. & Richard Rand trans., 1986); HEGEL AND LEGAL THEORY (Drucilla Cornell et al. eds., 1991). Specifically on paradox, see MATTHEW H. KRAMER, LEGAL THEORY, POLITICAL THEORY, AND DECONSTRUCTION (1991); GUNTHER TEUBNER, LAW AS AN AUTOPOIETIC SYSTEM (Zenon Bankowski ed., Anne Bankowska & Ruth Adler trans., 1993).

60 The term "logocentrism" is taken from JACQUES DERRIDA, OF GRAMMATOLOGY (Gayatri C. Spivak trans., 1976). For a lucid discussion and commentary, see RODOLPHE GASCHÉ, THE TAIN OF THE MIRROR: DERRIDA AND THE PHILOSOPHY OF REFLECTION (1986).

61 Duxbury, *supra* note 42, at 603.

locate with any degree of precision."[62] While there are clearly plenty of people connected in some fashion with process jurisprudence, and so also numerous stories to be told of Frankfurter, Dickinson, Fuller, Hart and Sacks, Wechsler, Bickel, Ely and Dworkin, to name but a few of the cornucopia and its *postehistoire*, the collective object of their endeavors is admirably indeterminate. The search for foundations of law, faith in reason, belief in principle, aspirations to integrity, and intuitions of democracy are, as their designation suggests, an elliptical "evolving body of thought,"[63] a slow "maturing of collective thought,"[64] an "embodiment of an attitude."[65] The question then is what constitutes this object, body, collectivity, or continuous and organic evolution? The answer is that we must be prepared to stare long, hard, and unflinchingly beyond the "key figures, themes, and texts" at a "mood," an "attitude," a form of "respect" for reason, an "embedded" expression, a "culture," a "general intellectual" trend, an "embodiment" of "importan[t]" concerns.[66] For a moment it might seem that these could be the conceptual objects of a Nietzschean history of sentiment, passion, conscience, and comparative law,[67] but, paradoxically, Duxbury is pursuing information and not ideas, persons and not concepts, contexts and not speculations: mood or attitude designates the stirring of thought, the prehistory of speech which precedes both writing and the self, individual or collective, that utters or is brought to utter again. Mood is paradoxically the form of self-consciousness, the self-presence of the author in the curiously vague reflection or form of *imitatio Dei* or unitary speaking being. While it may seem strange to encounter such chimerical and ephemeral objects as mood and attitude at all, let alone as the *topoi*—the places or expressions of ideas—they are the only unities available around which to locate the collective self or *bios* about which faith in reason must graft or write. It is thus not surprising that the historicist chorographer Duxbury returns rapidly to the familiar if currently unfashionable world of men, individuals singular and plural, one and all.

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62 *Id.* at 606.

63 *Id.* at 603.

64 *Id.* at 603-04 (citing Henry M. Hart, Jr., *The Supreme Court, 1958 Term—Forward: The Time Chart of the Justices*, 73 HARV. L. REV. 84, 100 (1959)).

65 *Id.* at 703.

66 *Id.* at 602, 605, 607, 703.

67 *See* NIETZSCHE, *supra* note 55, at 42-43:

> Hitherto all that has given colour to existence has lacked a history: where would one find a history of love, of avarice, of envy, of conscience, of piety, of cruelty . . . [or e]ven a comparative history of law . . . . All that up till now has been considered as the "conditions of existence," of human beings, and all reason, passion and superstition in this consideration—have they been investigated to the end?

REASON, FAITH, AND THE ENGLISH EVASION OF PHILOSOPHY

It is apparent within this arguably disingenuous and ostensibly modest scheme of historical description that process jurisprudence represents a marked advance upon both realism and its disappearing shadow, critical legal studies.[68] Let us list its virtues. Process jurisprudence is a mode of thought that is longer-lived, more solid, more persistent, and putatively more successful than both realism and critique. It has foundations in reason; it has sophistication; it is subtle; and it is politically realistic. It is also ethical and even grandiose in that it can promote "the very democratic ideals which, on the European continent, had been undermined by fascism and communism."[69] It has finally the virtues of principle and integrity, together with a project of rational reconstruction: "process jurists are concerned primarily with explaining how [law] ought to be. For, regardless of how it might appear to work in reality, law, from the process perspective, must always be understood in the light of the faith: as an institutionally autonomous activity founded in reason."[70] After the often jejune and inauthentic posturings of the realists, and the equally shallow or misconceived and intemperate diatribes of the critical legal scholars, process jurisprudence offers the temperance and security of a return not simply to law, but also to ethics or the law of law. In historical terms, it may be coined more briefly as a return, conscious or unwitting, to the values and specifically the conservatism of common law. The return to the values of the past, to the structure, principle, rationality, or underlying unity of law's development, is implicitly the remedy for the dark forces or incipient melancholia of contemporary irrationalism or the postmodern loss of faith in the enterprise of legality.

