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# The Many Meanings of "Wherefore" in Legal History

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# THE MANY MEANINGS OF "WHEREFORE" IN LEGAL HISTORY

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> WHEREFORE *n* : an answer or statement giving an explanation : REASON <wants to know the whys and s>[1]
>
> The most useful investigator, because the most sensitive observer, is always he whose eager interest in one side of the question is balanced by an equally keen nervousness lest he become deceived.
>
> —William James[2]

## I

This essay describes the strategies that sometimes allow me to make sense of the answers that people give to the question Why? when it comes up in scholarly accounts of legal outcomes from the past. The essay is constructive, not deconstructive; programmatic, not polemical. I mean to sketch and recommend a way of thinking about legal history that I call methodological self-consciousness. "Methodological individualism" would be both inaccurate and accurate as a label for the essay's approach to questions of causality. The label is inaccurate, because it fails to express the heavy emphasis that I place on the dialectical relationship between individual legal actors and the social context in which they are embedded: People cause law, but law, in many interesting ways, also causes people. On the other hand, the label is accurate, because the methodology I advocate pays close attention to the ways in which an observer imagines that individual legal actors experienced the production of legal outcomes. As far as my wherefores are concerned, chipmunks, rocks, and sunbeams don't make law: people do (although this does not mean that people aren't constrained and shaped by the physical world they inhabit). By the same token, classes, ideologies, and institutions don't sign decrees and

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1. WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 1342 (1988).

2. WILLIAM JAMES, *The Will to Believe, in* ESSAYS IN PRAGMATISM 102 (Alburey Castell ed., 1948) [hereinafter ESSAYS].

judgments ordering people to pay money or go to jail: individual judges do (although this does not mean that a judge's perceptions are not shaped—even determined—by his connections with one or more of these collectivities).

This essay's wherefores thus accept Robert Gordon's proposed "rule of style" for legal historians: "no sentence without a subject; no intellectual move without a reason—even if the particular subject and reason may sometimes be largely incidental to the grander thematic history of legal consciousness."[3] To accomplish this move, the methodology I describe will borrow and adapt Max Weber's concept of "adequacy on the level of meaning." In a nutshell, this concept refers to that quality of an account which attempts to recreate the experience of subjectivity in historical context. The accent will be placed on individuals as agents of legal practice because this method shows the personal responsibility that historical actors bore for the consequences of their actions and inactions—and, by inference, the responsibility that we bear for the consequences of our actions. With Sartre, I claim (but am unable to "prove") the absolute freedom of consciousness: that nothing in our own pasts *requires* that we follow any particular path in the future.[4] Thus, "the social structure made me do it" is a better explanation of why a past event in which we were involved happened the way it did—say, why a law professor who hates the grading system nonetheless continues, term after term, to hand in grades—than "the social structure did it." By placing the law professor (and not *just* the law school's bureaucratic apparatus) squarely in the middle of the explanatory sentence—the "place," as it were, where consciousness reproduces structure—the explanation helps to show how it is that each one of us, every day and all the time, creates and recreates the social world we inhabit, including those things about the world (and us) which we despise.

The real me is hardly ever as hypersensitive about methodology as this essay implies. I have thus chosen to abstract myself into an ideal-typical legal historian. The use of an ideal type in this context is unorthodox. Scholars usually create ideal types as tools to understand the historical subject they are investigating, rather than as tools to understand the presuppositions which they themselves bring to their practice. But the move I make here—my methodology for methodology, as it were—has its advantages. A half century ago the English philosopher and historian R.G. Collingwood wrote that

3. Robert W. Gordon, *Critical Legal Histories,* 36 STAN. L. REV. 57, 119 (1984).
4. JEAN-PAUL SARTRE, BEING AND NOTHINGNESS (Hazel E. Barnes trans., 1956).

> the historian himself, together with the here-and-now which forms the total body of evidence available to him, is a part of the process he is studying, has his own place in that process, and can see it only from the point of view which at this present moment he occupies within it.[5]

The present moment is always changing into the next, however, and with it the historian. It follows that "historical thought is a river into which none can step twice—even a single historian, working at a single subject for a certain length of time, finds that when he tries to reopen an old question that the question has changed."[6] By projecting my methodological strategies onto an ideal type, I can make methodological self-consciousness an object of study without having to claim either that the consciousness I study is immutable, or, for that matter, that any particular past moment of my consciousness is completely described by the ideal. The ideal type allows you and me to gaze, Foucault-like, on (1) "me" (2) regarding "legal historians" (3) regarding "legal history."[7] And the point of the gaze (the wherefore of this essay) is to engage reader and writer alike in the creative, but difficult and essentially local, enterprise of constructing and critiquing the discourse by which we give meaning to the past.

This enterprise is absolutely essential. In historical analysis, the "hair-line which separates science from faith," as Max Weber put it, consists of a relentless commitment to clarifying the meaning of our expressions.[8] By this measure, legal historians who assert causal claims pay far too little attention to the methodological foundations of their craft. In a recent essay, Joan Williams correctly observed that although a few legal historians have struggled to define their relationship to modernism during the past decade or so, "most legal historians appear to go about their business of interpreting the past undisturbed by theoretical questions."[9]

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5. R.G. COLLINGWOOD, THE IDEA OF HISTORY 248 (Oxford Univ. Press 1961) (1946) (first published in 1946, three years after the author's death).

6. *Id.*

7. The image is one of a philosopher whose "thirst for knowledge" brings him to the Panopticon to gaze upon its inmates, and thereby to exercise true power encoded in the gaze itself. MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON 201–02 (Alan Sheridan trans., Vintage Books 1979) (1975). I thus borrow and subvert Foucault's famous interest in "power as its extremities . . . with those points where it becomes capillary." 1 MICHEL FOUCAULT, THE HISTORY OF SEXUALITY 96–97 (1976), *quoted in* Alan Hunt, *Foucault's Expulsion of Law: Toward a Retrieval,* 17 LAW & SOC. INQUIRY 1, 8 (1992).

8. MAX WEBER, THE METHODOLOGY OF THE SOCIAL SCIENCES 110 (Edward A. Shils & Henry A. Finch eds. & trans., 1949) [hereinafter WEBER, METHODOLOGY].

9. Joan C. Williams, *Culture and Certainty: Legal History and the Reconstructive Project,* 76 VA. L. REV. 713, 714 (1990).

To be sure, most sophisticated legal historians these days have internalized the central lesson of historicism. They know that "[t]he meaning of history does not lie hidden in some universal structure, whether deterministic or teleological, but in the multiplicity of individual manifestations at different ages and in different cultures."[10] When those historians who have learned this lesson concern themselves with explanation, they usually mean a broad statement that is nonetheless still tied to a particular historical context. Causality, to such a legal historian, does not imply uniformity: The historicist knows that historical science is idiographic (tied to the investigation of particular entities), not nomothetic (concerned with the search for general and invariable laws).[11] Thus, for example, a growing number of legal historians have begun to draw from the historicist message the insight that law as perceived by powerful white male judges and legislators is not the only law there was, and that law as seen from the standpoint of disenfranchised and hitherto ignored groups—industrial workers, women, native Americans, etc.—also can be privileged as a subject for historical inquiry.[12] But whatever the subject of our inquiry may be, when

10. Hans Meyerhoff, *Introduction to* THE PHILOSOPHY OF HISTORY IN OUR TIME 10 (Hans Meyerhoff ed., 1959) [hereinafter PHILOSOPHY OF HISTORY].

11. In traditional philosophical discourse, the assertion that causation is "uniform" means that causal relations "can be expressed in the form of general laws or, in short, that similar causes always produce similar effects." Richard Taylor, *Causation, in* 2 THE ENCYCLOPEDIA OF PHILOSOPHY 56, 57 (Paul Edwards ed., 1967). According to Allan Megill, the distinction between the nomothetic and the idiographic sciences was first proposed by the German historian Wilhelm Windelband in 1894. Allan Megill, *Recounting the Past: "Description," Explanation, and Narrative in Historiography,* 94 AM. HIST. REV. 627, 632–33 (1989). Megill gives this useful example to illustrate the distinction:

> In historians' language, the following invented statement counts as a generalization (the question of whether or not the statement is correct does not concern us here): "As a result of the growth of towns and trade, feudalism gave way to incipient capitalism in late medieval and early modern Europe." The "problem of generalization," as historians conceive of it, is usually the problem of how to get from fragmentary and confusing data to such larger assertions. But . . . [i]n "nomothetic" science, the desired generalizations *transcend* particular times and places, as in, for instance, this invented statement: "*Whenever,* within a feudal system, towns and trade begin to grow [we would likely find enumerated further conditions, along with statements concerning their interrelations], *then* feudalism gives way to capitalism." In short, the generalizations in question are laws . . ., and assemblages of such laws brought together in theories.

*Id.* at 633 (footnote omitted).

12. *See, e.g.,* William E. Forbath et al., *Introduction: Legal Histories from Below,* 1985 WIS. L. REV. 759, 759 (describing their articles about law in the same volume of the *Wisconsin Law Review* as having been written from the standpoint of "industrial workers, women, and artisans in the 19th century"). Joan Wallach Scott calls this kind of scholarship, evocatively, the "pluralization of the subject of history." Joan W. Scott, *History in Crisis? The Others' Side of the Story,* 94 AM. HIST. REV. 680, 689 (1989). *See also* Robert A. Williams, Jr., *Taking Rights Aggressively: The Perils and Promise of Critical Legal Theory for Peoples of Color,* 5 LAW AND INEQ. J. 103 (1987).

the time comes for us to sit down at our computer terminals and type in words which assert that a particular/localized/contextualized past outcome happened this way (and not some other way) "because of" this or that factor (and not some other factor), *what exactly do we mean?* To be precise: What *relationship* do we mean to establish between our wherefore and the concrete historical reality it explains?

Although the neglect of methodology in this last sense of the word adversely affects all types of legal historiography, it is uniquely visible in scholarship that concerns itself with discovering why the judicial process produced certain results. In its typical form, this kind of scholarship begins by describing the findings of empirical inquiry into a specified set of judicial outcomes from the past. For example, Doctrine *A* was replaced by or changed into Doctrine *B*, or, more generally, a particular way that judges thought about the law was displaced by a different way of thinking. Then the scholar will connect the outcomes that interest her to certain factors that probably do not figure prominently in the texts of the legal materials themselves. For example, this or that ideology or set of interests explains what the judges did and why they did it.

This kind of scholarship asks a question that has pushed itself forward, forcefully and insistently, in the mind of anyone who has ever taken seriously at least the first part of that most famous of all Holmes' aphorisms: "The life of the law has not been logic: it has been experience."[13] If the logic of doctrine as applied to the facts does not account for legal outcomes, then what does? But despite this question's fascination and immediacy, the practice of imputing the products of the judicial process to some cause other than the simple fact that lawyers, judges, and juries physically participated in making them happen is particularly problematical, and hence interesting, from a methodological point of view. To name but two of many factors which make this so, judges and juries (unlike "economic" actors) usually have no obvious personal incentive to decide a case one way as opposed to another; and the role-specific interests and beliefs of a professional jurist are frequently incongruent, in the context of litigation, with the extralegal interests and beliefs of the most powerful groups in society. As a result of factors like these, the challenge of rendering a *coherent* account imputing particular judicial outcomes to an antecedent cause is more acute than, say, the challenge of imputing a particular piece of legislation to the campaign contributions of interest groups who lobbied for its passage.

13. OLIVER W. HOLMES, THE COMMON LAW 5 (Mark D. Howe ed., 15th prtg. 1963).

An illustration will help clarify the nature of the challenge to which I refer. Consider the common scholarly practice of investigating the law's response (or lack of response) to changes in the extralegal components of a given society during a particular historical period. "The United States in 1914" would be a concrete example of such a society, if a scholar were to view it as the endpoint of a long series of social and economic changes which she might sum up, for convenience, by the phrases "industrialization" or "the transition to capitalism."[14] Figure 1 depicts the problem of coherence presented by the typical case.

LAW'S RESPONSE (OR LACK OF RESPONSE) TO SOCIAL CHANGE:
A DESCRIPTION OF THREE JUDICIAL OUTCOMES

| | Time 1 | → | Time 2 | |
|---|---|---|---|---|
| Extralegal Facts | A | | B | |
| | | I<br>Anachronism | II<br>Functionalism | III<br>Relative Autonomy |
| Legal Facts | $\alpha$ | $\alpha$ | $\beta$ | $\alpha/\beta$ |
| Judicial Outcomes | $A(\alpha)$ | $B(\alpha)$ | $B(\beta)$ | $B(\alpha/\beta)$ |

**Figure 1**

Figure 1 describes what a legal historian might find upon investigating a hypothetical society that underwent significant social change during a particular span of time. At Time 1, before the social changes which interest the historian had occurred, a detailed description of all the potentially significant facts (structures, interests, ideas, etc.) which were in some sense empirically "present" in *extralegal* actors and institutions would be A, while a similarly detailed description of all the potentially significant facts present in *legal* actors and institutions would be $\alpha$. Assuming for the sake of argument that all judicial outcomes at Time 1 manifested, at the highest level of generality, legal and extralegal structures, interests and ideas interacting with one another in the context of litigation, our legal historian could then describe the early outcomes as having an overall content of $A(\alpha)$. At Time 2, however, after a period of massive change in this society, her description of all extralegal structures, interests and ideas (B) would

14. *See, e.g.*, SAMUEL P. HAYS, THE RESPONSE TO INDUSTRIALISM: 1885–1914 (1957); ROBERT HIGGS, THE TRANSFORMATION OF THE AMERICAN ECONOMY, 1865–1914: AN ESSAY IN INTERPRETATION vii (1971); NORMAN POLLACK, THE POPULIST RESPONSE TO INDUSTRIAL AMERICA: MIDWESTERN POPULIST THOUGHT (1962).

differ markedly from her description of the extralegal components of society at Time 1 (A). (For example, a legal historian investigating the United States in 1914 might conclude that, in comparison with what existed in 1800, farming and artisanal interests and ideas had drastically receded in numbers and in influence, while the interests and ideas of industrial capitalists and their allied classes had become ubiquitous and far more influential.) But notwithstanding the magnitude of the extralegal changes in Figure 1's society, our legal historian would observe that some legal institutions and ideas had changed, and some had not. As a helpful first step towards her goal of writing an account which imputes the judicial outcomes at Time 2 to an antecedent cause, she might then proceed to group the judicial outcomes according to their apparent "connection" with either new or old legal institutions and ideas. And unless she is the kind of quick-witted functionalist whose curiosity ceases after formulating a macro-level explanation for anything and everything that happens at the micro level,[15] here is what she would find:

First, some judicial outcomes (Category I) would seem to be related to judges' puzzling adherence to legal concepts held over from Time 1, and applied to a society which had fundamentally changed; these outcomes might strike our legal historian as stubborn anachronisms. (E.g., "Why have American admiralty courts continued to enforce, throughout 160 years of wildly different socioeconomic contexts, the ancient right of an injured seaman to sue both his ship and his employer for maintenance and cure?")[16] Other judicial outcomes (Category II) would seem to be related to legal concepts (described in Figure 1 as β) which are altogether *new*. (E.g., "The employment-at-will doctrine, first announced by Horace Wood in his 1877 treatise on master and servant, was quickly adopted by nearly all American courts.")[17] Since these judicial outcomes coincided temporally with the happening of massive extralegal changes, our legal historian would

15. *See* Gordon, *supra* note 3, at 82 (noting that "a nimble mind can invent a functional explanation for *anything*"). Speaking of Marxist functionalism in particular, Jon Elster similarly observes that "[a]ny writer with a modicum of ingenuity and eloquence can invent . . . analogies or 'structural homologies' between a set of mental attitudes and a socioeconomic structure." JON ELSTER, MAKING SENSE OF MARX 508 (1985).

16. *See, e.g.*, Warren v. United States, 340 U.S. 523 (1951); The Osceola, 189 U.S. 158 (1903); Harden v. Gordon, 11 F. Cas. 480 (C.C.D. Me. 1823) (No. 6,047) (Story, J.).

17. *See, e.g.*, Jay M. Feinman, *The Development of the Employment-at-Will Rule Revisited*, 23 ARIZ. ST. L.J. 733 (1991) (Wood invented the rule.); Jay M. Feinman, *The Development of the Employment at Will Rule*, 20 AM. J. LEGAL HIST. 118 (1976) [hereinafter Feinman, *Development*]; Mayer G. Freed & Daniel D. Polsby, *The Doubtful Provenance of "Wood's Rule" Revisited*, 22 ARIZ. ST. L.J. 551 (1990) (Wood did not invent the rule, but was the first to publicize it.).

be strongly tempted to view the new legal concepts and outcomes as functionally related to the extralegal changes[18]—either from the standpoint of society as a whole (e.g., "the outcomes were efficient adaptations to new circumstances"), or from the standpoint of some group within society (e.g., "the outcomes helped capitalists").[19] Finally, our legal historian would see that a third group of judicial outcomes (Category III) displays a confusing mix of old and new legal ideas, some of which seem to be anachronistic, some of which seem to be functional to the "needs" of an identifiable extralegal group, and some of which seem to be functional to the needs of still other (and possibly competing) extralegal groups. (E.g., "In such-and-such case or cases, the 'old' doctrine of consideration was interpreted to preclude enforcement of an employer's gratuitous promise to pay his employee a pension after retirement, but the 'new' doctrine of reliance-based liability was interpreted to permit enforcement of the very same promise.")[20]

Assuming that our legal historian finds more than a negligible number of judicial outcomes in each category, she would be forced to conclude that the overall judicial system of Figure 1's society at Time 2 was, as a general rule: in one sense *connected to* antecedent changes in extralegal life; in another sense *autonomous* of the extralegal changes; and in still another sense *relatively autonomous* of the extralegal changes. And therein lies the problem for anyone trying to render a coherent account of causation in the judicial process. Most known historical societies with legal systems have empirically generated judicial outcomes which combine both the old and the new, even during periods of great social change. Why then, in any given historical case, do some judicial outcomes appear to have been connected to changes in extralegal interests and ideas, and some not? And even if we grant that judges and lawyers frequently have an incentive to protect their

18. *Cf.* John Ashworth, *The Relationship Between Capitalism and Humanitarianism*, 92 AM. HIST. REV. 813, 813 (1987) ("Since an obvious temporal correspondence exists between the development of capitalism and the rise of [anti-slavery] humanitarianism, historians are understandably reluctant to believe that there is no causal connection.").

19. *Compare* Freed & Polsby, *supra* note 17, at 558 ("The employment-at-will rule was the natural offspring of a capitalist economic order, reflecting the value of individualism, the growth of competition and the mobility of labor.") *with* Feinman, *Development*, *supra* note 17, at 133 (The employment-at-will rule "conformed to the economic necessities and to the beliefs of the owners in the existence of and the need for an industrial elite of owners of capital with absolute control of their businesses.").

20. *See, e.g.*, Feinberg v. Pfeiffer Co., 322 S.W.2d 163 (Mo. Ct. App. 1959). For an analysis of the promissory estoppel doctrine as a failed attempt to overcome fundamental contradictions in late nineteenth century legal classicism, see Jay M. Feinman, *Promissory Estoppel and Judicial Method*, 97 HARV. L. REV. 678 (1984).

own craft interests by hanging on to archaic forms (certainly a plausible enough argument in many cases), why do they sometimes hang on, and sometimes let go?

* * * *

To assist my project of understanding the methodological foundations of causal claims in legal history, this essay examines (as a case study) the kind of scholarship which imputes judicial outcomes to one or more antecedent causes. The subject of causality is thus framed as a Kantian "ordering category of the human spirit," and not as a property of "things in themselves."[21] The concept of "judicial outcomes" is conceived broadly. It encompasses any tangible or intangible product of the judicial process, such as: legal doctrines, rules, and interpretations (including statutory interpretations); the manner in which law was applied by judges and juries; and the patterns or habits of legal thinking. I define the concept of "causal claims" pretty broadly, too. Mainstream scholarship of "the-doctrine-changed-because" type is included, to be sure. But I also include the kind of structuralist account that holds itself out as acausal on the basis of an Hegelian "the truth is in the whole" disclaimer at the end:[22] Why is it that *these* elements of the structure interacting with one another are responsible for the direction of the whole, rather than some other elements? As far as this essay is concerned, *no* account is acausal: To thematize at all is to select from the whole those elements which the observer knows (immanently) are significant for the operation of the whole. Consider, for example, the sort of Critical Legal Studies endeavor wherein the author traces what Robert Gordon calls "the rise and fall of successive mediating devices."[23] The moment this type of scholarship goes one step beyond showing *how* legal doctrine failed to mediate "fundamental contradictions" in society (say, self v. other, or individualism v. altruism), into arguing/saying/suggesting/hinting *why* a particular mediating structure from the past took whatever shape it did, then I read the author as making a causal claim.[24] But not only

21. Sibylle Tönnies, *Is Law an Eco-System?*, 1 SOC. & LEGAL STUD. 345, 354 (1992).

22. *See, e.g.*, Isaac D. Balbus, *Commodity Form and Legal Form: An Essay on the "Relative Autonomy" of the Law*, 11 LAW & SOC. REV. 571, 587 (1977).

23. Robert W. Gordon, *An Exchange on Critical Legal Studies Between Robert W. Gordon and William Nelson*, 6 LAW & HIST. REV. 139, 147 (1988).

24. *See, e.g.*, Gordon, *supra* note 3, at 114 (the self/other contradiction is "usually" mediated through legal structures primarily built by dominant elites, and therefore the system will contain a "*bias in favor of existing orders*") (emphasis added); Karl E. Klare, *The Public/Private Distinction in Labor Law*, 130 U. PA. L. REV. 1358, 1416 (1982) (liberal legal discourse is "*designed*" to conduce a belief that law and politics are separate) (emphasis added). Duncan Kennedy originated the fundamental contradiction concept. *See* Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1986) [hereinafter *Form and*

that; even when such an author merely *describes* the failure of legal actors to mediate fundamental contradictions in a particular context (usually by pointing out the logical indeterminacy of the rules and counter-rules that the actors generated), she is asserting an *implicit* causal claim. That is, most fundamental contradiction scholarship coherently accounts for the logical incoherence of legal practice by positing its structural inevitability.[25] To paraphrase von Clausewitz: The assertion that logical contradictions implicit in the structures of thought behind a particular set of past legal doctrines necessarily doomed legal actors to failure in their valiant effort to mediate the contradictions in an apolitical manner is simply an assertion of causality by other means.[26]

I focus on the kind of scholarship which asks "why" about judicial outcomes precisely because it presents such difficult and interesting methodological questions. However, the essay is intended to have a broader application and, it is hoped, a greater significance. What will be said here about methodology in the context of scholarship which seeks to learn the causes of this kind of law, from the perspective of judges, should also be useful, to a greater or lesser degree, for scholarship which concerns itself with any other kind of imputational question in legal history. But of course this claim of implicit congruence in coverage will have to prove itself in the course of the discussion.

* * * *

Given the unorthodox form of this essay, a bit of personal intellectual history seems called for. I came to the meanings of the wherefores sketched in this essay by having travelled two different paths. First, there is a part of me which gets satisfaction from reading (and doing)[27] instrumentalist/consequentialist legal scholarship built on

*Substance*]; Duncan Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFF. L. REV. 205 (1979) [hereinafter *Structure of Blackstone's Commentaries*]. Kennedy has since renounced it as one of those " 'philosophical abstractions' which you can manipulate into little structures." Peter Gabel & Duncan Kennedy, *Roll Over Beethoven*, 36 STAN. L. REV. 1, 15–16 (1984).

25. The locus classicus is Duncan Kennedy, *The Stages of the Decline of the Public/Private Distinction*, 130 U. PA. L. REV. 1349 (1982). *See also* Gregory S. Alexander, *The Dead Hand and the Law of Trusts in the Nineteenth Century*, 37 STAN. L. REV. 1189, 1193 (1985); Elizabeth V. Mensch, *The Colonial Origins of Liberal Property Rights*, 31 BUFF. L. REV. 635, 636, 660 (1982); Joseph William Singer, *The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld*, 1982 WIS. L. REV. 975, 1058–59.

26. I refer to von Clausewitz's epigram that "War is . . . a continuation of political relations . . . by other means." JOHN BARTLETT, FAMILIAR QUOTATIONS 448 (Emily M. Beck ed., 15th ed. 1980).

27. *See, e.g.*, Louis E. Wolcher, *Price Discrimination and Inefficient Risk Allocation Under the Rule of* Hadley v. Baxendale, 12 RES. L. & ECON. 9 (1989); Louis E. Wolcher, *The Accommodation of Regret in Contract Remedies*, 73 IOWA L. REV. 797 (1988).

the methodological premises of rational choice theory. The core assumptions of rational choice are (1) the theoretical primacy of individual actors rather than pre-existent social groups, (2) that in a world of scarcity people's goals cannot all be equally realized (that is, choices must be made), and (3) that actors select among alternative courses of action according to which course appears to be the most effective means of realizing their goal.[28] However, that part of me which enjoys working through the implications of these assumptions wonders, along with at least some other rational choice scholars, why and how individuals come to have the preferences they have.[29] The sociologist Michael Hechter, a leading rational choice theorist, calls this the problem of the "macro-to-micro transition," and uses the example of political support (or non-support) for right-to-die legislation as an example:

> Peoples' preferences about the right to die are affected by the *opportunities* they are afforded (by existing institutional arrangements and social policies) to make such decisions for themselves. People living in a society in which there is no right to die have much less opportunity to develop preferences concerning the conditions under which life is sustainable than those living in a society where they are compelled to state such intentions by existing medical policy.[30]

Noting the "low level of theoretical sophistication that characterizes most of our models of micro-macro relations," Hechter concedes that "rational choice theorists have concentrated on the first transition [the micro-to-macro] at the expense of the second [the macro-to-micro]."[31] In other words, they have neglected to inquire deeply into the possibil-

28. *See, e.g.,* Michael Hechter, *Introduction* to THE MICROFOUNDATIONS OF MACROSOCIOLOGY 3, 8 (Michael Hechter ed., 1983). A representative recent collection of essays applying these assumptions to a variety of historical problems can be found in MARKETS IN HISTORY: ECONOMIC STUDIES OF THE PAST (David W. Galenson ed., 1989). Jules Coleman does a good job of explaining the application of rational choice techniques to legal questions in Jules L. Coleman, *Afterword: The Rational Choice Approach to Legal Rules,* 65 CHI.-KENT L. REV. 177 (1989).

29. *See, e.g.,* ROBERT HIGGS, CRISIS AND LEVIATHON: CRITICAL EPISODES IN THE GROWTH OF AMERICAN GOVERNMENT 35–56 (1987) (discussing the need to integrate ideology into rational choice models of political behavior). Defining ideology as "a somewhat coherent, rather comprehensive belief system about social relations," *id.* at 37, Higgs endogenizes it by making ideology part of an individual's utility function. *Id.* at 40–41. He is thus able to conceive that an individual's choice to act collectively with like-minded people is rational, despite the free rider problem, because the individual's perceived self-identity is at stake: People "cannot receive this form of utility without acting; there is no closet solidarity." *Id.* at 54–55.

30. Michael Hechter, *The Micro-Macro Link in Rational Choice Theory,* PERSP. July 1992, at 1, 2.

31. *Id.* at 3–4. The problem that Hechter notes has also been underestimated and undertheorized in liberal theories of the state like Rawls' and Dworkin's. *See* Nicola Lacey, *Theories of Justice and the Welfare State,* 1 SOC. & LEGAL STUD. 323, 330–31 (1992).

ity that a great deal that is "social" stands behind, or even inside of, the flesh-and-blood individuals whose concrete actions give us the evidence of history.

This leads to the second part of me—a part which gets satisfaction from reading (and doing)[32] structuralist accounts of legal history. A structure may be defined as "a combination and relation of formal elements which reveal their logical coherence within given objects of analysis."[33] The structuralist paradigm finds coherence in history by exposing the underlying realities that the discourses of power, including law, obscure. For example, traditional Marxism is structuralist because it offers a society's economic base (the relations of production) to account for a whole variety of seemingly disparate phenomena, such as religion and law, which on their surface conceal or deny that they are superstructural.[34] Also structuralist is traditional Durkheimian positivist social science, which studies macro-level patterns of social variation (e.g., legal outcomes as "social facts"), quite independently of the motivations or understandings of individual actors.[35] In those versions of structuralism which produce what Thomas Heller calls a "material overkill of the liberal subject," the liberal's pre-social individual, freely choosing her ends and means, is exposed as an artifact of culture—of such collectivities as the structure of language, economic class, ideology, the apparatus of production, and so forth.[36] The self's activities (including its choices) merely instantiate the structures which constitute the self, as in this passage from Herbert Marcuse's *One Dimensional Man:*

> [In] advanced industrial society . . . the technical apparatus of production and distribution (with an increasing sector of automation) functions, not as the sum-total of mere instruments which can be isolated

32. *See, e.g.,* Louis E. Wolcher, *The Privilege of Idleness: A Case Study of Capitalism and the Common Law in Nineteenth Century America,* 36 AM. J. LEGAL HIST. 237 (1992) [hereinafter Wolcher, *Privilege of Idleness*]; Louis E. Wolcher, *"The Enchantress" and Karl Polanyi's Social Theory,* 51 OHIO ST. L.J. 1243 (1990) .

33. Jacques Ehrmann, *Introduction* to STRUCTURALISM at ix (Jacques Ehrmann ed., 1970). As Peter Gabel points out, this definition "does not elucidate the relationship of the structured object to the reason which forms it." That is, the definition does not say whether the structure "somehow resides in the object of study," or whether "I [am] organizing the object to facilitate my project of comprehension." Peter Gabel, *Intention and Structure in Contractual Conditions: Outline of a Method for Critical Legal Theory,* 61 MINN. L. REV. 601, 604–05 n.4 (1977).

34. *See* Thomas C. Heller, *Structuralism and Critique,* 36 STAN. L. REV. 127, 130 n.8 (1984); Tönnies, *supra* note 21, at 348.

35. *See* Roger Cotterrell, *The Durkheimian Tradition in the Sociology of Law,* 25 LAW & SOC'Y REV. 923, 927 (1991).

36. Heller, *supra* note 34, at 151. Heller cites Lévi- Strauss, Althusser, Foucault, and Lacan as the most avowedly "antihumanist" of the structuralists. *Id.* at 163.

> from their social and political effects, but rather as a system which determines *a priori* the product of the apparatus as well as the operations of servicing and extending it. In this society, the productive apparatus tends to become totalitarian to the extent to which it determines not only the socially needed occupations, skills, and attitudes, but also individual needs and aspirations. It thus obliterates the opposition between the private and public existence, between individual and social needs.[37]

Consciousness of choice—that phenomenon in which we experience ourselves as choosing subjects—is regarded either as an illusion, or as an uninteresting and random particularity: Reality, by this account, *is* structure. Still, as Heller has observed, "it is a presumptive matter of interest and inquiry for structuralist theory to explain why an author produced *that* text, a patient dreamed *that* dream, a court wrote *that* opinion."[38] Sophisticated (that is, non-functionalist) structural accounts do a poor job of explaining the micro-details of practice, which persist in presenting themselves to an honest observer in a bewildering variety that is increasingly difficult to deduce from structure. What is more, even for the most dogmatic structuralist "there continues to exist a phenomenal distinction between the subject's conscious experience of self-determination and its reflective admission of a reductive construction."[39] For instance, a structuralist, along with everybody else, surely *feels* that she is choosing chocolate cake instead of a peach when, after deliberation in the cafeteria line, she picks up the former as her dessert.[40] The structuralist half of me thus wonders how real historical subjects actually came to feel and act in a world that is dominated by structures.

The two paths that led to this essay intersected and transformed themselves into a third. If subjectivism (whether the rational choice version or any other version) isn't the real story because it leaves out the social structures which in some sense produce the individual, and if structuralism isn't the real story because it leaves out the subjects whose activities not only are necessary to produce and reproduce structures, but also display such messy complexity, then perhaps there is no *single* real story at all. In the "slippage between the continental

37. HERBERT MARCUSE, ONE-DIMENSIONAL MAN: STUDIES IN THE IDEOLOGY OF ADVANCED INDUSTRIAL SOCIETY at xv (1964).

38. Heller, *supra* note 34, at 145.

39. *Id.* at 150.

40. The example is Thomas Nagel's. THOMAS NAGEL, WHAT DOES IT ALL MEAN? 47–58 (1987).

plates of subjectivism and structuralism," as James Boyle puts it,[41] perhaps the only safe place for a legal historian to stand is simply where she is already. Indeed, where else *could* one stand? Thomas Heller's observations about the task of poststructuralism begin to get at what I mean by this:

> Poststructuralism must not deny consciousness, but must relocate it as a discourse appropriate to particular situations. At the same time, poststructuralism must not suggest a nihilistic abolition of the possibility of explanation, but must transform our understanding of what adequate theory is. Instead of imagining truth as a timeless equilibrium, a definitive account of the particular, or an innate order such as Chomskian grammar or a Jungian archetype, knowledge must be represented in poststructuralism as an equifinal moment in an evolutionary process involving multiple and competing sets of structural rules.[42]

And R.G. Collingwood's remark, quoted earlier, about the historian's "place in th[e] process" by which she describes and explains the past completes the point I want to make here; it reveals the direction of the third path formed by the conjunction of structuralism and subjectivism.[43] It points to what I mean by the concept of methodological self-consciousness: neither a privileging of structure over subject, nor subject over structure, but rather a privileging of the *historian's* own part in the process of reconstructing the past. To borrow James Boyle's apt phrasing, the method sketched in this essay seeks "to reweight the balance between subject and structure, to capture momentarily our experience of the world in such a way to permit us to act in it,"[44] by pointing out that it is the historian who is holding the scales by which the balance is struck. It is the historian, not history, who terminates indeterminacy, and in doing so she brings out some of the potentialities in the past at the expense of rendering other possible determinations obscure.[45]

* * * *

The ideas in this essay were influenced by the writings of many authors—most notably, Carl Becker, Peter Berger, Emile Durkheim, Jon Elster, Jerome Frank, Robert Gordon, Antonio Gramsci, Michael

41. James Boyle, *The Politics of Reason: Critical Legal Theory and Local Social Thought*, 133 U. PA. L. REV. 685, 763 (1985).

42. Heller, *supra* note 34, at 146 n.30.

43. *See supra* text accompanying note 5; *cf.* Peter Gabel, Book Review, 91 HARV. L. REV. 302, 308 n.12 (1977) (reviewing RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1977)) ("[t]he theorist is 'an element in the structure. . . .' ").

44. Boyle, *supra* note 41, at 777.

45. The sentence in the text paraphrases Dimitri N. Shalin, *Critical Theory and the Pragmatist Challenge*, 98 AM. J. SOC. 237, 258 (1992).

Hechter, William James, Mark Kelman, Duncan Kennedy, Karl Mannheim, Karl Marx, Karl Polanyi, Roberto Unger, and Max Weber.[46] There are quite a few sociologists on this list. I trust that it

46. The principal influences were:

*Carl Becker:* DETACHMENT AND THE WRITING OF HISTORY: ESSAYS AND LETTERS OF CARL L. BECKER (Phil L. Snyder ed., 1958) [hereinafter DETACHMENT].

*Peter L. Berger:* THE CAPITALIST REVOLUTION: FIFTY PROPOSITIONS ABOUT PROSPERITY, EQUALITY, AND LIBERTY (1986); THE SACRED CANOPY: ELEMENTS OF A SOCIOLOGICAL THEORY OF RELIGION (1969) [hereinafter BERGER, SACRED CANOPY]; PETER L. BERGER & THOMAS LUCKMANN, THE SOCIAL CONSTRUCTION OF REALITY: A TREATISE IN THE SOCIOLOGY OF KNOWLEDGE (1966) [hereinafter BERGER & LUCKMANN, SOCIAL CONSTRUCTION]; INVITATION TO SOCIOLOGY: A HUMANISTIC PERSPECTIVE (1963).

*Emile Durkheim:* ON INSTITUTIONAL ANALYSIS (Mark Traugott ed. & trans., 1978); READINGS FROM EMILE DURKHEIM (Kenneth Thompson ed. & Margaret A. Thompson trans., 1985); THE DIVISION OF LABOR IN SOCIETY (W.D. Halls trans., 1984).

*Jon Elster:* MAKING SENSE OF MARX, *supra* note 15.

*Jerome Frank:* LAW AND THE MODERN MIND (1930). For me, Frank's most influential judicial opinion has been Zell v. American Seating Co., 138 F.2d 641 (2d Cir. 1943), *rev'd per curiam,* 322 U.S. 709 (1944).

*Robert Gordon: Critical Legal Histories, supra* note 3; *Historicism in Legal Scholarship,* 90 YALE L.J. 1017 (1981); *New Developments in Legal Theory, in* THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 413 (David Kairys ed., 1990); *The Politics of Legal History and the Search for a Usable Past,* 4 BENCHMARK 269 (1990) [hereinafter Gordon, *Politics of Legal History*].

*Antonio Gramsci:* AN ANTONIO GRAMSCI READER (David Forgacs ed., 1988) [hereinafter GRAMSCI READER]; SELECTIONS FROM THE PRISON NOTEBOOKS OF ANTONIO GRAMSCI (Quintin Hoare & Geoffrey N. Smith eds. & trans., 1971) [hereinafter GRAMSCI, PRISON NOTEBOOKS].

*Michael Hechter:* THE MICROFOUNDATIONS OF MACROSOCIOLOGY, *supra* note 28.

*William James:* ESSAYS, *supra* note 2.

*Mark Kelman:* A GUIDE TO CRITICAL LEGAL STUDIES (1987).

*Duncan Kennedy:* LEGAL EDUCATION AND THE REPRODUCTION OF HIERARCHY: A POLEMIC AGAINST THE SYSTEM (3d prtg. 1983) [hereinafter KENNEDY, REPRODUCTION OF HIERARCHY]; *Form and Substance, supra* note 24; *Freedom and Constraint in Adjudication: A Critical Phenomenology,* 36 J. LEGAL EDUC. 518 (1986) [hereinafter Kennedy, *Critical Phenomenology*]; *Structure of Blackstone's Commentaries, supra* note 24; *Toward an Historical Understanding of Legal Consciousness: The Case of Classical Legal Thought in America, 1850–1940,* 3 RES. L. & SOC. 3 (1980).