Medicine or the curative science, of which psychoanalysis is historically a sub-discipline, is the most semiotic of the classical disciplines; it operates of necessity by reference to the external signs of

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68 For an interesting and amusing account of the disappearance of critical legal studies, see Michael Fischl, *The Question that Killed Critical Legal Studies*, 17 LAW & SOC. INQUIRY 779 (1992) (book review). *See also* Pierre Schlag, *"LE HORS DE TEXTE, C'EST MOI": The Politics of Form and the Domestication of Deconstruction*, 11 CARDOZO L. REV. 1631 (1990); Pierre Schlag, *Normative and Nowhere to Go*, 43 STAN. L. REV. 167 (1990). For a broader account, see Peter Goodrich, *Sleeping with the Enemy: An Essay on the Politics of Critical Legal Studies in America*, 68 N.Y.U. L. REV. 389 (1993). On Europe and America and the geopolitics of ideas and specifically of reception theory, see ROBERT C. HOLUB, CROSSING BORDERS: RECEPTION THEORY, POSTSTRUCTURALISM, DECONSTRUCTION (1992).

69 Duxbury, *supra* note 42, at 704.

70 *Id.* at 705.

internal functions.[71] The body is a cipher which awaits decipherment. In the present instance, the body that awaits its proper or curative reading is that body of knowledge which passes for American Jurisprudence. It is a knowledge which has fallen into a cycle or pattern of sometimes "chilling[ ]"[72] repression and unconscious repetition. If we ask, as Duxbury suggests, what process jurisprudence was for,[73] the answer given is that it was not simply for improvement, but for the ideals of reason and democracy and the autonomy of law. Duxbury endorses these features of the school.[74] They reflect a surface of appealing simplicity in which principle, integrity, and judgments of "soundness"[75] guide the law and keep it from the dual dangers of unreason and political excess. More than that, what is valuable is the return to some sense of the purity, the separation and autonomy of law, such that faith in reason will maintain the rule of law, and, specifically, judicial activism in reviewing institutional decisions will constitute a bulwark against the encroachment of administration or the arbitrary descent into some species of authoritarianism.[76] The law must not only have a formal existence, it must also carry with it a belief in an innate ethical superiority which stems from its refusal to engage in those vague and divisive issues of culture, intellect, or dialectic which absorb the academy and divide the polity.[77]

Duxbury is entitled to his argument and to his substantive values. More than that, it would be impossible not to appreciate the copiousness of his scholarship, his attention to the plenitude and intricacy of historical detail, the subtlety of nuance in his judgments. The issue I have raised and will continue to elaborate is one based in historical method. The vision of the biographer and the candor and the good sense of the chronicler are directed respectively to the unity of individual lives and the narrative of their succession. Their purpose is that of the encomium or funeral oration: it is to praise the life and to lay the ghost to rest. By virtue of externality and the decorum of the funerary rite, the encomium would tend to exaggerate the merits of the departed and to self-consciously forge an appealing and manifestly fictive unity of purpose and *telos* to the life that had ended. It was

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71 *See* Eugen Baer, *The Medical Symptom*, *in* FRONTIERS IN SEMIOTICS 140-53 (John Deely et al. eds., 1986); BARBARA M. STAFFORD, BODY CRITICISM (1991).

72 Duxbury, *supra* note 24, at 198.

73 Duxbury, *supra* note 42, at 602.

74 *See id.*

75 *Id.* at 602-03, 665.

76 *Id.* at 624-25.

77 On the concept of the innate and specifically the innate sense of justice, see Neil Duxbury, Phenomenological Jurisprudence: An Ontological Sketch (1987) (unpublished Ph.D. dissertation, University of London).

important that the individual had stood for something, that his life had been for a cause or had contributed to some collective or institutional end. This would give the chronicler a story and the obituarist a singular theme. It is indeed on this note that Duxbury's account of process jurisprudence begins:

> Even the most cursory survey of the history of jurisprudence reveals a remarkable tendency on the part of legal philosophers to develop concepts, for want of a better word, which are purportedly foundational to the existence of a legal system. . . . This obsession with singularity in the search for foundations seems to be reflected in philosophy generally.[78]

Whether or not this ascription is statistically or generally true of philosophy, it is certainly evident in Duxbury's philosophy of legal history. Rationalism lurks on the margins of this particular account of process jurisprudence; the belief in order and good sense are the "what for" of Duxbury's history of process as a democratic legal theory.