*Karl Mannheim:* IDEOLOGY AND UTOPIA: AN INTRODUCTION TO THE SOCIOLOGY OF KNOWLEDGE (Louis Wirth & Edward Shils trans., 1936).

*Karl Marx:* BASIC WRITINGS ON POLITICS AND PHILOSOPHY: KARL MARX AND FRIEDRICH ENGELS (Lewis S. Feuer ed., 1959); CAPITAL: A CRITIQUE OF POLITICAL ECONOMY (Frederick Engels ed. & Samuel Moore & Edward Aveling trans., 1906 (vol. 1); Frederick Engels ed., 1967 (vols. 2 & 3)); KARL MARX: A READER (Jon Elster ed., 1986); WAGE-LABOUR AND CAPITAL & VALUE, PRICE AND PROFIT (1976); *On the Jewish Question, in* KARL MARX: EARLY WRITINGS 1–40 (T.B. Bottomore ed. & trans., 1963).

*Karl Polanyi:* PRIMITIVE AND MODERN ECONOMICS: ESSAYS OF KARL POLANYI (George Dalton ed., 1971); THE GREAT TRANSFORMATION: THE POLITICAL AND ECONOMIC ORIGINS OF OUR TIME (1957); TRADE AND MARKET IN THE EARLY EMPIRES: ECONOMIES IN HISTORY AND THEORY (Karl Polanyi et al. eds., 1957).

*Roberto Unger:* KNOWLEDGE AND POLITICS (1975); FALSE NECESSITY: ANTI-NECESSITARIAN SOCIAL THEORY IN THE SERVICE OF RADICAL DEMOCRACY (1987)

requires no extended argument these days to prove that good legal history is also good sociology of law, at least when an inquiry into the causes of a particular legal manifestation is on the scholar's research agenda. In terms of his influence on this essay, Max Weber weighs heaviest by far among this group of thinkers. Weber's strong influence will be apparent throughout, although I hasten to say that this is not an exegesis of his or anyone else's writings. Weber's methodological self-consciousness was so acute that at times it seemed to border on the neurotic. But as my earlier comments imply, the premise of this essay is that we legal historians could use a bit of neurotic self-consciousness on this subject.

The next section describes the methodology that this essay uses to understand the methodological foundations of causal claims: In a nutshell, I create five ideal-typical methodologies, none of which is privileged over the others, and all of which are conceived to get at different manifestations of the same reality. My ideal types are not meant to explain why I or other scholars think the way they do. This is not a "typology of the political modes of legal history," such as Robert Gordon has written.[47] Knowing why scholars make the causal claims they do is less important to me, here, than understanding what their causal claims are.

The essay's methodologies, being ideal types of scholarly *action,* cannot apply themselves. To make them comprehensible, I must orient them to some end which is held valuable by a human being. I have found it necessary, therefore, to externalize an ideal-typical legal historian, whom I have asked to behave "methodologically." The me that is she wants to satisfy her curiosity about what caused judicial outcomes to happen the way they did—that is her only end.[48] The posi-

[hereinafter UNGER, FALSE NECESSITY]; SOCIAL THEORY: ITS SITUATION AND ITS TASK (1987); PLASTICITY INTO POWER: COMPARATIVE-HISTORICAL STUDIES ON THE INSTITUTIONAL CONDITIONS OF ECONOMIC AND MILITARY SUCCESS (1987); THE CRITICAL LEGAL STUDIES MOVEMENT (1983).

*Max Weber:* ECONOMY AND SOCIETY: AN OUTLINE OF INTERPRETIVE SOCIOLOGY (Guenther Roth & Claus Wittich eds., 1968) [hereinafter WEBER, ECONOMY AND SOCIETY]; FROM MAX WEBER: ESSAYS IN SOCIOLOGY (H. Gerth & C. Mills eds. & trans., 1958); METHODOLOGY, *supra* note 8; THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM (Talcott Parsons trans., 1958) [hereinafter WEBER, PROTESTANT ETHIC].

47. Gordon, *Politics of Legal History, supra* note 46, at 274.

48. That *actual* scholarship usually is produced for a variety of additional or other reasons cannot be denied: Articles and books about legal history are written to obtain tenure or a promotion, to appear "productive" in the eyes of one's colleagues, to advocate certain values, to advance certain consciously held political objectives, and so forth. And since the assessment of an action's rationality (in the sense that the term is used here) depends on the action's relationship to a posited end, it also cannot be denied that scholars who are oriented to goals other than, or in addition to, the satisfaction of intellectual curiosity will rationally choose

tive content of the term "curiosity" is conveyed by William James' notion of the sentiment of rationality: the craving to have expectancy defined in such a manner that the mind can enjoy the relief which comes from grasping a universal concept which renders "concrete chaos rational."[49] But curiosity also has a privative connotation: It means the absence of any conscious orientation of research to the advancement of a particular normative agenda (more on this below). My ideal-typical legal historian also is imbued with certain attitudes about the nature of historical reality, the uses of methodology, and the meaning and limits of her scholarly claims. Her attitudes on these subjects will be described in detail, and are themselves ideal-typical: They give the five methodologies the kind of concrete context of subjective meaning that is absolutely necessary to make them heuristically useful.

I should, however, make one of her attitudes—implied in the term "curiosity" when taken in its privative sense—very clear at the outset: As far as her *task* as a scholar is concerned, she thinks of herself as both political and apolitical. She regards her work to be political in the following sense: She knows, first, that the very problems she investigates are selected by virtue of her interest in them (that is, with reference to their relevance to certain cultural values which *she* thinks make the problems worth writing about in the first place), and second, that she perceives, describes, and analyzes historical facts from a position (her own context) that makes the attainment of a context-transcending objectivity impossible. *No* historian can find an Archimedean place to stand outside her own context (or, as Allan Megill recently put it, there is no such thing as "immaculate perception").[50] Moreover, my ideal-typical scholar is aware not only that her values and interests shape her perception of what is interesting and relevant, but also that that which she discovers in her research acts back upon her values and interests, either reinforcing them or causing them to change.

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methodologies that may differ in content or emphasis from those which are constructed in this essay. For example, a young scholar seeking to obtain tenure might employ an extreme form of obstructionism and determinism that imputes judicial outcomes to doctrine pure and simple (existing doctrine foreclosed *all* choices except the ones that judges made) because she concludes that this is the most appropriate means for reaching her goal, given the nature of the audience she wants to influence; and she might do this even though the methodology she has chosen does not lead to results which satisfy *her* intellectual curiosity. Although in principle one could construct as many ideal-typical legal historians as there are scholarly goals, this essay will leave that formidable task for another day.

49. WILLIAM JAMES, *The Sentiment of Rationality, in* ESSAYS, *supra* note 2, at 3, 8, 16.

50. Megill, *supra* note 11, at 632. *See generally* PETER NOVICK, THAT NOBLE DREAM: THE "OBJECTIVITY QUESTION" AND THE AMERICAN HISTORICAL PROFESSION (1988).

The developmental sequence depicted in Figure 2 shows what I mean

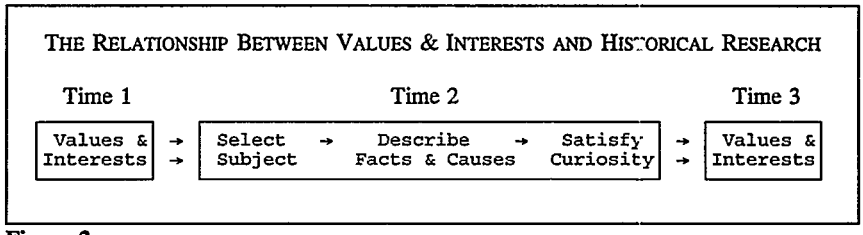


**Figure 2**

Figure 2 is one way to represent what has been called a "post-Heideggerian hermeneutic circle."[51] In Allan Megill's words:

> [T]he circle runs between the investigator and what is being investigated. The investigation will be prompted by the traditions, commitments, interests, and hopes of the investigator, which will affect what the investigator discovers. Conversely, the process of historical research and writing will change both the investigator and the audience—at least, it will do so if the inquiry is more than trivial.[52]

The essay's ideal-typical scholar is acutely aware that her values and interests affect all aspects of her scholarship during Time 2, and that her scholarship, in turn, shapes her values and interests at Time 3. For example, scholars who want to explain (and are adept at explaining) the past in terms of rational choice are likely to look for, and find, the truth that historical actors made rational choices; and these scholars' research successes, in turn, are likely to reinforce (in their minds) both the wisdom of their past quests, and the desirability of conducting similar quests in the future. On the other hand, scholarship doesn't *always* operate on the biblical premise of "seek, and ye shall find."[53] To illustrate: At least some CLSers began their academic careers as liberals, wanting to find that legal rights have a determinate content; they then proceeded to find that rights actually are doctrinally indeterminate.[54] Thus it is that our politics (defined as our val-

51. Megill, *supra* note 11, at 636–37 (quoting RICHARD J. BERNSTEIN, BEYOND OBJECTIVISM AND RELATIVISM: SCIENCE, HERMENEUTICS, AND PRAXIS 135–36 (1983)); *see also* HANS-GEORG GADAMER, TRUTH AND METHOD 190–92, 265–66, 291–92 (2d ed. 1989).

52. Megill, *supra* note 11, at 636–37.

53. *Matthew* 7:7 (King James).

54. For an account of one such transformation, see Alan Freeman, *Racism, Rights and the Quest for Equality of Opportunity: A Critical Legal Essay,* 23 HARV. C.R.-C.L. L. REV. 295, 299–315 (1988).

ues and interests) orient our research, and our research orients our politics.

Despite what I've just said on the extent to which her scholarship is political, my ideal-typical scholar thinks that the label "apolitical" also would be accurate if applied to what she does. It would be accurate, that is, to the extent that it reflects her commitment to solving those historical problems which she has selected to research in a "non-evaluative" manner. When actually engaged in the practice of imputing particular past judicial outcomes to a cause (during "Time 2" in Figure 2), she tries to suspend what Weber called value *judgments:* "practical evaluations of the unsatisfactory or satisfactory character of phenomena subject to our influence."[55] Our scholar knows that the more that evaluations of this sort intrude into her consciousness as she practices legal history, the less she will be able to see what Weber called "personally uncomfortable" facts—facts about an historical situation which tend to undercut her opinion concerning whether a particular set of judicial outcomes was good or bad.[56] In other words, she thinks that if the quality of being morally reprehensible does not make a fact any less causally significant, neither does it make that fact more so: Bad causes and good causes are all still causes. Thus, "being apolitical," as my scholar conceives it, is simply another methodological aid: It does not involve a commitment to something like an ontological distinction between facts and values; rather, it is a *habit of mind* by which she suspends the assertion of value judgments about historical actors' behaviors in order to perceive and express all the more clearly what their behaviors were. She follows Weber on this point: "When the normatively valid [or invalid] is the object of investigation, its normative validity [or invalidity] is disregarded. Its 'existence' and not its 'validity' is what concerns the investigator."[57]

55. WEBER, METHODOLOGY, *supra* note 8, at 1.

56. *Id.* at 5; *cf.* ISAIAH BERLIN, KARL MARX: HIS LIFE AND ENVIRONMENT 202 (3d ed. 1963) (Marx's "hatred of all separatism, as of all institutions founded on some purely traditional or emotional basis, blinded him to their actual influence.").

57. WEBER, METHODOLOGY, *supra* note 8, at 39; *cf.* Mark Tushnet, *Critical Legal Studies and Constitutional Law: An Essay in Deconstruction,* 36 STAN. L. REV. 623, 647 (1984) ("[According to one] view [of Marx's attitude toward capitalism], a social scientist would ask why certain social practices were regarded as just or unjust in specific societies, but would not ask whether they *were* just or unjust."). For a possible critique of my scholar's attitude, see Pierre Schlag, *Normativity and the Politics of Form,* 139 U. PA. L. REV. 801, 811–12 (1991):

> At present, the supposition that descriptive or positive research can be value free is only barely intelligible. Still, within certain selected contexts, the claim can make sense. Within the common academic language game that privileges *the context as given* and accords determinate effect to the autonomous intent of the individual thinker, it is possible to discern

The next section describes the five methodological types in general terms. I then turn my attention to the following inquiries, in order: With what common question about legal history do the five ideal-typical methodologies concern themselves, and where is that question situated with reference to the empirical relationship between legal and extralegal phenomena? Where is each methodology situated with reference to the empirical process by which individual legal actors create, reproduce, and destroy law? What ontological point of view does my ideal-typical legal historian take, with specific reference to her "theories" and "descriptions" of historical reality? How does each methodology attain plausibility in the mind of my scholar, and how does she determine when the accounts they generate are "causally adequate?" Finally, I give an example to show how the quality of being methodologically self-conscious works in practice.

## II

This essay's methodology for methodology brings to bear upon the subject of causal claims in legal history one of social theory's most important heuristic devices, the ideal type. Weber's definition of the ideal type remains the most lucid:

> In *all* cases, rational or irrational, sociological analysis both abstracts from reality and at the same time helps us to understand it, in that it shows with what degree of approximation a concrete historical phenomenon can be subsumed under one or more [theoretical] concepts. For example, the same historical phenomenon may be in one aspect feudal, in another patrimonial, in another bureaucratic, and in still another charismatic. In order to give a precise meaning to these terms, it is necessary for the sociologist to formulate pure ideal types of the corresponding forms of action which in each case involve the highest possible

differences in the degree to which the thinker *intentionally allows* her own moral or political inclinations *consciously to affect* her thought process or conclusions.

. . . The question whether the legal thinker *intentionally allows* the moral or political inclinations *consciously to affect* her work presumes the normatively controversial claims that the legal thinker's intent is somehow the relevant parameter—that she is in control of her own moral or political inclinations. This puts beyond question the ways in which the context and the legal unconscious already perform normative work in selecting, establishing, and organizing the so-called "descriptive" categories deployed in legal thought.

I would reply to Schlag: first, that experience has taught me that the angrier I get about an event I'm observing, the less about it I am able to "see" (for example, that's why the presence of conscious moral outrage against disease isn't high on my list of criteria for selecting a doctor to treat me when I'm sick); second, since no one (not even Schlag) is "in control" of who they are already, all of us must in some sense *accept* our "context as given," even if we do not choose to privilege it; and third, that this essay's conception of methodological self-consciousness is designed precisely to put a legal historian's moral and political inclinations "in question," rather than beyond it.

> degree of logical integration by virtue of their complete adequacy on the level of meaning. But precisely because this is true, it is probably seldom if ever that a real phenomenon can be found which corresponds exactly to one of these ideally constructed pure types.[58]

Before I describe my ideal-typical methodologies, let me say a few more words on why I have adopted this form of discourse. It is impossible for a scholar to express any conclusions, causal or otherwise, about reality except by means of abstractions which are, by their very nature, distortions of that which simply "is." As Zen masters realized long ago, human language is incapable of expressing the totality of reality.[59] That which is does not dictate the properties of the discourse by which its intelligibility to humans is rendered, and thus knowledge claims can be properly viewed as simply forms of discourse.[60] We've all had the experience of feeling impressed and persuaded by a well-crafted causal account (if only our own). Still, when someone persuasively imputes judicial outcomes to this or that cause—for example, a coherent set of beliefs like "capitalist values," "the free labor ideology," "Social Darwinism," "laissez-faire attitudes," etc.—the scholar's description of the causal ideology clearly cannot be a literal rendering of all the influences that were empirically operating on and in all of the judges who participated in the cases that interest her. Regardless of what authors like this may think they are doing, what they are doing is creating an abstract synthesis (a structure) of the ideas which they contend had causal significance in the cases they are investigating.[61] Weber's discussion of this point makes it clear why this is always the case:

> [T]hose "ideas" which govern the behavior of the population of a certain epoch[,] i.e., which are concretely influential in determining their conduct, can, if a somewhat complicated construct is involved, be formulated precisely *only* in the form of an ideal type, since empirically it exists in the minds of an indefinite and constantly changing mass of individuals and assumes in their minds the most multifarious nuances of

58. 1 WEBER, ECONOMY AND SOCIETY, *supra* note 46, at 20.

59. *See* Laurence G. Wolf, *Reality and Deconstruction: A Comment*, 55 SCI. & SOC'Y 471, 472 (1991–92). Wittgenstein came later. LUDWIG WITTGENSTEIN, TRACTATUS LOGICO-PHILOSOPHICUS 74 (D.F. Pears & B.F. McGuiness trans., 1974) (1st German ed. 1922).

60. This, more or less, is how postmodernism puts what Zen masters know without stating. *See* Stanley Fish, *Play of Surfaces: Theory and the Law*, *in* LEGAL HERMENEUTICS: HISTORY, THEORY, AND PRACTICE 297 (Gregory Leyh ed., 1992); Kenneth J. Gergen, *Feminist Critique of Science and the Challenge of Epistemology*, *in* FEMINIST THOUGHT AND THE STRUCTURE OF KNOWLEDGE 27, 36 (Mary McCanney Gergen ed., 1988); *infra* text accompanying notes 234–36.

61. To paraphrase Peter Gabel, the historian both finds and fashions the causal structure at the same time. Gabel, *supra* note 33, at 605 n.4.

> form and content, clarity and meaning. Those elements of the spiritual life of the individuals living in a certain epoch of the Middle Ages, for example, which we may designate as the "Christianity" of those individuals, would, if they could be completely portrayed, naturally constitute a chaos of infinitely differentiated and highly contradictory complexes of ideas and feelings. . . . It is a combination of articles of faith, norms from church law and custom, maxims of conduct, and countless concrete interrelationships which *we* have fused into an "idea."[62]

The discourse of ideal types, at its core, thus acknowledges and brings out into the open two very profound truths: Words are not isomorphs of the reality to which they refer, and the participation of the speaker is part of any sincere statement of fact.[63] If you are prepared to agree that the word "apple" is not exactly the same thing as the juicy orb you ate for lunch today, then you are open to conceiving of "apple" as an ideal type. The main reason for a thinker to *call* a concept an ideal type is to remind herself that the content and meaning of the concept is the *thinker's* own creation, and not something that she has plucked, in toto, out of historical reality and can hold forth as the "real thing." Now don't get me wrong: When my eight-year-old son asks for an apple, I don't demand that he frame his inquiry in ideal-typical terms. But the label "ideal-typical" does serve the useful function of reminding a professional thinker (e.g., a legal historian) of the extent to which she is the one who is recreating the past by means of her descriptions and explanations. That, in the final analysis, is what it means to be methodologically self-conscious. So conceived, the methodology of ideal types does not espouse a naive commitment to the possibility of value-free historical inquiry; on the contrary, it serves to brand the account on its face as a distinctively *scholarly* artifact.

The essay's ideal-typical "forms of scholarly action" will be called *particularism, obstructionism, rationalism, determinism,* and *dialectical individualism.* Figure 3 begins to describe the contents of the five methodologies, foreshadowing some of what is to come in this and later sections.

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62. WEBER, METHODOLOGY, *supra* note 8, at 95–96 (emphasis added).

63. *See* MICHAEL POLANYI, PERSONAL KNOWLEDGE 254 (2d ed. 1962). Gerald Frug has written that "[m]uch of modern philosophy has been devoted to a critique of the notion that one can understand the world in a way that is independent of one's perspective." Gerald E. Frug, *A Critical Theory of Law,* 1 LEGAL EDUC. REV. 43, 47 (1989) (citing Nietzsche, Wittgenstein, Quine, and Gadamer). Weber joined in this critique, as anyone who takes the trouble to read his essay *"Objectivity" in Social Science and Social Policy,* first published in 1904, will learn. WEBER, METHODOLOGY, *supra* note 8, at 49–112; *see* David M. Trubek, *Max Weber's Tragic Modernism and the Study of Law in Society,* 20 LAW & SOC'Y REV. 573, 585 (1986).

A TYPOLOGY OF METHODOLOGIES, CAUSES, AND MECHANISMS FOR THE EXPLANATION OF JUDICIAL OUTCOMES

| Methodology | Cause Claimed | Mechanism |
|---|---|---|
| *Particularism* | Biography | Legal history is explained by the actual life circumstances (backgrounds, interests and contexts) of particular individuals. |
| *Obstructionism* | Structure (Negative Aspect) | Social products (e.g., legal doctrine, ideology) establish a context for prototypical legal actors which renders certain choices unfeasible and certain preferences unimaginable. |
| *Rationalism* | Interest | Prototypical legal actors rationally implement their preferences by choosing means designed to accomplish their ends. |
| *Determinism* | Structure (Positive Aspect) | Social products (e.g., legal doctrine, ideology) determine the positive behaviors of prototypical legal actors: All preferences and choices are socially constructed. |
| *Dialectical Individualism* | Social Psychology | Prototypical legal actors' behaviors are explicable in terms of social psychology: Behavior is conditioned by, but irreducible to, biography, interests, and structures. |

**Figure 3**

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At one level, the essay's five methodologies are meant to be caricatures of the methodological practices to be found in the actual scholarship produced by legal historians. Weber's general description of the relationship between an ideal type and the empirical reality to which it is oriented makes it clear what this means:

> An ideal type is formed by the one-sided *accentuation* of one or more points of view and by the synthesis of a great many diffuse, discrete, more or less present and occasionally absent *concrete individual* phenomena, which are arranged according to those one-sidedly emphasized viewpoints into a unified *analytical* construct (*Gedankenbild*).[64]

One might well ask what good a one-sided caricature is in the context of an essay about methodology in legal history. The beginning of

64. WEBER, METHODOLOGY, *supra* note 8, at 90.

an answer to this question is suggested by the metaphor of a caliper. The different ideal types of methodologies sketched in this essay, all of which consciously exaggerate the meaning of certain kinds of imputational claims, are the opposing jaws of the caliper. Between them an unruly concrete instance of historiography may be grasped, and then examined for those dimensions of the scholarship which the observer considers methodologically interesting or important.

An example will help give meaning to the metaphor. It follows from what has been said already that the methodology embodied in a particular real work of scholarship may or may not correspond exactly to any of the categories described in this essay. But occasionally the correspondence is, for all practical purposes, virtually complete. As an illustration, consider the following passage from the conclusion of a well-received recent article by Herbert Hovenkamp:

> [J]udges trained in the classical tradition of political economy carry that intellectual baggage into their chambers. In the case of substantive due process, they carried American writers' unique perspective on political economy, which for them defined both the content of the property rights protected by the Constitution and the limits of the state's power to regulate those rights. When the dominant American ideology changed—not until the first three decades of the twentieth century—the legal ideology followed close behind.[65]

Here Hovenkamp summarizes his account of the rise and fall of substantive due process, a constitutional doctrine which was prominent in the work of the United States Supreme Court from around 1885 to 1937. Viewing this passage methodologically—that is, setting aside the undeniably complex *content* of the explanandum and explanans referred to in this passage, and developed elsewhere in his article—Hovenkamp seems to assert, first, that a coherent set of ideas called "the classical tradition of political economy" *caused* judges who believed in the tradition to reach certain results in litigated cases, and second, that when the tradition ceased to be plausible in society, another "ideology" took its place as the explanation for the content of Supreme Court decisions. By imputing judge-made legal outcomes in equilibrium to an ideology, and imputing change in legal outcomes to a change in ideologies, the article offers a static model and a dynamic model of judicial behavior which are both unqualifiedly deterministic. But the meaning of the determinism that is embodied in the quoted

65. Herbert Hovenkamp, *The Political Economy of Substantive Due Process*, 40 STAN. L. REV. 379, 446–47 (1988). Hovenkamp expands this same theme to explain other legal doctrines in HERBERT HOVENKAMP, ENTERPRISE AND AMERICAN LAW, 1836–1937 (1991).

passage is made even clearer by contrasting it first with obstructionism, and then with rationalism (each of these being the jaw that stands opposite to determinism in two different pairs of calipers). Unlike obstructionism, which seeks to explain what did not happen, Hovenkamp's methodology tries to explain what judges *did* decide. And unlike rationalism, the quoted passage seems to proceed on the deterministic assumption that all preferences are socially constructed: that is, the so-called choices that judges seemed to make among their available decisional options can be and are imputed to one or more internalized social structures—in this case "the classical tradition of political economy."

Although the methodology embedded in the foregoing passage from Hovenkamp's article is unidimensional (and this is not meant to be a criticism), a given instance of actual scholarship also may embody more than one of the essay's categories of action. The most common manifestation of multiple methodologies in legal historiography is linear—that is, one methodology following another in logical progression. Methodological practices of this sort are particularly visible in the rational choice literature. The typical rational choice account first describes the constraints and inducements which a given social order creates for actual or typical individual actors, and then posits that the actors in question will rationally select a course of action designed to achieve their particular goals by the most effective available means. Such accounts are *obstructionistic* to the extent that they deny the availability of choices which the relevant social constraints and inducements foreclose as practical options, yet *rationalistic* to the extent that they assume individual actors possess the chance[66] to choose among those options that the social order does make available to them.

A concrete example of such a linear account in legal historiography is Richard Danzig's well-known piece on the famous 1854 decision in *Hadley v. Baxendale,*[67] in which the English Court of the Exchequer announced the rule that contract damages must have been foreseeable at the time of contracting to be recovered. Among other things, Danzig mentions that two of the three judges who decided the case had professional or family connections with the defendants' firm, and suggests that the judges' affiliations may have been relevant to the

66. I prefer William James' term "chance" to "freedom" in this context because "chance" signifies a lack of interest in the old (and unresolvable) free will v. determinism debate. WILLIAM JAMES, *The Dilemma of Determinism, in* ESSAYS, *supra* note 2, at 61–62.

67. 156 Eng. Rep. 145 (Ex. 1854).

defendants' success (a *particularistic* methodology).[68] He also discusses the procedural rules of the mid-nineteenth century English court system, which made jurisdiction depend on the amount in controversy, as doctrinal facts which both created a problem for Superior Court judges and constrained their choice of solutions (an *obstructionistic* methodology).[69] Finally, Danzig employs a *rationalistic* methodology to account for the doctrinal outcome of the case. The judges of the increasingly overburdened Superior Courts had a strong interest in managing their workload, he reasons. *Therefore,* they rationally adopted a means which was very appropriate to that end, given the constraints the judges faced: Smaller recoverable damages in contract cases meant less trial work for the Superior Courts under the relevant rules for determining jurisdiction, while the promulgation of a discretion-controlling rule of damages allowed for closer appellate supervision of County Court results.[70]

The essay's ideal types of methodology are neither theories nor descriptions. They are created (in the first instance) to give expression to the reality of methodology in legal history, and not explain or describe it. For example, rationalism doesn't "describe" the methodology that Richard Danzig employed in writing his piece on *Hadley v. Baxendale* because rationalism as a concept does not capture all the nuances of meaning that can be found on those pages; still less does rationalism "explain" Danzig's scholarship, for it does not purport to impute his work to one or more causes. But the idea of rationalism does allow us to understand and discuss one point of view from which Danzig asked and answered a question that intrigued him: namely, What individual interests caused the English Court of the Exchequer to decide *Hadley* the way it did in 1854?

* * * *

The five methodologies are distinguished from one another by the types of causes and causal mechanisms that they put forward to account for judicial outcomes. The causal types associated with the five methodologies are, in summary form, as follows (later sections will elaborate the meaning and operation of these forms of action in greater detail):

(1) In the case of *particularism,* the causes are the details of a concrete legal actor's biography (his particular interests, social context,

68. RICHARD DANZIG, THE CAPABILITY PROBLEM IN CONTRACT LAW: FURTHER READINGS ON WELL-KNOWN CASES 68, 90 (1978).

69. *Id.* at 91–93.

70. *Id.* at 93–95.

etc.). Particularism is historicism writ small.[71] The meaning of "history" in this narrowest sense of the word is suggested by contrasting it with the following passage, in which Jon Elster describes the task of social scientists (including historical sociologists) who are trying to understand the causal significance of ideology:

> [W]e should consider only belief systems that are *widely held*, in a certain society or among members of a certain social group. Social science cannot be biography. It cannot look into the recesses of the individual mind, to find the reasons and causes that have led to the adoption of a certain belief or value.[72]

Of course, sometimes historians mean to assert no *privileged* causal claim whatever, even when they write what might be called biography; sometimes they choose, as Simon Schama put it recently, to "deliberately dislocate[] the conventions by which histories establish coherence and persuasiveness."[73] For instance, Schama's *Death of a Harvard Man* tells many different stories about the sensational 1849 murder trial of a Harvard chemistry professor, none of which he privileges as "the truth."[74] Nevertheless, *within* each plausible mini-story he tells, Schama is able to make the narrative comprehensible only because he gives the reader causal links: For example, he has Chief Justice Lemuel Shaw, while he is instructing the jury, ascend from emotionalism to a commanding authoritarianism by reading himself into the role of a great jurist.[75] Particularism as a methodology for *causal* claims must at some point depart from what Thomas Heller calls "the narrative of a fragmented, egoistic spirit" and offer a causal mechanism: either "motivational analysis" (e.g., rationalism or dialectical individualism) or a "reduction to some objective order" (e.g., obstructionism or determinism).[76] Thus, whether an account is unilinear or multilinear, historians who engage in particularism almost always apply one or more of the other methodologies as a means of understanding the *unique* historical personality (usually a "Great Judge") whom they are investigating. Particularism therefore parasitizes the other forms

71. *See* 1 WEBER, ECONOMY AND SOCIETY, *supra* note 46, at 19.

72. ELSTER, *supra* note 15, at 464.

73. SIMON SCHAMA, DEAD CERTAINTIES (UNWARRANTED SPECULATIONS) 321 (1991).

74. *Id.* at 71–318. Schama writes that his purpose is to "play with the teasing gap separating a lived event and its subsequent narration." *Id.* at 320; *cf.* Williams, *supra* note 9, at 717 ("Instead of looking for common elements, recent intellectual historians have preferred to build up a picture of an intellectual movement through thick descriptions, from which intellectual currents emerge as a complex of overlapping tendencies, arguments, and outlooks.").

75. SCHAMA, *supra* note 73, at 262–63.

76. Heller, *supra* note 34, at 152, 152 n.47.

of methodological action and is distinguishable from them chiefly by the extremely narrow limits of its claims.

Thus, for example, the common causal sequence "Judge *X's* belief in *Y* caused decision *Z*" is a form of determinism (whether or not an author posits the precise mechanism by which the relevant historical actor came to hold the belief in question) because the author identifies a *structure embedded in consciousness* as the significant causal fact. To illustrate, James Oldham has discovered in Lord Mansfield's trial notes evidence that the judge "believed [more] in . . . fairness [than in] certainty" as a guide to the resolution of contract disputes—*therefore,* Oldham tells us, we now know why Mansfield's contract jurisprudence was built around the fairness-laden concepts of expectation and unjust enrichment.[77] Likewise, Timothy Huebner's recent article names beliefs as the cause of a particular group of antebellum contracts opinions written by Joseph Henry Lumpkin, who was Chief Justice of the Georgia Supreme Court from 1846 to 1867. According to Huebner, the opinions as a whole were, paradoxically, both pro-capitalist and pro-slavery: They favored Southern capital formation and industrial development, but always within the context of support for an agrarian economy premised on slavery. Huebner imputes this odd mix of outcomes to Lumpkin's personal ideological context: "As an Evangelical and a Whig, Lumpkin possessed a millennial outlook—a vision for the future of southern society that allowed him to both promote economic development [at the same time that he] advocate[d] the continuance of slavery."[78] Both pieces employ determinism, but in a very narrow context: Having imputed Mansfield's and Lumpkin's judicial behaviors to an assertedly coherent set of beliefs, neither Oldham nor Huebner take their projects past the retail level; they do not ask such wholesale questions as, What caused *other* members of the King's Bench or the Georgia Supreme Court to join in these judges' opinions?

Given the foregoing description of particularism, it should be clear that the remaining methodologies concern themselves with judicial outcomes produced by legal actors about whose idiosyncratic personal contexts little or nothing is known. The remaining four methodologies thus describe different causal mechanisms to account for the behaviors of actual legal actors whom the historian has abstracted into one or more *prototypes.* As even a cursory glance at the tables of contents from past issues of *The American Journal of Legal History* and the

77. James Oldham, *Reinterpretations of 18th-Century English Contract Theory: The View from Lord Mansfield's Trial Notes,* 76 GEO. L.J. 1949, 1980 (1988).

78. Timothy S. Huebner, *Encouraging Economic Development: Joseph Henry Lumpkin and the Law of Contract, 1846–1860,* 1 GA. J. S. LEGAL HIST. 357, 371 (1991).

*Law and History Review* reveals, this kind of imputational scholarship (e.g., "the nineteenth century origins of the attractive nuisance doctrine")[79] represents by far the lion's share of work produced by American legal historians. The remaining methodologies are historicism writ large, as it were, and inevitably enter the domain of the historical sociology of law.

(2) In the case of *obstructionism,* the causes are structures embedded in the consciousness of legal actors (ideas about the "state" and "legal doctrine," ideology, class bias, concepts of race or gender, etc.) which constrain either the plausible (the rational choice version) or the imaginable (the social constructionist version). Obstructionism is distinctive as a type of scholarship because it appeals to social facts originating "outside" the individual to explain why certain past judicial outcomes did *not* happen—for example, why judges did not implement their personal preferences in their decisions, or why legal institutions were not optimal, either from the standpoint of society as a whole, or from the standpoint of particular groups within society. For example, the following statement would be obstructionistic: "Judges who are required to run for reelection are sometimes constrained by that requirement from rendering unpopular (but socially beneficial) decisions."[80] Likewise, when Charles McCurdy writes that the ideology of free labor caused late nineteenth century judges to "instinctively resist[] the very idea of essentially unfree labor contracts,"[81] he is employing methodological obstructionism. The premise of both statements is that judges' responses were constrained so completely by social products (originally external to them but somehow internalized in the course of their socialization) that they were simply not able to reach the posited (obstructed) end: Elected judges couldn't render optimal decisions, and nineteenth century judges adjudicating labor disputes couldn't see that some (even most) workers did not experience themselves as free to choose the terms of their employment. If functionalism, in one of its scholarly manifestations, is the teleological claim that institutions and social structures always generate results that "they" need, then methodological obstructionism in its most extreme form can be used to give voice to the obverse claim, which might be called non-*dys*functionalism: Institutions and social struc-

79. *E.g.,* Peter Karsten, *Explaining the Fight over the Attractive Nuisance Doctrine: A Kindler, Gentler Instrumentalism in the "Age of Formalism,"* 10 LAW & HIST. REV. 45 (1992).

80. *Cf.* Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?,* 101 YALE L.J. 31, 81 n.188 (1991).

81. Charles W. McCurdy, *The Roots of "Liberty of Contract" Reconsidered: Major Premises in the Law of Employment, 1867–1937,* 1984 Y.B. SUP. CT. HIST. SOC'Y 20, 33.

tures never generate results that they do *not* need. For example, if the free labor ideology "required" judges to believe that employment agreements were, by definition, freely entered into by bosses and workers alike, it also must have required either that judges never believe otherwise, *or,* if some did believe otherwise, that they also believed that most *other* judges saw labor as a priori free to such an extent that any kind of counter-hegemonic struggle by the deviant judges would have been useless.[82] Methodological obstructionism is frequently associated with the use of concepts like "long-term irrationality," "constraints on choices (or on thoughts)," "hegemony," and "the relative autonomy of the law." It is heuristically useful to distinguish obstructionism from rationalism and determinism because that which obstructionistic claims seek to explain is always a pure artifact of the scholar's creative imagination. Practitioners of obstructionism want to know why the legal system failed to reach a state of affairs that is usually regarded as normatively preferable to what actually happened.[83] However, one need not be a postmodernist to see that the privileged state of affairs is contrafactual, and so *by definition* it can have only such content and meaning as the scholar chooses to give it.

(3) In the case of *rationalism,* the causes are choices that were made by prototypical legal actors who pursued their interests through the deliberate selection of means designed to achieve ends which were formulated in the actors' subjective consciousness. The behavioral premise of methodological rationalism corresponds to Weber's notion of means/ends rationality (*Zweckrationalität*): a "type of action in which the actor is trying to accomplish something in the world by calculating how to arrive at some end."[84] Rationalism imputes outcomes to what Weber classified as "subjectively rational" action: that is, behavior that actually was oriented, in the mind of the relevant actor, towards achieving some goal. Neither the "value" of the actor's end nor the "correctness" of the means he adopts (assuming for the moment that these could somehow be objectively ascertained) has anything to do with the subjective rationality of the action. For example, the coherence and integrity of a rationalistic causal link, as a statement about history, remains unaffected by any second-order inquiry the

82. This is Duncan Kennedy's notion of the "double objectivity" of social products. Kennedy, *Critical Phenomenology, supra* note 46, at 521.

83. *See, e.g.,* Lea S. VanderVelde, *The Gendered Origins of the* Lumley *Doctrine: Binding Men's Consciences and Women's Fidelity,* 101 YALE L.J. 775, 778 (1992) (investigating why nineteenth century judges were not able to perceive women performers as something the *author* calls "free and independent employees").