Without entering any extended comment upon the geopolitics of legal doctrine or the extended transmission of common law as a culture, two remarks upon the substructure or unconscious affiliations of Duxbury's account of process deserve brief advertisement. The first is simply to remark that Duxbury is, among other things, a property lawyer. While at the surface level of the text he is content to trace process jurisprudence to a somewhat vague origin in the case method and theory of principles developed by Langdell, he also alludes to a more classical origin in the English common law. Referring to process jurisprudence as demanding a "[m]astery of . . . both natural and artificial reason,"[79] Duxbury cites no less an authority than Sir Edward Coke in endorsing the distinctive mission of process scholarship as the fostering of a unique "craft" of legal criticism, a technical discipline of doctrinal development, a moral enterprise in the governance of rules. The reference to Coke is a reference to the *longue durée* of common law belief, and both specifically and generally it recollects a repeated structure within what is arguably the oldest of the social sciences.[80] Specifically, the notion of an artificial reason of law returns

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[78] Duxbury, *supra* note 42, at 601.

[79] *Id.* at 635. The reference is to *Prohibitions del Roy*, 77 ENG. REP. 1342, 1343 (1608). The distinction was familiar to common lawyers of the period and was defined earlier by Abraham Fraunce, for example. FRAUNCE, *supra* note 12, at fol. 2b (stating that artificial reason consists of "the ordering of precepts drawn from natural reason and conforming with it." The appeal of this definition of artificial reason is clearly and interestingly stated by Fraunce to reside in the subordination of art to nature: "there ought nothing to bee put downe in Art, whereof there is no ground in nature, for *ars imitari debet naturam* . . . .").

[80] *See* W.T. Murphy, *The Oldest Social Science?: The Epistemic Properties of the Common*

not only to Coke but also to Littleton, and, specifically, to Coke's *Commentary upon Littleton*, subtitled "not the name of a Lawyer onely, but of the Law itselfe."[81] Here then, at the beginning of the tradition, is a figure capable of representing the craft of legal doctrine: a hero fit for law, an emblem of process and juristic craft. Littleton's teaching, according to Coke, should be "termed . . . Institutes, because my desire is, they should institute and instruct the studious, and guide him in a ready way to the knowledge of the national laws of England."[82] The craft of law, however, is an artificial excellence, a constructed reason, a formal art predicated upon "the essential skill of good pleading."[83] Here then is an original process jurisprudence. It is an art of infinite particulars, of writs, symbols and other tables, fines and deeds that enter into the arcane procedures of common law as a system of formal precedents and established and common pleas. Their attraction is their closure; their process is their formalism, their jurisprudence or logic an insular and evasive exercise in the imagination of common law.

In a more substantive sense, the appeal of procedure or good pleading is the attraction of legal difference; it is the allure of a science of property and succession which is both opaque and particular, obscure and unchanging, traditional and traditionalistic. It is this dark, melancholy, and inkhorn art which process jurisprudence in a certain manner invokes and against which Littleton's contemporaries protested and Duxbury's critically inclined colleagues rebelled.[84] While we could ask, "who was Littleton?," the power of Littleton's text is its excellence and self-evident truth: he "is proved and approved by these two faithful witnesses in matter of Law, Authority, and Reason."[85]

Law Tradition, 54 MOD. L. REV. 182 (1991). *See generally* GERALD J. POSTEMA, BENTHAM AND THE COMMON LAW TRADITION (1986).

81 EDW. COKE, THE FIRST PART OF THE INSTITUTES OF THE LAWES OF ENGLAND (photo. reprint 1979) (London, Societie of Stationers 1628) (orthography modernized). Also instructive in this respect is SIR MATTHEW HALE, THE HISTORY OF THE COMMON LAW (photo. reprint 1993) (London, 5th ed. 1794).