84. RANDALL COLLINS, MAX WEBER: A SKELETON KEY 42 (1986).

scholar may make into whether or not the means actually adopted was what Weber called "objectively rational"—i.e., that *technique* which, under the circumstances, the scholar thinks was most likely to achieve the actor's hoped-for end at the expenditure of the least amount of undesirable (to the actor) costs.[85] It is absolutely essential to distinguish rationalism as a tool for distinctively *historical* inquiry from what Richard Posner has called the "task of economics" as a *policy* tool:

> The task of economics . . . is to explore the implications of assuming that man is a rational maximizer of his ends in life, his satisfactions—what we shall call his "self-interest." Rational maximization should not be confused with conscious calculation. Economics is not a theory about consciousness. *Behavior is rational when it conforms to the model of rational choice, whatever the state of mind of the chooser.*[86]

Posner's definition corresponds to what Rogers Brubaker has called "latent objective rationality"—action which appears objectively rational (that is, a correct technique) from the point of view of some end (e.g., efficiency) which is unintended or unacknowledged by the actor.[87] By way of illustration, consider the so-called "evolutionary" theories of common law development which have been advanced by certain law-and-economics writers. These theories assume that the differential decisions of nonlegal actors about when to litigate a dispute create a tendency for law to evolve towards efficiency (defined as wealth maximization), even if all the players in the process—legal and nonlegal actors alike—are ignorant of or indifferent to the concept of efficiency. In this sort of scholarship, the present *effects* of inefficient rules in the extralegal world also become the *causes* of the rules' future demise, without any need to posit intervention by a cadre of judges, or anyone else, subjectively bent on maximizing wealth in society.[88] Although the details of these theories vary from one scholar to the next, they all ultimately are forms of determinism (seasoned with a dash of rationalism in the middle), because their causal sequence is

85. For a good discussion of Weber's distinction between subjective and objective rationality, see ROGERS BRUBAKER, THE LIMITS OF RATIONALITY: AN ESSAY ON THE SOCIAL AND MORAL THOUGHT OF MAX WEBER 53–55 (1984).

86. RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW § 1.1, at 3–4 (3d ed. 1986) (emphasis added). *Accord* Frank H. Easterbrook, *The Inevitability of Law and Economics,* 1 LEGAL EDUC. REV. 3, 6 (1989).

87. BRUBAKER, *supra* note 85, at 55.

88. The leading citations are Paul H. Rubin, *Why Is the Common Law Efficient?,* 6 J. LEGAL STUD. 51 (1977), and George L. Priest, *The Common Law Process and the Selection of Efficient Rules,* 6 J. LEGAL STUD. 65 (1977). Elhauge, *supra* note 80, at 68–71, summarizes the extensive literature on evolutionary theories of common law development.

"Inefficient Rule *X* (a structure) caused a disproportionate number of rational choices *Y*. . . *Yn* to litigate, leading to Outcome *Z* (the rule was modified or overruled)."[89]

Rationalism can be found, among other places, in scholarship employing various forms of rational choice theory (including public choice, social choice, and law-and-economics) to account for why a particular set of judicial outcomes *did* happen; it is associated with the use of concepts like "constrained choice" and "maximization." For example, when Jonathan Macey deduces from the empirical existence of a flexible doctrine of stare decisis the interesting hypothetical end that judicial decisions balance the interests of "lazy" and "intellectually active" judges, he is employing methodological rationalism.[90] But scholars of the left also use this methodology sometimes. A good example is Morton Horwitz's claim that the decisions of mid-nineteenth century American judges displayed hostility to commercial arbitration *because* the judges subjectively chose to maximize their own jurisdiction (the means) in order to effect the kind of social control and change that favored "commercial interests" (the end).[91]

The foregoing juxtaposition of Macey's and Horwitz's accounts illustrates a fundamental logical problem which tends to subvert the plausibility of this methodology. Very often a scholar cannot acquire, ex ante, any clear understanding of what an historical actor's ends were—a particularly acute impediment in the case of judicial behavior, where the assumption of standard ends like maximizing personal income usually are not plausible.[92] Thus, reasoning "backwards"

89. For example, Richard Posner summarizes the central methodological assumption of most evolutionary theories as follows: "The inefficient rule will lead to more litigation than the efficient rule, and thus give the courts more opportunity to reexamine it." POSNER, *supra* note 86, § 21.5, at 528.

90. Jonathan R. Macey, *The Internal and External Costs and Benefits of Stare Decisis*, 65 CHI.-KENT L. REV. 93, 110–12 (1989).

91. MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780–1860, at 154–55 (1977). Horwitz also applies rationalism when he asserts, elsewhere, that "[o]ne of the central *goals* of nineteenth century legal thought was to create a clear separation between constitutional, criminal, and regulatory law—public law—and the law of private transactions—torts, contracts, property, and commercial law." Morton J. Horwitz, *The History of the Public/Private Distinction*, 130 U. PA. L. REV. 1423, 1424 (1982) (emphasis added). Unlike Foucault's mysterious notion of a "strategy without strategists," Horwitz posits that judges actually held certain views on the public/private dichotomy in their subjective consciousness. *Compare id.* at 1426 *with* Alan Hunt, *Foucault's Expulsion of Law: Toward a Retrieval*, 17 LAW & SOC. INQUIRY 1, 24 (1992).

92. *See, e.g.*, Jack M. Beermann, *Interest Group Politics and Judicial Behavior: Macey's Public Choice*, 67 NOTRE DAME L. REV. 183, 221 (1991) ("One reason little is written about judicial behavior from a public choice perspective is that it is very difficult to get a handle on the influences operating on judges."); Macey, *supra* note 90, at 93 ("There simply are no economic

from means to ends is, at times, the only way a scholar *can* employ methodological rationalism to judicial outcomes. For example, Macey's account of stare decisis has judges (considered as a group) seeking more or less the following end: "We would rather have some power and some leisure than any other mix of these two outcomes"; while Horwitz's account of judges' hostility to commercial arbitration has them greedily pursuing the opposite strategy—one which was designed to give them lots of cases to decide (and hence lots of power and little leisure). Both ends happen to "match" the means actually chosen. But of course, this alone proves absolutely nothing: If nothing is known about the end that a chooser subjectively sought to advance, the means which he actually chose always can be made to appear rational in hindsight. The *post hoc ergo propter hoc* fallacy (*B* followed *A*, and therefore *A* caused *B*)[93] actually looks good compared to the assertion that an action is always assumed to have been preceded by a certain kind of intention to produce it. Thus, for example, if the word "razional" were to appear in this manuscript without any further explanation, one *could* impute the word to my rational choice to misspell it as a deeply subtle way of demonstrating that not all consequences which flow from an act (such as writing an essay) are intended. But surely the appearance of the word "razional" would be at least equally consistent with my having made an unintended spelling blunder. In other words, it is not true that people always intend the consequences that actually flow from their actions, and never intend one outcome but produce another. People make mistakes, and often (indeed, more often than not) their actions produce unintended consequences. Thus, methodological rationalism as a coherent strategy for historical imputation requires its practitioner to suppress the urge to promote what she knows actually did and did not happen after a judicial outcome into a proof of its "actually intended" (subjectively rational) cause.

Usually, although not always, scholarship in which the methodological premise is rationalism first invokes some form of obstructionism as a way of positioning what then becomes an imputation of actual judicial outcomes to individual choices.

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theories at all to explain how 'independent' judges, whose incomes are not contingent on the outcomes of cases, go about making decisions.").

93. *See, e.g.*, Jerry L. Mashaw, *The Economics of Politics and the Understanding of Public Law*, 65 CHI.-KENT L. REV. 123, 145 (1989) ("[W]ork that focuses on the beneficial effects of legislation on particular groups proves nothing. The studies are, at most, testaments to the ubiquity of *post hoc ergo propter hoc* fallacies.").

(4) In the case of *determinism,* the causes are supraindividual structures offered to account for why a particular set of judicial outcomes *did* happen. Determinism is ubiquitous in American legal historiography and in its most extreme form is used to express the functionalist claim that social structures (for example, the "ruling class," or the concept of "democracy") always generate results that "they" need.[94] It can be seen, for example, in the sort of mainstream "needs-of-society" scholarship in which judges are said to respond to what the author calls the "conditions of the country"[95] or "shared legal tradition[s]."[96] But it also can be seen in the kind of left-oriented legal scholarship in which an historical actor's relation to an economic class is said to produce a set of beliefs which the observer posits to be uniform for all members of the class.[97] Determinism is associated with the use of concepts like "social needs," "the evolution of doctrine," "ideology," "class bias," and "the ideas encoded in legal doctrine." Usually, although not always, deterministic accounts first invoke some form of obstructionism as a way of positioning what then becomes the imputation of actual judicial outcomes to one or more structures.

The methodological determinism that this essay employs comes in two basic forms: accounts which portray legal actors as having experienced themselves as bounded by socially constructed categories, and accounts which say that legal actors reached the result they did because their beliefs led them to feel it was the right thing to do. The common thread in both forms of determinism is the primacy of a structure, originally residing *outside* the individual, which acts upon and through him to produce the outcome in question.

The first kind of determinism embodies this methodology in its purest form—it knowingly exaggerates the phenomenon of feeling bounded by a social context into a logically integrated causal explanation of judicial outcomes. The relevant actor is said to have *experienced* the constraint whether or not he was conscious of it. Unconscious constraint manifests itself in the perception that a particular legal outcome is "natural," in the sense of being beyond doubt,

94. For a thoroughgoing discussion and critique of all forms of functionalism in legal historiography (from whatever place on the political spectrum it issues forth), see Gordon, *supra* note 3, at 59–100. *See also* Tönnies, *supra* note 21, at 346–49 (critiquing the "law as ecosystem" approach).

95. *E.g.,* Melvin I. Urofsky, *State Courts and Protective Legislation during the Progressive Era: A Reevaluation,* 72 J. AM. HIST. 63, 91 (1985).

96. *E.g.,* P. John Kozyris, *In the Cauldron of Jurisprudence: The View from Within the Stew,* 41 J. LEGAL EDUC. 421, 429 (1991).

97. *See, e.g.,* HORWITZ, *supra* note 91, at 188; Feinman, *Development, supra* note 17, at 135.

self-evident, or a matter of common sense. Thomas Grey's observation that "categorical schemes have a power that is greatest when it is least noticed" hints at why this form of determinism can be made to sound so plausible in accounting for so many different kinds of historical outcomes.[98] An apt illustration is Stanley Fish's argument that although the Founders may have *felt* in 1789 that the constitutional requirement that the president be at least thirty-five years of age meant that he be at least thirty-five *chronological* years of age, that number was picked against a background of cultural conditions in which "thirty-five" had a certain meaning; while Fish notes that in a different set of contexts and conditions (concerning such matters as how long it usually takes people to mature, what their average life expectancy is, etc.) "thirty-five" might be interpreted to mean "fifty," the coherence of his historical assertion that the Founders experienced themselves as bounded by a particular context is undiminished.[99] This form of determinism asserts what is rarely if ever the case in fact: it imagines that the relevant historical actors were in some sense *conscious* that they were *not conscious* of the particular social influences on their behavior. As such, the method is analogous to the rational choice move which imagines behavior to be rational if it conforms to a model of rational choice, regardless of the state of mind of the actor.[100]

This experience of boundedness also can be portrayed as having been *consciously* felt, and still be a form of determinism. The course taken might have appeared odious to the actors in question (for example, if judges reluctantly concluded that they "had to" dismiss meritorious claims that were barred by the statute of limitations); alternatively, the course taken might have been something the actors would have chosen to do anyway had they felt they had a choice (for example, if judges were to dismiss time-barred lawsuits that they felt were frivolous anyway). By portraying the judges' subjective preferences as irrelevant to their conduct, and their choices as limited to one, such accounts assert that human beings, in the cases under investigation, were mere puppets of social forces utterly beyond their control. This kind of scholarship eerily resembles the assertions found in some forms of mainstream liberalism that legal doctrines and princi-

98. Thomas C. Grey, *Langdell's Orthodoxy,* 45 U. PITT. L. REV. 1, 49–50 (1983).

99. STANLEY FISH, DOING WHAT COMES NATURALLY: CHANGE, RHETORIC, AND THE PRACTICE OF THEORY IN LITERARY AND LEGAL STUDIES 358–59 (1989).

100. Compare Heidegger's discussion of the "illogic" (but necessity) of framing the question of "Being": since all questions are guided by what is sought, when we ask "What *is* being?", we are already operating from within some understanding of being. MARTIN HEIDEGGER, BEING AND TIME 24–28 (John Macquarrie & Edward Robinson trans., 1962).

ples (originating in society, outside of individual judges' personal preferences) can and should bind legal actors to reach correct results.[101] But the difference is that determinism as a *methodology* doesn't care whether a particular kind of social constraint on judges (e.g., the "Rule of Law") is good, bad, or indifferent: It only cares about whether social constraints can plausibly be portrayed as causes of particular judicial outcomes from the past.

The second form of this methodology is determinism once-removed, as it were—it makes use of the insight that people internalize beliefs about what is right and wrong, good and bad, to impute judicial outcomes to legal actors' pursuit of the ends that those beliefs make valuable for their own sake. The behavioral premise of this form of determinism corresponds to Weber's notion of value-rationality (*Wertrationalität*): a "type of action that is an end in itself. The action is not a means to an end, but itself embodies its own value."[102] It is easiest to see the structuralist quality of this kind of determinism in scholarship depicting actors as being empty vessels for social products, like ideology, which they uncritically internalized as the truth. A good illustration is Wythe Holt's account of why nineteenth century judges generally favored employers in quantum meruit actions brought by workers who quit before they had served their full terms of service: The cause of these outcomes, writes Holt, was "the organic socioeconomic complex of capitalism whose elements (culturally infused into the heads of the judges) shaped their responses and determined what they felt to be their needs."[103] Another example is Daniel Ernst's recent analysis of the "free labor" system in late nineteenth century America: The attitudes generated by the system "provided the judges who fashioned the law of labor disputes with a set of unquestionable truths which led them to condemn strikes for the discharge of nonunion workers and secondary boycotts."[104] However, it is also the case that imputing a judicial outcome to a set of beliefs is a form of determinism even if the relevant historical actors are said to have felt that

101. *See, e.g.*, DWORKIN, *supra* note 43, at 81–130; Kozyris, *supra* note 96, at 434 n.34 ("If within a given legal system most interpreters most of the time in most contexts will arrive at the same meaning of certain words, this is the 'true' meaning for such system."); *cf.* David B. Wilkins, *Legal Realism for Lawyers,* 104 HARV. L. REV. 468, 484–96 (1990).

102. COLLINS, *supra* note 84, at 42.

103. Wythe Holt, *Recovery by the Worker Who Quits: A Comparison of the Mainstream, Legal Realist, and Critical Legal Studies Approaches to a Problem of Nineteenth Century Contract Law,* 1986 WIS. L. REV. 677, 727; *cf.* Gabel, *supra* note 43, at 311 ("Transformation in socioeconomic structures do not 'cause' new ideas; they are occasions when new ideas are felt to be necessary.")

104. Daniel R. Ernst, *Free Labor, the Consumer Interest, and the Law of Industrial Disputes, 1885–1900,* 36 AM. J. LEGAL HIST. 19, 27 (1992).

they "chose" to have the beliefs in question. Even in moments of conscious self-creation (e.g., "I choose to go to law school, and acquire the ethics of a lawyer, instead of choosing to go to medical school") people never asocially create their normative beliefs out of whole cloth. They come to choose them from a menu of possible beliefs that social conditions make conceivable. And while any *particular* legal actor's subjective beliefs will differ from the beliefs of other similar actors around him, determinism's focus on *prototypical* legal actors requires that inevitable (and unknowable) variations in the contents of the beliefs held by actual historical agents be assumed away in order to make the account coherent. When this is done the resulting belief system is inevitably seen as a social product: that is, a coherent set of attitudes both shared and reproduced in action by many people (e.g., "the distinction between public and private spheres in late nineteenth century judicial consciousness"). Thus, to say that a prototypical actor had a set of beliefs at a time prior to acting on them necessarily implies, first, that the beliefs were internalized social products, and second, that the beliefs were experienced as being "present" in the actor (as a structure) at the time he acted. Of course, to do determinism as a methodology one does not have to subscribe to the view that there is a one-to-one correspondence between structure and action. One can acknowledge the ontological slippage that occurs between structure and subjectivity (or, if you will, between authentic and inauthentic being[105]), yet still construct one's account in such a manner, and at such a level of generality, that only the structure is talked about as causally significant.[106]

(5) In the case of *dialectical individualism,* the causes are social-psychological reactions such as anxiety, cognitive dissonance, sympathy, and guilt, that are experienced by typical legal actors in the context of typical social situations, and that are offered to account for either the presence or the absence of certain judicial outcomes. Dialectical individualism sometimes appears in scholarship seeking to account for outcomes of the judicial process which cannot easily be explained by means of any other methodology, such as observed regularities, or irregularities, in the typical identities of the winning or losing parties in an historically interesting group of lawsuits. A good

105. HEIDEGGER, *supra* note 100, at 69.

106. A good example is Gerald Turkel's analysis of the ways in which Duncan Kennedy, Isaac Balbus, and Karl Klare have portrayed the impact of the public/private distinction (a structure) on three different types of "primary actors": legal practitioners, social researchers, and workers. Gerald Turkel, *The Public/Private Distinction: Approaches to the Critique of Legal Ideology,* 22 LAW & SOC'Y REV. 801, 819–20 (1988).

example of this form of dialectical individualism is Gary Schwartz's reliance on the psychological distinction between sympathy and empathy, as mediated through class-structured perceptions of sameness and difference, to account for judges' disparate application of the fellow-servant rule to different classes of workers during the late nineteenth century.[107] Dialectical individualism imputes outcomes to legal actors' experience of subjectivity in the midst of *conflicting* structures. It offers social psychology as a tie-breaker, as it were, to resolve the intellectual anomie which arises in the mind of the legal historian when other methodologies fail to generate coherence about the causes of judicial outcomes.

The most famous example of this methodology from outside the domain of legal history is Max Weber's "Protestant Ethic" thesis. The ethical duty to work in a calling—though unquestionably *relevant* to the development of what Weber called the "spirit of capitalism"—was common to all forms of Protestantism in the sixteenth and seventeenth centuries. Although the historical development of this ethical viewpoint formed a large part of Weber's account of the rise of capitalism, he also wanted to discover why the early *Calvinists* in particular were such good capitalists. His answer was Calvin's doctrine of predestination, which he cited not as the cause, but as a cause of *the* cause. Calvinism didn't demand that its adherents behave like greedy capitalists: On the contrary, the tenet that one's eternal fate is set by God before one's birth, and that the elect differ externally in this life in no way from the damned, hardly gives *doctrinal* support for the kinds of behaviors that are needed to get ahead in business. Indeed, predestination's "logic" seems more consistent with an attitude of fatalistic resignation and passivity. Nevertheless, Weber thought that the *anxiety* of not knowing whether they were among God's elect, or damned for eternity, "must" have led true believers to search for a sign of their salvation in how well they had mastered their material portion on earth (i.e., their calling). Not Calvinism, but believers' psychological *reaction* to Calvinism, was the cause of the early Calvinists' obsessive attention to the use of capital to generate still more capital.[108]

107. Gary T. Schwartz, *The Character of Early American Tort Law*, 36 UCLA L. REV. 641, 712–13 (1989).

108. WEBER, PROTESTANT ETHIC, *supra* note 46, at 109–11. Jon Elster succinctly describes Weber's argument as follows: "Given Calvinism or Methodism, inner-worldly asceticism was a way of reducing the cognitive dissonance between the belief in predestination and the personal concern for salvation." ELSTER, *supra* note 15, at 509; *see also* BRUBAKER, *supra* note 85, at 2, 22–25; GIANFRANCO POGGI, CALVINISM AND THE CAPITALIST SPIRIT: MAX WEBER'S PROTESTANT ETHIC 63–70 (1983).