82 EDWARDO COKE, THE FIRST PART OF THE INSTITUTES OF THE LAWS OF ENGLAND; OR, A COMMENTARY UPON LITTLETON xxxviii (1st Amer. ed., Philadelphia, Robert H. Small 1853) (19th London ed. n.d.). Coke's contemporary, William Fulbecke, observes of common lawyers that "Littleton's Tenures is their breakfast, their dinner, their boier [supper] and their rare banquet." WILLIAM FULBECKE, A PARALLELE OR CONFERENCE OF THE CIVIL LAW, THE CANON LAW, AND THE COMMON LAW OF THIS REALME OF ENGLAND sig. B 2 a-b (London, Company of Stationers 1618).

83 COKE, *supra* note 82, at sig. C 5 a.

84 For a discussion of Littleton's contemporaries, see PETER GOODRICH, LANGUAGES OF LAW (1990), especially 53-110. For a discussion of Duxbury's colleagues, see CRITICAL LEGAL STUDIES (Peter Fitzpatrick & Alan Hunt eds., 1987). See also the parody of legal styles in COSTAS DOUZINAS ET AL., POSTMODERN JURISPRUDENCE 199-271 (1991).

85 COKE, *supra* note 82, at sig. C 5 a (orthography modernized).

In less polemical terms, the artificial and therefore closed reason of pleading is backed up or legitimated by the natural reason and immemorial truth of common law. In short, the attraction of process is nascent in the appeal to a second order of reason, to a truth or power that resides beyond the text, behind the words, between the lines, in the spirit and not the letter of the law. It is thus ultimately the law of nature which Coke conceives to underpin and support the particular and artificial reason of common law.

The ritualistic appeal to nature or to an unwritten law of law is one of the most consistent and puzzling of the legacies of the early common law tradition. It marries well with the claim to believe in an innate sense of justice, a wisdom peculiar to a people, territory, culture, and nation. It is equally consonant with an elite version of empiricism: good sense and common custom are the articles of faith of a legal class, a profession, an academy or institution of technicians who alone know, through their craft and their intuitions, the law that hides behind the written rules. While it is arguably the oldest maxim of legal interpretation that the pontiff or lawyer knows both the words of the law and the force of the law, or, in Ulpian's version, that "the expression 'from the law' is to be taken to mean as much from its true sense as from its literal meaning,"[86] the import of the natural reason of law runs much further than simple rules of legal construction. The appeal to nature, whether through procedure or pleading, intuition or justice, is a reference to the sacred quality of legal knowledge and of a law which is written first not in books nor in pleas rolls, but in the hearts of men. The classical discipline of law was both in the *Digest* and in England defined as a sacred calling, as a knowledge of things both divine and human, for "knowledge of the Law is affirmed to be *Rerum divinarum humanarumque Scientia* . . . ."[87] For Sir John Davies, this meant quite simply that English common law could be extolled as better than any other (and merely written) law. Being written "onley in the heart of man,"[88] it was to be deemed not simply a craft or procedure but "better then [sic] all the written lawes in the

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86 DIG. 50.16.6.1 (Ulpian, Ad Edictum 3) ("Verbum 'ex legibus' sic accipiendum est: tam ex legum sententia quam ex verbis.") (translated by author); DIG. 1.3.17 (Celsus, Digest 26) ("Scire leges non hoc est verba earum tenere, sed vim ac potestatem"—"To know the law is not to know the words of the law, but its force and power") (translated by author). For a lucid commentary, see IAN MACLEAN, INTERPRETATION AND MEANING IN THE RENAISSANCE: THE CASE OF LAW 142-58 (1992). *See also* 3 SIR EDWARD COKE, THE REPORTS OF SIR EDWARD COKE (London, Joseph Butterworth & Son 1826) [REPORTS sig. C 7 b (London, J. Rivington 1777)] ("in lectione non verba sed veritas est amanda"—"in reading it is not the words but the truth which ought to be loved.").

87 SIR JOHN DODERIDGE, THE ENGLISH LAWYER 28-29 (London, I. More 1631).

88 SIR JOHN DAVIES, A DISCOURSE OF LAW AND LAWYERS (1614), *reprinted in* 2 THE

world . . . as comming [sic] neerest [sic] to the Lawe of Nature . . . ."[89] That common law was not written was also a dictate of political interest. According to Sir Henry Spelman, the unwritten character of common law was an innoculation against the forgetfulness and incivility engendered by written laws. The common law was unwritten precisely so that it could be fixed in the memory and the habitual behavior of every citizen, which was to say, in every man.[90] It was thus innate, or at least an aspect of nature imposed or invisibly inscribed in every English soul.

The ethics of common law has been at best elliptical and at worst occlusive. The brief excursus offered by way of interpretation of the *longue durée* or prescription of Duxbury's interests may or may not be an accurate deconstruction or interpretation of his underlying or unconscious motives. The point to be made is much simpler. His analysis of intellectual tendencies, collective moods, the evolution of ideals, and the formulation of directions resorts both to comparative historical evaluations and to ascriptions of the political purposes of doctrinal practices. His analyses raise again and again the question of ethics in relation to law, but then assume in subtle and distanced forms that ethics cannot be an explicit object of analysis. To move from criticism of legal historiography—the underestimations or inaccuracies of mid-century American jurisprudence—or appraisals of the spring or autumn, twilight or sunrise of particular figures of American juristic thought, to the statement of a political position or ethical goal that coincides with the rewriting of history, would fall outside the implicit purpose of Duxbury's doctrinal history. The assumption of a nature in culture or of an unwritten law of memory within the written law of reason is a way of replacing action with precedent, thought with recognition. The recourse to the fantasy of a common law that exceeds or outlasts all other laws is in principle and effect a resort to an ethics of inaction, or, in terms of the philosophy of legal history, a disciplinary anti-intellectualism. It asks not that the critic think but that he take sides, not that the jurist judge but that he act so as not to disturb the order of things, namely, that fantasy of nature which is held up to be the innate or intuitive order of law.

In that Duxbury's primary interest is explicitly in reason and not

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WORKS IN VERSE AND PROSE (INCLUDING HITHERTO UNPUBLISHED MSS) OF SIR JOHN DAVIES 243, 253 (Alexander B. Grosart ed., n.p. 1876).

89 *Id.* For a similar statement, see SIR JOHN FORTESCUE, DE LAUDIBUS LEGUM ANGLIÆ 32-33 (London, John Streater et al. 1672).

90 Sir Henry Spelman, *The Original of the Four Law Terms of the Year*, *in* THE POSTHUMOUS WORKS OF SIR HENRY SPELMAN KT. RELATING TO THE LAWS AND ANTIQUITIES OF ENGLAND 67, 102 (London, D. Brown et al. 1723).

in faith, it may be somewhat unfair to direct criticism at his failure to elucidate, elaborate, or use the unconscious or imagined dimensions of writing history. His message is that we already have the law in us; it is innate, and at the level of ethics we are all innately democratic. Such is and has always been the message of natural law: it believes in the good and in the persistence of the good. In this sense, Dr. Duxbury's cure is that of endeavoring to distance jurisprudence from those philosophies of law that are either less optimistic or less hedonistic than his own account of the moralistic advances of American jurisprudence. At a psychoanalytic level, however, it is hard not to remain at least marginally suspicious of this singular and somewhat rigid historicism. It offers its cure while denying that it intervenes at all; it rewrites the past while claiming to give information; it implies intellectual inertia while claiming to exhort adherence to democratic values; it claims to stare candidly and unflinchingly upon the objects of history while denying the existence of its own gaze, regard, or interpretations. It is a mode of historical writing which wants desperately and explicitly to be utilitarian, to be used. Yet, ironically, we cannot know who it is that we use, or, to pursue the implicit sexual metaphor, what body it is that we will be using. Such is the historiographic equivalent of lying back and thinking of England: it is a history that does its job, that fulfills its contract but does not question, let alone challenge, the power or conscience that established the contract or ordered the labor to be performed. Such is jurisprudence festooned with details of the past; it implies a tradition of legalism or observance, a history of jurists, but it is not properly speaking a history of law, doctrine, or jurisprudence.

To return to the beginning, I began by invoking the baroque image of a multiple history and its many reflections. The example was that of a widow remembering her husband both to honor his memory and to mourn his loss. The purpose of the metaphor was not simply to juxtapose a plural and fragmentary image of recollection to the singular explanations of modernist legal historiography. The metaphor of the widow also has psychoanalytic and political resonances. In terms of the former, memory is used to effect an unconscious cure in the widow through allowing her to imagine differences, and so to separate herself from or exorcise her subjection to the past. This could be termed the process of therapy in the individual, and the work of culture in the collectivity.[91] In either case, the work of memory is a

[91] See FREUD, *supra* note 2, on the individual therapy. On the collectivity, see GANANATH OBEYESEKERE, THE WORK OF CULTURE (1990). *See also* Drucilla Cornell, *What Takes Place in the Dark*, 4 DIFFERENCES: J. FEMINIST CULTURAL STUD. 45 (1992).