By far the most sophisticated recent "non-legal" use of social psychology by an historian is Thomas Haskell's account of the rise of antislavery sentiment in eighteenth and nineteenth century England and America.[109] But legal historians also have made increasing use of this methodology. For example, the kind of "fundamental contradiction" historiography associated with Critical Legal Studies is grounded in dialectical individualism because it privileges, as a causal mechanism, psychological *conflicts* in judicial consciousness between antithetical structures such as self and other, or individualism and altruism. The causal sequence in this sort of account is not "Belief *X* led to Outcome *Y*" (as in determinism), but rather "The conflict between Belief *X* and Belief *Y* in judges' minds led them to produce logically incoherent micro-outcomes *Z* . . . *Zn*, while their psychological desire for coherence and certainty led them to deny the very existence of the conflict in the language of their opinions."[110] One final example of an overtly "psychological" account will nicely illustrate the tie-breaker quality of dialectical individualism: It is Robert Cover's argument that cognitive dissonance caused certain antebellum Northern judges who hated slavery to enforce the Fugitive Slave Act despite their personal beliefs.[111] According to Cover, the ideology of antislavery demanded one action from those judges who believed in it (let run-

109. Thomas L. Haskell, *Capitalism and the Origins of the Humanitarian Sensibility,* 90 AM. HIST. REV. 339, 339–61, 547–66 (1985). Haskell's thesis is that the increasing importance and wide geographic scope of market relations led to a change in people's perception of causation: They began to see that their material well-being depended on distant forms of inhuman exploitation (slavery) for which they could no longer disclaim personal responsibility. "[O]nce we begin to perceive our inaction as a cause of the stranger's suffering," Haskell writes, "then the psychological pressure to do something on his behalf can grow irresistible." *Id.* at 359. According to Haskell, "[t]he rise of antislavery sentiment was, among other things, an upwelling of powerful feelings of sympathy, guilt, and anger," which happened when they did and took the form they did as a consequence of this market-induced "change in the perception of causal relations." *Id.* at 343. It is edifying to compare Haskell's thesis about the relationship between the perception of causal responsibility and the emergence of sympathy and guilt with the common argument that juries often fail to convict defendants who are charged under statutes which the juries perceive to be unduly harsh. *See, e.g.,* Carol Smart, *The Woman of Legal Discourse,* 1 SOC. & LEGAL STUD. 29, 37–38 (1992) (discussing application of "draconian" English infanticide statute to unmarried women in 17th and 18th centuries).

110. *See, e.g.,* Feinman, *supra* note 20, at 718 (describing judges' "futile" search for concepts to mediate between individual and community in contract cases as motivated by a cognitive desire to "return to certainty"); *supra* text accompanying notes 23–26. *See generally* Williams, *supra* note 9, at 716 ("The histories that follow [Duncan] Kennedy's methodology start from the premise that our legal rules are indeterminate because they derive from structures of thought that are fundamentally contradictory."); Note, *'Round and 'Round the Bramble Bush: From Legal Realism to Critical Legal Scholarship,* 95 HARV. L. REV. 1669, 1678 n.60 (1982) (noting "[c]ritical historiography's focus on the internal dynamic of legal thought").

111. ROBERT M. COVER, JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS 226–29 (1975).

away slaves go free), and the ideology of judicial restraint demanded exactly the opposite action (enforce the valid law of the land). Thus, Cover obviously couldn't generate a *coherent* causal account by shrieking, deterministically, "the ideology made them do it:" Why one ideology rather than the other? To calm the causal waters, Cover claims that it was antislavery judges' psychological reactions to the *conflict* in their beliefs that best accounts for their behaviors.[112]

## III

The practice of imputing judicial outcomes to a cause is only one kind of scholarship about legal history. As a necessary first step in avoiding methodological confusion, therefore, the historical inquiry towards which the essay's five ideal-typical methodologies are oriented must be situated within a broader taxonomy of imputational endeavors in legal history. This particular historical inquiry (What caused judicial outcomes?) isolates and conceives of law as an *effect* within the context of a *process.* The process, in turn, is one of *mutual* interaction and *reciprocal* causation. This being so, a scholar who investigates what caused one part of the process to come out the way it did necessarily must hold the other parts of the process constant in her mind, either unconsciously or consciously (that is, as a methodological strategy). The net effect of this kind of scholarship is to engender insights into some portion of the total "conversation" that went on among the various constitutive elements of the process in the particular historical case under investigation.

By way of illustration, consider "ideology," that ubiquitous workhorse of a cause associated with methodological determinism and some forms of methodological obstructionism. Ideology is a notoriously slippery concept, and people have defined it many ways. It can been defined narrowly (as in: "the ideas, conceptions, and categories that express and promote the interests of a dominant class"),[113] or broadly (as in: "a somewhat coherent, rather comprehensive belief system about social relations"),[114] or somewhere in between.[115] For the

112. *Id.* at 7, 226–29.

113. Christine B. Harrington & Sally Engle Mery, *Ideological Production: The Making of Community Mediation,* 22 LAW & SOC'Y REV. 709, 711 (1988) (noting that this definition "has often been used within the critical tradition").

114. HIGGS, *supra* note 29, at 37; *cf.* ELSTER, *supra* note 15, at 462 (Ideologies are "beliefs and values consciously entertained by some individual or individuals.").

115. For example, the editors of a 1988 special issue of the *Law & Society Review,* dedicated to the subject of "law and ideology," issued a call for papers suggesting that ideology might be used to refer to any one or more of the following concepts:

moment, however, I shall adopt Karl Mannheim's seminal definition of that term, and its doppelganger, "utopia," in order to make a point:

> The concept "ideology" reflects the one discovery which emerged from political conflict, namely, that ruling groups can in their thinking become so intensively interest-bound to a situation that they are simply no longer able to see certain facts which would undermine their sense of domination. There is implicit in the word "ideology" the insight that in certain situations the collective unconscious of certain groups obscures the real condition of society both to itself and to others and thereby stabilizes it.
>
> The concept of *utopian* thinking reflects the opposite discovery of the political struggle, namely that certain oppressed groups are intellectually so strongly interested in the destruction and transformation of a given condition of society that they unwittingly see only those elements in the situation which tend to negate it. Their thinking is incapable of correctly diagnosing the existing condition of society. . . . In the utopian mentality, the collective unconscious, guided by wishful representation and the will to action, hides certain aspects of reality. It turns its back on everything which would shake its belief or paralyse its desire to change things.[116]

The point I wish to make is this: Mannheim's definition, if taken in isolation from the rest of his work[117] and followed faithfully by a scholar who is investigating the causal significance of any particular manifestation of ideological or utopian thinking on the part of a legal actor, *necessarily* leads to the construction of an account which is partial (and hence reality-distorting). For one thing, the very notion that there was a *single* set of perception-influencing ideas held by a "group" presupposes that the scholar who advances the notion has obliterated,

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(1) false consciousness associated with and produced by particular structures of domination; (2) systems of belief of a group or class; (3) coherent meanings encoded in social relations and institutions; (4) consciousness linked to material conditions; (5) contested areas of social life as opposed to those that are taken for granted; and (6) the processes by which meanings and ideas are produced.

*From the Special Issue Editors,* 22 LAW & SOC'Y REV. 629, 629 (1988).

116. MANNHEIM, *supra* note 46, at 40.

117. Mannheim's view of ideology is far more nuanced than the quotation in the text suggests. Mannheim privileged social location (e.g., class position) as a source of perspective, explicitly rejecting a psychology of interests. An outright distortion or lie in one's interests Mannheim called a "particular ideology;" but an honest view from one's social location he called a "total ideology." Mannheim's most important epistemological insight was what he called "relationism": that knowledge seems relative only because there are competing versions of it. However, according to Mannheim each perspective consists of an *objective* "relation" between the social location of the knower and the object of knowledge. Hence each perspective is "true," albeit if only from the perspective of the knower's particular social location. *See* MANNHEIM, *supra* note 46, at 264–311. (I am grateful to Craig Mason for suggesting this formulation.)

for the sake of consistency, all of the many nuances of meaning which were empirically present in the subjective consciousness of the particular individuals who comprised the group. But there is another, equally fundamental, problem: Mannheim's definition privileges interests over ideas, and thus suppresses the reciprocal relationship that always exists between them in empirical reality. Although an individual's interests shape his ideas and perceptions, his ideas and perceptions also shape what he thinks he wants (that is, his interests).[118] If Marie Antoinette really said "Let them eat cake,"[119] was it because a desire to preserve her throne caused her not to see the people's hunger for bread, or was it because her royal context caused her to want to preserve her throne? The concession that both causes might have been operative, in some sense, does not mean that Mannheim's definition of ideology is "bad." It only means that a scholar following his definition chooses to suppress one part of the dialectic between interests and ideas in order to make a clear causal statement—for example, "Marie Antoinette's interest in preserving her privileges *caused* her to have beliefs which blinded her to the reality that the people needed bread. (If you want to hear about how her royal beliefs shaped her preferences, read my next book.)" Accounts like this nicely illustrate Weber's epigram that " 'purpose' is the conception of an *effect* which becomes a *cause* of an action."[120]

Now consider the common law, which is perhaps the clearest example of a process that generates outcomes which are distinctively *judicial.* The common law involves certain events from the everyday (that is to say, "extralegal") world entering the jurisdiction of the "legal" world in the form of lawsuits. These event-based lawsuits, in turn, require judges to produce certain outcomes (judgments on verdicts, decrees, opinions, etc.). Having been produced, the legal outcomes themselves then "reenter" everyday life in multifarious ways. Mark Kelman's observation that "[w]e can no longer speak coherently of law *responding* to distinct prelegal interests once we see how much these interests are defined by law"[121] captures, at a high level of abstraction, the relationship of reciprocal causation that exits between what we sometimes call "law" (including common law) and "society."

118. [T]he legal forms we use set limits on what we can imagine as practical options: Our desires and plans tend to be shaped out of the limited stock of forms available to us: The forms thus condition not just our power to get what we want but what we want (or think we can get) itself.

Gordon, *supra* note 3, at 111.

119. *See* BARTLETT, *supra* note 26, at 359 n.2 (attributing quotation to Rousseau).

120. WEBER, METHODOLOGY, *supra* note 8, at 83.

121. KELMAN, *supra* note 46, at 243.

But a more concrete illustration would be helpful in making the process understandable. It comes from the recent and well-publicized dispute between Texaco and Pennzoil concerning Getty Oil. The operatives of Getty and its two corporate suitors (Pennzoil and Texaco) began the process, in the everyday extralegal world, by taking account of relevant legal constraints (at some level, and with varying degrees of skill) in the course of complex business negotiations involving the sale of Getty Oil's stock. Texaco succeeded in these business negotiations, leading to disappointment on the part of Pennzoil, and thence to a lawsuit filed in the legal world by Pennzoil against Texaco for the common law tort of interference with contractual relations. In the legal world thus brought to life by Pennzoil's lawsuit, the jury returned a verdict against Texaco for approximately $10.6 billion. When all but $2 billion of the judgment on this verdict was eventually affirmed, and enforcement was imminent, Texaco had very good cause to question its continuing ability to pay creditors in the everyday extralegal world. Finally, this perception of its insolvency led Texaco to file a bankruptcy petition in the legal world, thereby starting the process of mutual interaction and reciprocal causation all over again.[122]

Robert Gordon calls this process the "fundamentally constitutive character of legal relations in social life."[123] Some of his examples are worth quoting, because they tend to show that the process does not manifest itself just in "big cases" like the Texaco/Pennzoil dispute, but is ubiquitous and truly systemic:

> [I]t is just about impossible to describe any set of "basic" social practices without describing the legal relations among the people involved—legal relations that don't simply condition how the people relate to each other but to an important extent define the constitutive terms of the relationship, relations such as lord and peasant, master and slave, employer and employee, ratepayer and utility, and taxpayer and municipality. For instance, among the first words one might use to identify the various people in an office would likely be words connoting legal status: "That's the owner over there." "She's a partner; he's a senior associate; that means an associate with tenure." "That's a contractor who's come in to do repairs." "That's a temp they sent over from Manpower."[124]

122. The dispute and its aftermath are discussed in Michael Ansaldi, *Texaco, Pennzoil and the Revolt of the Masses: A Contracts Postmortem,* 27 HOUS. L. REV. 733 (1990), Roger M. Baron & Ronald J. Baron, *The Pennzoil-Texaco Dispute: An Independent Analysis,* 38 BAYLOR L. REV. 253 (1986), and Robert H. Mnookin & Robert B. Wilson, *Rational Bargaining and Market Efficiency: Understanding* Pennzoil v. Texaco, 75 VA. L. REV. 295 (1989).

123. Gordon, *supra* note 3, at 104.

124. *Id.* at 103.

Thus it is that the causal loop "society-law-society" repeats itself every day, all the time, in big ways and in small, and to grab a hold of one segment of the loop as the "cause" is to choose to exclude the other segments from the account.

* * * *

Those scholars who ask why particular past judicial outcomes happened may or may not have the foregoing process in mind. It is enough to note here that this essay—and the essay's ideal-typical legal historian—place the question within a taxonomy of similar questions in legal studies, all of which share a distinctly *methodological* premise: The reciprocal relationship between legal and extralegal outcomes always makes causation a matter of imputation by the scholar, and never simply a matter of discovering some discrete and insular fact that can be labelled the uncaused cause of the outcome in question.

Figure 4 illustrates the taxonomy.

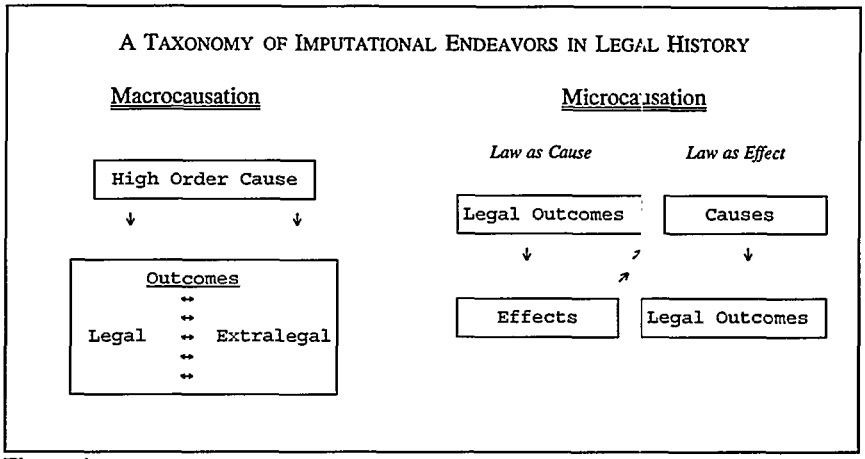


**Figure 4**

A simple two-class taxonomy of scholarship will do for present purposes. The universe of writings about legal history which ask the question "why" is divided into two classes: accounts of *macrocausation* and accounts of *microcausation.* The former are characterized, first, by their attitude of agnosticism concerning the causal relationships between particular legal and extralegal outcomes, and second, by their effort to establish what might be called a "high order cause" as responsible for features common to both kinds of outcomes during a given historical period. The latter are characterized by their propensity to dig into the causal relationships that existed between *particular* legal and extralegal outcomes from the past. The mere existence of

good macrocausational scholarship tends to refute John Dewey's epigram that "[h]istory cannot be written *en masse*. . . . [T]he various strains must first be segregated and each followed through its course."[125] However, the far greater number of microcausational accounts that have been written illustrates the widespread appeal to scholars of the sentiments which Dewey expressed. Because microcausational scholarship probes "inside" the law/society amalgam to investigate causal relationships, it is further differentiated into two orders: work which conceives of legal outcomes as *causes,* and work which conceives of legal outcomes as *effects.*

Max Weber's preoccupation with "Western rationalism" and Antonio Gramsci's theory of hegemony will be sufficient to illustrate that class of scholarship which is oriented to questions of macrocausation. Much of Weber's work seeks to demonstrate that the admittedly interdependent historical development of legal and extralegal institutions in the Occident occurred as it did *because of* a world view and pattern of thinking that was unique to the West in general, and, within the Western tradition, unique to Judeo-Christian conceptions of God and personal salvation in particular. According to Weber, these ancestral conceptions left evidence of their causal significance in the attitude of world mastery through rational calculation that is immanent in the way *all* institutions (legal and extralegal) operate in the modern West.[126] Gramsci's theory of hegemony also fits in the class of macrocausational scholarship, because it imputes the permeation throughout society of a whole range of interlocking extralegal and legal structures and beliefs to the interests of the ruling class. According to Gramsci, hegemony—which he conceived to be an overall system of culture in which the elite occasionally gives concessions to the oppressed, but in which more radical outcomes are rendered unimaginable or unfeasible by the cumulative weight of social structures and beliefs—is "necessarily . . . *based on* the decisive function exercised by the leading group in the decisive nucleus of economic activity."[127]

125. John Dewey, *Historical Judgments, in* PHILOSOPHY OF HISTORY, *supra* note 10, at 163, 167.

126. This aspect of Weber's work is discussed in ANTHONY T. KRONMAN, MAX WEBER 147–65 (1983), DEREK SAYER, CAPITALISM AND MODERNITY: AN EXCURSUS ON MARX AND WEBER 116–33 (1991), and WOLFGANG SCHLUCHTER, THE RISE OF WESTERN RATIONALISM: MAX WEBER'S DEVELOPMENTAL HISTORY (Guenther Roth trans., 1981).

127. GRAMSCI, PRISON NOTEBOOKS, *supra* note 46, at 161; *see* GIUSEPPE FIORI, ANTONIO GRAMSCI: LIFE OF A REVOLUTIONARY 238 (1971) (Gramsci accorded causal primacy to "[t]he philosophy of the ruling class pass[ing] through a whole tissue of complex vulgarizations to emerge as 'common sense.' "). The application of Gramsci's theory to legal studies is discussed,

Having thus identified a high-order cause as responsible for the overall content of an entire social *system,* both Weber and Gramsci can step back, as it were, and observe that during any given historical period the various elements of the system necessarily interacted with one another on the terms that were established by their mutual causal ancestor. Weber's theory, for example, asks us to note that the ever-increasing rationalization of the economy under capitalism was matched by an ever-increasing rationalization of the legal system; and that whenever these two elements of social life interacted with one another they usually tended to strengthen and reinforce their common commitment to enhancing people's ability to calculate the practical consequences of their acts. And even though a judge might order Capitalist *A* to pay Worker *B* damages on account of a particular injury, Gramsci's theory asks us to observe that this seemingly pro-worker micro-result rests on a host of ultimately pro-capitalist macro-premises: for example, the premise that injured workers have absolutely no right to compensation unless they meet the burden of proving that their employer did a discrete bad act (say, that he behaved negligently), and even the premise that there are such seemingly immutable categories of people as "employees" and "employers" in the first place. In other words, neither Weber's nor Gramsci's macro-causational scholarship sweats the small stuff: It is enough (and this is no small feat of scholarship) that the direction of the system as a whole is coherently imputed to an overarching master cause.

Most legal historians have more modest ambitions than Weber and Gramsci. Given the forest, they are content to investigate some of the trees, and so they turn their attentions to questions of *micro*causation. Having descended to the forest floor, however, they must choose a perspective if they are to achieve any degree of clarity about their task: Do they want to know what effects the trees had on the forest's crea-

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in an accessible manner, in Edward Greer, *Antonio Gramsci and "Legal Hegemony," in* THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 304 (David Kairys ed., 1982), and Duncan Kennedy, *Antonio Gramsci and the Legal System,* 6 ALSA FORUM 32 (1982). Although Gramsci rejected the "vulgar" Marxian conceptual distinction between base and superstructure, *see* GRAMSCI READER, *supra* note 46, at 196–98, his emphasis on hegemony's class-based *economic* core allows the theory to call itself "Marxist." *Cf.* Judy Fudge & Harry Glasbeek, *The Politics of Rights: A Politics with Little Class,* 1 SOC. & LEGAL STUD. 45, 65 (1992) (Gramsci thought classes determine the general trend of historical development "over the long haul."). For an unkind commentary on this aspect of Gramsci's work, see Thomas L. Haskell, *Convention and Hegemonic Interest in the Debate over Antislavery: A Reply to Davis and Ashworth,* 92 AM. HIST. REV. 829, 834 (1987) ("Because the Gramscian alchemy acknowledges the existence of pluralism and consensus, even as it transmutes them into proof of domination, it serves—paraphrasing what Erasmus Darwin said about the relation of Unitarianism to Christianity—as a feather pillow, perfect for catching falling Marxists.").

tures, or do they want to know what caused the trees to grow up the way they did in the first place? In other words, does their historical inquiry conceive of law as an effect, or as a cause?

Microcausational scholarship of the order which investigates the historical *consequences* of legal outcomes has been a mainstay of American legal studies at least since the advent of legal realism. A work identifies itself as falling within this order any time it asserts the empirical claim that particular legal outcomes generated historical effects of any sort, either large or small, and whether inside or outside the legal system. A few concrete examples will serve to illustrate this kind of historiography. Thus, one paradigm is scholarship which imports Gramsci's macrocausational theory of hegemony to explain the microcausational effects of any given subset of legal doctrines or practices. One example of this paradigm is Douglas Hay's analysis of the way the criminal law "made it possible [for the English ruling class] to govern eighteenth-century England without a police force and without a large army";[128] a second is William Forbath's recent attempt to "show how American trade unionists made many hard-nosed choices that importantly narrowed their political and industrial paths *as a result of* harsh constraints and significant incentives forged by the nation's courts."[129] Another paradigm of scholarship which conceives of law as a cause is the sort of law-and-economics endeavor which works through the consequences of assuming that people outside the legal system (in Richard Posner's words) "respond to incentives—that if a person's surroundings change in such a way that he could increase his satisfactions by altering his behavior, he will do so."[130] One example is Richard Zerbe's analysis of the way grain elevator regulations in late nineteenth century America caused businesses engaged in the grain trade to employ many "ingenious subterfuges to

128. Douglas Hay, *Property, Authority and the Criminal Law, in* ALBION'S FATAL TREE: CRIME AND SOCIETY IN EIGHTEENTH-CENTURY ENGLAND 17, 56 (Douglas Hay et al. eds., 1975). For a recent discussion of how Gramsci's theory can be used to describe the mechanisms by which hegemony is reproduced at the micro level, see Susan S. Silbey, *Making a Place for Cultural Analyses of Law,* 17 LAW & SOC. INQUIRY 39, 41–42 (1992).

129. WILLIAM E. FORBATH, LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT at xi (1991) (emphasis added); *see* William E. Forbath, *The Shaping of the American Labor Movement,* 102 HARV. L. REV. 1109, 1236 (1989) (organized labor's responses to law's "rights rhetoric" offered as evidence to support Gramsci's theory of hegemony). Forbath continues the same theme in William E. Forbath, *Courts, Constitutions, and Labor Politics in England and America: A Study of the Constitutive Power of Law,* 16 LAW & SOC. INQUIRY 1 (1991).

130. POSNER, *supra* note 86, § 1.1, at 4.

avoid regulation;"[131] another is Margaret Brinig's attempt to explain the change in demand for diamond engagement rings in twentieth century America by postulating an "increase in need for such a bond *because of* the abolition of a cause of action for breach of marriage promise."[132]

The examples just mentioned frame the order of historiography I call "Law as Cause." This order is to be distinguished from scholarly discourse about "Law as Effect." It is the latter kind of scholarship that this essay takes as its theme. In other words, what is left in the taxonomy is that order of historiography which conceives of legal outcomes as the *effects* of antecedent causes, whether those causes are endogenous or exogenous to the legal system. Within *this* order, indeed, the question to which the essay's five ideal-typical methodologies are oriented is but one family, albeit a large and important one, because not all legal outcomes are products of the judicial process. Thus, the essay's methodologies are not concerned with discovering the causes of legislation, or of administrative rulings, or of the investigative procedures of police departments, or of any other non*judicial* products that plausibly deserve the label "legal outcomes" (although the methodologies easily could be adapted to those ends). In short, our topic—the causes of legal outcomes in the judicial process—is situated precisely as follows in the taxonomy of kindred imputational endeavors: Its *class* is "Microcausation"; its *order* is "Law Conceived as an Effect of a Cause"; and its *family* is "Legal Outcomes in the Judicial Process."

It is obvious that many works of legal historiography can and do address questions which fall in more than one category of the taxonomy described above. For example, both Lawrence Friedman's *A History of American Law* and Morton Horwitz's *The Transformation of American Law,* leading examples of writings which advance the so-called "subsidy thesis" of legal development in this country, are concerned with the effects *and* the causes of many different kinds of legal outcomes in American history.[133] Although a particular piece of scholarship may indeed straddle more than one of my categories, it is

131. Robert O. Zerbe, Jr., *The Origin and Effect of Grain Trade Regulations in the Late Nineteenth Century,* 56 AGRIC. HIST. 172, 180 (1982).

132. Margaret F. Brinig, *Rings and Promises,* 6 J.L. ECON. & ORGANIZATION 203, 213 (1990) (emphasis added).

133. LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW (2d ed. 1985); HORWITZ, *supra* note 91. The term "subsidy thesis" is from Gary T. Schwartz, *Tort Law and the Economy in Nineteenth-Century America: A Reinterpretation,* 90 YALE L.J. 1717, 1718 (1981), and refers to the contention that nineteenth century judges designed the law in order to benefit commercial interests.

enough to note that the essay treats it as being concerned with discovering the causes of legal outcomes in the judicial process to the extent that somewhere inside its covers it isolates that particular question as worthy of attention. Thus, for example, the claim found in Horwitz's book that a group of nineteenth century court opinions distinguishing between builders and laborers for purposes of recovery in quantum meruit "seems to be an important example of class bias,"[134] and Friedman's more general assertion that the legal system "does the bidding of those whose hands are on the controls" in society,[135] are both instances of the kind of scholarship about which this essay is written. And this is so even though elsewhere in the same books other kinds of questions are addressed: "*A* caused *B*" is still causal talk, even if in another chapter or paragraph the author goes on to tell us that *B* then caused *C*.

## IV

In the previous section I described the simple (and hardly original) insight, common to all five methodologies, that the creation of judicial outcomes empirically involves a process of reciprocal causation among the legal and extralegal components of society. But a similar relationship also exists among individual legal actors and the social structures with which they interact on a daily basis. Each methodology/cause combination is a different way of expressing the common insight that the production of judicial outcomes is a dynamic social process, in which legal actors play the roles of both authors and performers. This section lays the foundation for understanding what this concept means for the practice of methodological self-consciousness in legal historiography.

* * * *

The five ideal-typical methodologies share the premise that law production by individual legal actors, rather than being a static phenomenon, is but one aspect of a dynamic social process. Just as "law" and "society" are bonded together in a relationship of reciprocal causation, so too the "law/society" amalgam is itself bonded together in an identical relationship with individual legal actors. Restated in its most basic form, the premise is that individual human beings both create

134. HORWITZ, *supra* note 91, at 188. For a recent critique of this account, and of Wythe Holt's rather similar account, *supra* text accompanying note 103, see Peter Karsten, *"Bottomed on Justice": A Reappraisal of Critical Legal Studies Scholarship Concerning Breaches of Labor Contracts by Quitting or Firing in Britain and the U.S., 1630–1880,* 34 AM. J. LEGAL HIST. 213 (1990).

135. FRIEDMAN, *supra* note 133, at 18.

social institutions like law and are themselves products of the very society they have created. The chicken-and-egg aspect of this insight into law production means that when one speaks of what caused the law, one also is mindful of what caused the lawmaker, and vice versa.

There is nothing mysterious or occult about this insight. By way of illustration, consider that variant of the English language which appears in American legal writing. "Lawspeak" is indubitably created by human beings, for no nonhuman creature or thing is known ever to have uttered a syllable of it. At the same time, lawyers and judges are, but have not always been, "Lawspeak*ers*"—that is, the language of the law was once an uncomprehended cacophony external to them, which they nonetheless somehow learned to understand and use in law school and in practice. Lawspeak at some point became part of how they think and speak, and hence part of who they are. Language is not only a key mediator in human interaction, it is a *socially* grounded practice which filters and channels the stories speakers tell.[136] As Duncan Kennedy puts it, "[o]ther actors in the legal system have influenced, persuaded, outraged, puzzled, and instructed me, until I can never be sure in what sense an opinion I strongly hold is 'really' mine rather than theirs."[137] Thus it is that lawyers and judges both produce legal language and are produced by it.

The process of reciprocal creation, being a dynamic one, extends over time. The conception of this process can be used to describe (in very general terms which are not meant to be an explanation) how new law, and new meanings for old law, are produced and reproduced. It also can be used to describe how legal institutions, after they are produced, eventually decline and die. Continuing with the example of legal language, a well-known instance drawn from the history of American contract law will serve to illustrate the heuristic potential of the conception that law production is a process of reciprocal creation.

During the late nineteenth century, many lawyers and judges, seeking to give expression to the claims of people who relied to their detriment on promises for which there was no bargained-for consideration, uttered the old words "equitable estoppel," thereby endowing them with a new meaning.[138] By the middle of this century, new words, "promissory estoppel," were being spoken as a means of expressing

136. *See, e.g.*, Elizabeth Mertz, *The Uses of History: Language, Ideology, and Law in the United States and South Africa*, 22 LAW & SOC'Y REV. 661, 662 (1988).

137. Kennedy, *Critical Phenomenology*, *supra* note 46, at 548.

138. *See, e.g.*, Ricketts v. Scothorn, 77 N.W. 365, 367 (Neb. 1898); Prescott v. Jones, 41 A. 352, 353 (N.H. 1898).

more or less the same idea.[139] Finally, during at least the last several decades, the phrases "contracts without consideration" and "promises reasonably inducing action or forbearance" have begun to enter the practical vocabulary of many lawyers and judges as replacements for "promissory estoppel."[140] Legal actors unquestionably created all of these expressions. But at various points in time, each one also came to constitute part of the consciousness of legal actors trained to be involved in cases of this sort. Each of these verbal formulations imported its own distinct conceptual apparatus, which, when internalized by legal actors as "An Argument" or "The Law," tended to produce differing consequences. Thus, for example, "equitable estoppel" required the task, difficult for some, of equating promises with representations of fact;[141] "promissory estoppel," while overcoming the latter difficulty, made it hard for some to conceive of offers as being in the same category as promises;[142] and finally, "contracts without consideration" made it easier to conceive of reliance on offers as a rights-generating activity that was entitled to its own legal category, distinct from reliance on promises.[143] The new expressions displaced the old ones exactly to the extent that the former were used, and the latter not used, by concrete legal actors in the course of their daily work. Thus, it is common these days to hear two versions of Lawspeak on the subject of those who rely upon naked promises: Law professors and recent law graduates often think and speak of "contracts without consideration," while lawyers and judges who were trained many years ago continue to think and speak of "promissory estoppel." But at the same time, virtually no one today says "equitable estoppel" in this context; the meaning for contract law that nineteenth century lawyers and judges infused into that expression has simply ceased to exist, as a social reality, due to the absence of its ongoing reproduction by individual Lawspeakers.

Each of the five ideal-typical methodologies outlined earlier emphasizes a different *stage* of the total social process by which particular

139. *See, e.g.*, James Baird Co. v. Gimbel Bros., 64 F.2d 344, 346 (2d Cir. 1933); Feinberg v. Pfeiffer Co., 322 S.W.2d 163, 168 (Mo. Ct. App. 1959); Benjamin F. Boyer, *Promissory Estoppel: Requirements and Limitations of the Doctrine,* 98 U. PA. L. REV. 459, 459 n.1 (1950), (citing 1 S. WILLISTON, CONTRACTS § 139 (1st ed. 1920)) (attributing first use of the term "promissory estoppel" to Williston).

140. *See* RESTATEMENT (SECOND) OF CONTRACTS (1979) (quoting the titles of Chapter 4, Topic 2 and § 90).

141. *Compare Ricketts,* 77 N.W. 365 (doctrine available) *with Prescott,* 41 A. 352 (doctrine not available to those who rely on promises).

142. *Compare James Baird Co.,* 64 F.2d 344 (doctrine not available to those who rely on offers) *with* Drennan v. Star Paving Co., 333 P.2d 757 (Cal. 1958) (doctrine available).

143. *See* RESTATEMENT (SECOND) OF CONTRACTS § 87(2) (1979).

instances of law are produced, reproduced, or destroyed. In order to give a precise explanation of these differences in emphasis (and hence of meaning), it is necessary to break down the process of reciprocal creation that has just been described into smaller segments. An adequate vocabulary for speaking about these segments is provided by Peter Berger's terms "externalization," "objectivation," and "internalization." The following passage from Berger's book *The Sacred Canopy* will imbue what he calls these "three moments, or steps" with meanings that are sufficient for present purposes:

> Externalization is the ongoing outpouring of human being into the world, both in the physical and the mental activity of men. Objectivation is the attainment by the products of this activity (again both physical and mental) of a reality that confronts its original producers as a facticity external to and other than themselves. Internalization is the reappropriation by men of this same reality, transforming it once again from structures of the objective world into structures of the subjective consciousness. It is through externalization that society is a human product. It is through objectivation that society becomes a reality *sui generis.* It is through internalization that man is a product of society.[144]

In *methodological obstructionism,* institutions and social structures are conceived of as becoming things in the minds of historical actors (in Marxian terminology, they become reified), who perceive them to be no less real than a mighty river. Perception can be conscious or intuitive. In either case, these institutional things, just like the course of a riverbank, refuse to permit judicial outcomes to move in certain directions. By way of illustration: Because general incorporation laws have made it possible for IBM to exist in a certain juridical form (including the fiction of corporate personality and limited shareholder liability), I simply "know" that the legal expression of any dissatisfaction I feel with the performance of the computer I bought from IBM *cannot* be directed against IBM's flesh-and-blood owners. Methodological obstructionism thus connects most strongly with the moment of objectivation in this three-part process of reciprocal creation because it emphasizes the facticity of social products, like legal doctrine, which foreclose the possibility of certain results in the consciousness of individual legal actors.

144. BERGER, SACRED CANOPY, *supra* note 46, at 4. In this work on the sociology of religion, Berger builds upon themes that he first developed with Thomas Luckmann in BERGER & LUCKMANN, SOCIAL CONSTRUCTION, *supra* note 46. For interesting pragmatist formulations of the dialectic, see JOHN DEWEY, FREEDOM AND CULTURE 88 (1989), WILLIAM JAMES, *Pragmatism's Conception of Truth, in* ESSAYS, *supra* note 2, at 171, and GEORGE H. MEAD, MIND, SELF, AND SOCIETY 17–18 (Charles W. Morris ed., 1934).

*Methodological determinism* shares objectivism's concern with the power of institutions and social structures, but shifts its emphasis to the moment of internalization. In methodological determinism, individual legal actors are conceived to reappropriate human creations, such as language or ideology, so completely that they become puppets of their context. In other words, a strong if not exact correlation is assumed to exist between the content of what people internalize during their ongoing socialization and what they externalize when they generate concrete judicial outcomes. Continuing the story of my disgruntled relationship with IBM as an illustration: The massive facticities of the company, the legal system, and multifarious other social institutions and structures which symbolically interact to shape my perception of reality all are such that I feel I *must sue IBM* after I reach a certain stage of dissatisfaction with my computer. In short, the system forces me to act in this way: "I can't let them get away with it, so I'll sue IBM," I say, speaking and hence reproducing structure through my lips.

*Methodological rationalism,* by stressing legal actors' chance to choose among all available decisional options, places its emphasis on the moment of externalization, although the notion of availability also implicitly invokes the moment of objectivation as a background condition of choice. More from the saga of my IBM computer will illustrate: Although I know I must sue IBM and no one else for any computer dissatisfaction I experience, I *can* choose whether to file suit, ask for arbitration, write a letter of complaint to the Better Business Bureau, etc., and I will choose whichever of the available options best serves my interests. However, since methodological rationalism is concerned with explaining the past in terms of choices (that is, the manifestations of preferences), and not in terms of how the preferences themselves were formed, it excludes the moment of internalization from the account.

The methodology of *dialectical individualism* balances its emphasis equally between the moments of internalization and externalization. This methodology serves to explain why legal actors sometimes produce (externalize) outcomes which, though they reflect the actors' social construction of reality (internalization), nonetheless do not exactly reproduce the contents of antecedent institutions and social structures and cannot easily be explained by appealing to the notion of rational choice. Hence it is that this methodology is "driven," as it were, to reconstruct coherence concerning the past by means of social-psychological processes. For example, dialectical individualism might offer some interesting insights into why, instead of suing IBM for my

malfunctioning computer or pursuing various methods of alternative dispute resolution, one day I hauled off and punched IBM's largest shareholder on the nose.

In its relationship to the process of reciprocal creation, *methodological particularism* is simultaneously the most catholic and the most parochial of all five methodologies. In any given account it may concern itself with all three moments in the process, but only insofar as they pertain to the particular identity and behavior of a concrete historical actor. To illustrate: Given enough knowledge about *me,* an historian might try to explain why I filed (externalized) a scatologically worded legal complaint against IBM's shareholders on account of my !#$*%! computer, even though its practical chances of succeeding were nil. She might learn, to give a purely hypothetical example, that as a boy, I (like Martin Luther) was caned on the buttocks for misbehaving,[145] and that in letters to my friends, I expressed great admiration for the teachings of Thoreau, Gandhi, and King on the virtues of civil disobedience; from the facts she uncovered about me as an individual, the historian might feel justified in imputing the complaint I filed to my having internalized the particular objectified social products which the facts show I encountered in my youth. However, the minute a scholar engaged in this form of scholarship extrapolates her findings from the reconstructed biography of a given individual (to switch examples, Chief Justice Lumpkin of the Georgia Supreme Court) to other *types* of individuals from the same era, about whose actual lives little or nothing is known (say, other antebellum state court judges in the South),[146] she is *pro tanto* doing historical sociology by means of one or more of the other four methodologies.