translation between past and present, word and symbol, conscious and unconscious. More than that, the widow's memory is an instance of a feminine recollection, and it remembers a law which was never one. This incursion of difference is intrinsic to the work of memory and lends significance to the writing of law's histories. Nor is such an evocation of plurality or contingency particularly novel in methodological terms. Writing in the scholastic tradition, the English lawyer and judge Sir John Doderidge suggests that "Memory Intellective" has a double operation. The one is called

> *Actus memorandi*, the other *Actus reminiscendi*. The first of these is the representation of things past, as if they were present, representing the image of things forepassed in the same manner as if they were now actually and really present. *Actus reminiscendi* is as it were a discourse of memory . . . out of one thing remembered [memory] discovereth another thing in manner lost and forgotten . . . .[92]

In each case, memory is used both to simulate and to invent, to disturb and to pursue, to think and to imagine thinking otherwise.[93]

In more explicitly political terms, the multiple, fragmentary, and fluid form of the widow's memory is redolent of an unstable, labile, and, in many respects, more imaginative history of the present. Where psychoanalysis has tended historically to adapt the individual to the institution and so to cure through conformity, feminist historiography has subverted the technique so as to create specifically feminine forms of writing the unconscious, of thinking for oneself. While the practice of *écriture feminine* has tended to be stylistically extravagant, at least by the rhetorical reckonings of the academy, it has been the political expression of the body, of the incurable soul, and the life or better fate of the unconscious.[94] Whatever the successes of writing otherwise, feminist historiography has engendered novel forms of historical self-consciousness, and, specifically, an awareness of difference. Feminist jurisprudence seeks to replace the unitary certainties of an

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92 DODERIDGE, *supra* note 87, at 16-17. On memory, see generally MARY J. CARRUTHERS, THE BOOK OF MEMORY: A STUDY OF MEMORY IN MEDIEVAL CULTURE (1990).

93 For Duxbury's comments on psychoanalysis and history, see Neil Duxbury, *Exploring Legal Tradition: Psychoanalytic Theory and Roman Law in Modern Continental Jurisprudence*, 9 LEGAL STUD. 84 (1989); Duxbury, *Middle Ages*, *supra* note 32.

94 Of the extensive literature of *écriture feminine*, see HÉLÈNE CIXOUS, COMING TO WRITING AND OTHER ESSAYS (1991); LUCE IRIGARAY, MARINE LOVER OF FRIEDRICH NIETZSCHE (Gillian C. Gill trans., 1991); LUCE IRIGARAY, J'AIME À TOI (1992). In a specifically jurisprudential context, see DRUCILLA CORNELL, BEYOND ACCOMODATION: ETHICAL FEMINISM, DECONSTRUCTION, AND THE LAW (1991). Of the secondary literature, ROSSI BRAIDOTTI, PATTERNS OF DISSONANCE (1991); ALICE A. JARDINE, GYNESIS: CONFIGURATIONS OF WOMAN AND MODERNITY (1985) are particularly to be recommended.

inherited *ratio scripta*, or other concepts of written reason as universal law, with other writings and more radical interpretations. The new historiography could well turn to writing the other histories of law, and, specifically, the histories of law's other jurisdictions, histories that examine the profusion of local laws and countenance the distinctive principles of spiritual courts so as to think the possibility of legal differences.[95] Such a project is at a considerable remove from Duxbury's reading of an instance of an American faith in reason. It would be not least uncharitable and certainly irrelevant to suggest that he ought to have written a different article, and I trust that my observations on the method of his work will not be taken to imply such an improbable thesis. They are rather reflections in response to a style and to the relations or the law that such a style implies. If they appear in some sense to be unduly harsh, that is probably a reflection of a sense of my own complicity in the faults or differences that this reading suggests. It would be wrong, however, to conclude on a discordant note. There is already too much competitiveness, too much rivalry, too much law in this response. I will end by observing that I am usually happier for reading Duxbury. On this occasion doubly so: first, because his fluency and erudition betray a love of something which history, the archive, or writing represents, second because his admirable essay has provided both the opportunity and the occasion for being published in the august pages of this *Review*.

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[95] This theme is implicit in IRIGARAY, J'AIME À TOI, *supra* note 94. I try to develop the point in my review of Irigaray. *See* Peter Goodrich, *Writing Legal Difference*, 6 WOMEN: A CULTURAL REVIEW 317 (1993) (reviewing IRIGARAY).