## V

The following statement is the foundation of all five methodologies: Legal historiography is the generation of coherence about the past by means of simplifying (and hence reality-distorting) concepts in which causal claims are asserted, either explicitly or implicitly. The essay's hypothetical legal historian thinks that concrete historical reality is always the product of what Weber (giving voice to his neo-Kantian epistemology) called an "infinite causal web," radically contingent in

145. *See* ERIK H. ERIKSON, YOUNG MAN LUTHER: A STUDY IN PSYCHOANALYSIS AND HISTORY 79, 244–50 (1962) (imputing certain of Martin Luther's scatological expressions and other behaviors to this cause).

146. *Cf.* Huebner, *supra* note 78, at 357 ("Lumpkin's record offers clues about how some southerners dealt with economic issues.").

its manifestations and unknowable in its totality.[147] To restate this point in imputational terms, everything "out there" in reality is epiphenomenal: There simply are no such things as uncaused causes. To speak of causes is thus to *choose* one point in the causal web to isolate as a "phenomenon" that is to be explained by establishing some sort of causal relationship between it and other aspects of reality. In other words, phenomena do not exist but are chosen: a truth that has been know at least since the publication of John Stuart Mill's *System of Logic* in 1843, but nonetheless a truth which, it seems, we must constantly remind ourselves of.[148] A discussion of what is involved when a scholar expresses "theories" and "descriptions" will show what all this means.

* * * *

Theories, of course, make their causal claims explicit. But the unimportant facts a theory passes over are usually just as much linked, causally, to an outcome as the facts which the theory touts as important. Every known theory of social or individual action fails to account for unintegrated residues of facts, or elements of reality which the theories find unimportant; moreover, whatever a theory's criterion for inclusion may be, that criterion cannot ask simply if a fact was "causally related" to the outcome that interests the theorizer. To illustrate: In connection with the question, Why do institutions take the shape they do? the Coase Theorem asks us to pay attention to the causal significance of transaction costs.[149] However, this intensive focus on transaction costs, no matter how rewarding, makes us overlook the role that earthworms play in the production of legal institutions. The ongoing activities of earthworms lead to aerated soil, which leads to healthy plants, which lead to a regular supply of oxygenated air for people to breath, which leads to the formation and maintenance of human societies, which lead to the production of law. To invert and subvert Sartre's famous epigram, worms could be seen to be the beings

147. WEBER, METHODOLOGY, *supra* note 8, at 84. For a useful discussion of Weber's neo-Kantian epistemology, see Stephen M. Feldman, *An Interpretation of Max Weber's Theory of Law: Metaphysics, Economics, and the Iron Cage of Constitutional Law*, 16 LAW & SOC. INQUIRY 205, 209–12 (1991).

148. Morton J. Horwitz, *The Doctrine of Objective Causation*, *in* THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 360, 363 (David Kairys ed., 1990). Horwitz does not appear to notice that the decline of the 19th century belief in objective causation in the sciences and in tort law theory (which he ably describes) *also* profoundly undermines the authority of his *own* causal account of why this decline occurred in law. *Cf. id.* at 365–70 (imputing the decline to the growing recognition, traced to Holmes, that law is policy).

149. R.H. COASE, THE FIRM, THE MARKET, AND THE LAW (1988); R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

at the heart of somethingness.[150] Yet, while it is plausible that the activities of earthworms are a necessary condition for the happening of law, as far as I know there are *no* existing theories which incorporate a wormistic perspective on legal outcomes.[151] "[I]t must not be forgotten," Weber wrote, "that every individual causal complex, even the apparently 'simplest,' can be infinitely subdivided and analyzed. The point at which we halt in this process is determined only by our *interests* at the time."[152] Thus, even though no wormistic theory of law ever has existed, one can imagine an ardent environmentalist constructing one; and from his (or an earthworm's) point of view such a theory might be considered long overdue.

Thus, no matter how many attempts we make to slice up legal history in causal terms, there are still different or ever-finer slices that could be cut. As William James put it more than a hundred years ago:

> There is nothing improbable in the supposition that an analysis of the world may yield a number of formulae, all consistent with the facts. In physical science different formulae may explain the phenomena equally well—the one-fluid and the two-fluid theories of electricity, for example. . . . Why may there not be different points of view for surveying it, within each of which all data harmonize, and which the observer may therefore either choose between, or simply cumulate one upon another?[153]

To illustrate: Shall we talk about Holmes' nonfatal wound at the Battle of Chancellorsville in 1863 as a cause of his subsequent decisions? How about his other nonfatal war wounds, at Ball's Bluff in 1861, and Antietam in 1862? Or his father's marriage to his mother in 1840? Or his ancestor David Holmes' decision to come to America in the seventeenth century? A thousand and more questions like these convince this essay's ideal-typical scholar that her choice of a cause for the judicial outcomes that interest her is just that: *her choice*. It is not something that is unambiguously circumscribed as "the cause" somewhere in the past that preceded the decision.

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150. SARTRE, supra note 4, at 21 ("Nothingness lies coiled in the heart of being—like a worm.").

151. *But cf.* Gabel & Kennedy, *supra* note 24, at 20 (discussing significance of worms).

152. WEBER, METHODOLOGY, *supra* note 8, at 179 n.38; *see* JAMES, *supra* note 144, at 168 ("We choose the kind of theory to which we are already partial . . . ."); *see also* H.L.A. HART & TONY HONORÉ, CAUSATION IN THE LAW 11 (2d ed. 1985) (stating that the distinction between "causes" and "conditions" depends on "the particular context and purpose for which a particular causal inquiry is made and answered").

153. JAMES, *supra* note 49, at 12. As this passage suggests, pragmatism and pluralism go hand-in-hand.

It's not just that events are linked to events in a chain as long as time itself. Our scholar thinks that even when she hones in on a single link of the chain she must choose what causal relationships to emphasize. For instance, should she emphasize the social construction of a given actor's preference or the act of choice by which the preference was instantiated? An example drawn from Holmes' career will illustrate this last point. Suppose we want to know why Holmes wrote his most infamous sentence—"Three generations of imbeciles are enough"—in the course of his opinion for the Court in *Buck v. Bell,*[154] which upheld a Virginia statute providing for the involuntary sterilization of those inmates of state-supported institutions who suffered from a hereditary mental disability. We know a great deal about Holmes' life, given the massive scholarly resources that his importance has attracted. Indeed, we probably know as much about Holmes as we know about any past judicial personage in this country, and a whole lot more than we will ever know about most. It seems a simple enough question to ask: What caused the Great Man to express himself in such brutal terms about Carrie Buck, the white woman whom the State of Virginia was seeking to sterilize in the case before him?

To simplify the discussion, suppose that we uncover two "important" facts about Holmes which we think are relevant to our inquiry. First, based on the following two quotations and a variety of other, less revealing, sources, we conclude that Holmes believed racial eugenics—the social control of procreation to achieve human genetic improvement—was good social policy:

> I believe that the wholesale social regeneration which so many now seem to expect, if it can be helped by conscious, coordinated human effort, cannot be affected appreciably by tinkering with the institution of property, *but only by taking life in hand and trying to build a race. That would be my starting point for an ideal law.*[155]
>
> I do not lose my hopes. . . . I think it probable that civilization somehow will last as long as I care to look ahead—*perhaps with smaller numbers, but perhaps also bred to greatness and splendor by science.*[156]

154. 274 U.S. 200, 207 (1927).

155. Oliver W. Holmes, Jr., *Ideals and Doubts,* 10 ILL. L. REV. 1, 2–3 (1915), *reprinted in* THE HOLMES READER 102, 104 (Julius Marke ed., 1955) (emphasis added), *quoted in* Mary L. Dudziak, *Oliver Wendell Holmes as a Eugenic Reformer: Rhetoric in the Writing of Constitutional Law,* 71 IOWA L. REV. 833, 842 (1986).

156. Oliver W. Holmes, Jr., *Law and the Court,* Address Before the Harvard Law School Association of New York (Feb. 15, 1913), *in* THE HOLMES READER, *supra* note 155, at 98 (emphasis added), *quoted in* Dudziak, *supra* note 155, at 843.

Second, we locate, in the archives of Holmes' papers at the Harvard Law School, the following note written by Chief Justice Taft as part of his assignment to Holmes to draft the majority opinion in *Buck v. Bell:*

> Some of the brethren are troubled about the case, especially Butler. May I suggest that you make a little full [your discussion of] the care Virginia has taken in guarding against undue or hasty action, proven absence of danger to the patient, and other circumstances tending to lessen the shock that many feel over the remedy? *The strength of the facts in three generations of course is the strongest argument.*[157]

Many possible Holmeses emerge from these two facts, *if* the task is to impute his "three generations" phraseology in *Buck v. Bell* to one or more antecedent causes. Of course, we know many other facts about Holmes which are arguably relevant to this task—Holmes and his wife Fanny were childless, some of Holmes' expressions suggest that he learned to accept the sometimes grim need to make great sacrifices for the common good while serving in the Civil War, Holmes was a positivist who tended to reject as unreal any justification but policy justifications for legal rules, Holmes often wrote that judges should defer to the power of legislatures to make social policy, etc.—but adding these facts to the discussion would only multiply the number of different Holmeses whom we could construct.[158] A description of three possible Holmeses, based on the two facts noted above, will be quite sufficient to illustrate my point that what caused the real Holmes to write "Three generations of imbeciles are enough" is necessarily a coherence-generating distortion of (or, if you will, a narration of) reality.

The first Holmes was a man whose overt callousness towards Carrie Buck was determined by his fervent belief in the normative imperative of racial eugenics as a "starting point for an ideal law." That belief caused him to see Carrie Buck as an "other" whose physical capacity to procreate posed a danger to the human race. The "three generations" sentence (or something very much like it) would have been on the tip of his pen even if Taft had never written him the note; indeed, even if the note had asked him to go softly on this point, no amount of political expediency would have stopped him from having his say. In other words, but for his belief in racial eugenics, this Holmes never

157. Letter from William H. Taft to Oliver Wendell Holmes, Jr. (Apr. 23, 1927), *quoted in* SHELDON M. NOVICK, HONORABLE JUSTICE: THE LIFE OF OLIVER WENDELL HOLMES 351–52 (1989) (emphasis added).

158. *See, e.g.,* CATHERINE D. BOWEN, YANKEE FROM OLYMPUS: JUSTICE HOLMES AND HIS FAMILY (1944); NOVICK, *supra* note 157, at 477–78 n.65.

would have written about another human being (who was innocent of any particular wrongdoing) in such an alarming way.[159]

The second Holmes was simply a man who had a job to do. His assigned task was to build a majority coalition of justices who would vote to uphold the Virginia statute. Although this Holmes possessed a general knowledge of his colleagues' attitudes and preferences, Taft's note provided him with valuable inside information concerning which argumentative strategy was most likely to succeed in the case at hand. The reason this Holmes wanted to vote with the majority is unknown and unknowable; that is, his belief in racial eugenics may or may not have been the cause of his preference, since we also know that he believed in deferring to legislative judgments on matters of policy. But whatever the cause of his preference may have been, it would appear from the evidence that this Holmes rationally chose the "three generations" language (and other language to the effect that an unsterilized Carrie Buck posed a threat to society) as a means to his end of building a majority coalition because the Chief Justice had given him reason to believe that such talk might appeal to "the brethren." The verisimilitude of this Holmes tends to be confirmed by the care that he took in his opinion (and that Taft asked him to take) to describe in detail the many procedural safeguards that Virginia had established to protect patients' rights in cases of this sort.[160] In other words, but for Taft's note, Holmes would have chosen some other rhetorical strategy to build a coalition, and the sentence in question never would have been written.[161]

The third Holmes believed in the wisdom of racial eugenics, secretly wanted to draw attention to the mental incapacities of Carrie Buck, her mother, and her daughter, but never actually would have justified his opinion by such brutal language if the political utility of the idea had not been suggested to him by the Chief Justice. Both facts were

159. This is the thrust of the argument in Dudziak, *supra* note 155, at 859–65. *Cf.* Patrick J. Kelley, *The Life of Oliver Wendell Holmes, Jr.*, 68 WASH. U. L.Q. 429, 455, 468, 482–83 (1990) (book review) (depicting Holmes as a rigid ideologue who applied a "reductive positivist methodology to the study of law," and as a man whose views produced "harsh, unrealistic, and inhuman" results).

160. Buck v. Bell, 274 U.S. 200, 206–07 (1926). Although Justice Butler dissented, he did so alone, and without opinion. *Id.* at 208. On the subject of the "procedural safeguards" in the statute at issue in *Buck*, see NOVICK, *supra* note 157, at 478 n.65 ("The elaborate procedural safeguards provided by the Virginia statute were a sham, exhibited in the *Buck* case, to be ignored thereafter. Carrie Buck's sister, for instance, was told she needed an appendectomy and then sterilized without her knowledge."). *See also* Paul A. Lombardo, *Three Generations, No Imbeciles: New Light on* Buck v. Bell, 60 N.Y.U. L. REV. 30 (1985).

161. This *apparently* is the thrust of the argument in NOVICK, *supra* note 157, at 351–52, 477–78 n.65.

necessary conditions for this Holmes' "three generations" language. In other words, but for his legitimating belief in racial eugenics, Holmes never would have considered writing such words even if they had been suggested to him by others; and but for Taft's note, although Holmes still would have written the majority opinion, his sense of discretion (and personal intellectual ambition) would have led him to conceal the true harshness of his thoughts.[162]

Will the real Holmes please stand up? Was it Holmes the unbending ideologue, Holmes the rational coalition-builder, or Holmes the crafty ideological opportunist who wrote "Three generations of imbeciles are enough?" Suppose that the real Holmes, contacted in a seance, were to groan to us from the Other Side: "No, you've got it all wrong! I wrote those words because I thought it was my duty as a judge to defer to legislative judgments on matters of social policy. The phrase just came to me as I wrote, and I meant that the *legislature of Virginia* could reasonably conclude that three generations of imbeciles are enough. Taft's note and my personal beliefs had nothing to do with my choice of words." Even this dramatic and supernatural insight into the subjective consciousness of the real Holmes would not settle the problem of causation. At best it would give us grounds to construct a fourth Holmes: one whose words are imputed to his stated *motives.*

Motives and causes are two altogether distinct concepts in legal history. A scholar's knowledge of an historical actor's stated motives may allow her to eliminate causal explanations which are *based* on contrafactual motives. I said "may" because even then she cannot be sure that the stated motives were the real ones—people do sometimes misstate their motives. But even if we think that the stated motives were the real ones, our conviction would not affect the plausibility of those explanations in which the actor's behavior was imputed to something other than his motive. Some kinds of scholarship plausibly count the actor's motives as mere legitimations for conduct caused by something else which was acting upon and through him, but about which he had limited or no conscious awareness. Were this not so, an historian could never have anything meaningful to say about why people had the preferences they said they had; and scholars writing history from the standpoint of ideology or psychology would have look for another line of work.

Since the real Holmes cannot be contacted from beyond the grave, we will never know for sure even what motivated him (let alone what

162. *Cf.* Kelley, *supra* note 159, at 482–83 (noting Holmes' "vast" intellectual ambition).

caused him) to pen his "three generations" line. If we want to write imputational history, therefore, we have no alternative but to breathe life into one or more of our three Holmeses. That is, we must *choose* which of the various aspects of what little is known about Holmes and this case (a lot more, I repeat, than is known about most other judges and most other cases) to *emphasize*. "A single explanation of a fact," wrote William James, "only explains it from a single point of view."[163]

* * * *

If theories are caricatures of causation (because they leave too much out, and therefore exaggerate what is put in), pretheoretical descriptions are, for the same reason, caricatures of the reality that theories are supposed to explain. The reality of what happened in the past is far too complex, and the available historical record is far too meager, for historians to relate even the simplest of events *wie es ist eigentlich gewesen* ("as it really happened").[164] Few authors have made this point more clearly than Carl Becker:

> What is the historical fact? Let us take a simple fact, as simple as the historian often deals with, viz.: "In the year 49 B.C. Caesar crossed the Rubicon." A familiar fact this is, known to all, and obviously of some importance since it is mentioned in every history of the great Caesar. But is this fact as simple as it sounds? Has it the clear, persistent outline which we commonly attribute to simple historical facts? When we say that Caesar crossed the Rubicon we do not of course mean that Caesar crossed it alone, but with his army. The Rubicon is a small river, and I don't know how long it took Caesar's army to cross it; but the crossing must surely have been accompanied by many acts and many words and many thoughts of many men. That is to say, a thousand and one lesser "facts" went to make up the one simple fact that Caesar crossed the Rubicon; and if we had someone, say James Joyce, to know and relate all these facts, it would no doubt require a book of 794 pages to present this one fact that Caesar crossed the Rubicon. Thus, the simple fact turns out to be not a simple fact at all. It is the statement that is simple—a simple generalization of a thousand and one facts.[165]

We may disclaim any explicit theoretical pretensions—that is, we may think we are just describing the past—but pretheoretical assumptions about the significance of facts guide us nonetheless. The assumption of a fact's significance is but another name for a way of being in

163. JAMES, *supra* note 49, at 6.

164. The quotation is from Carl L. Becker, *Detachment and the Writing of History, in* DETACHMENT, *supra* note 46, at 3, 6. The intellectual history of the aspiration in American historiography to relate the past "as it really happened" is ably treated in NOVICK, *supra* note 50.

165. Carl L. Becker, *What Are Historical Facts?, in* DETACHMENT, *supra* note 46, at 41, 43–44.

which the scholar frames her theories *in advance* (pre-consciously) by selecting those facts which explicit theory seems to "fit" later on. And why wouldn't it fit?: Our future theory is "present" in the very criteria we use to select what facts to put in and leave out of our description. For example, as the foregoing passage from Becker implies, Caesar's significance to us draws our attention to *his* having crossed the Rubicon. We don't talk about the bakeshop mules Caesar had with him earlier that day as having crossed the Rubicon (even though they may have done so).[166] We think Caesar was important, in the sense that his actions and personality produced certain historically important consequences, including this crossing, which we think had historically important consequences in its own right; that is why we are interested in Caesar and the Rubicon. We also think Caesar would have gotten across the river with or without the mules; that is why we don't mention them in our description of the event.

Thus, when we say that Caesar crossed the Rubicon we not only describe the real event by means of a caricature, we also make certain implicit causal claims. For example, one implicit claim is that Caesar (not the mules) caused the crossing; another is that Caesar's crossing of the river is worth writing about at all because it was causally connected to later events that are also worth writing about (whether by ourselves or someone else). To illustrate: we simply are not interested in mules or other modes of transport; hence either we fail to ask whether any bakeshop mules crossed the Rubicon with Caesar, or we consider the very question boringly irrelevant. Were we historians of transportation or muleophiles, however, we might have an altogether different view about these beasts' importance, and we might spend a considerable amount of time trying to learn if Caesar rode them across the river. And if our scholarly interests were oriented in a mulish direction, we might discover facts which we would not have even looked for in the absence of such interests. For instance, we might learn that but for the mules, Caesar never would have crossed *when* he did, and hence Pompey would not have fled Rome, and hence the course of history would have been radically different.[167] Alternatively, we might learn that the mules returned to their bakeshops, and thus

166. Suetonius mentions the mules and that Caesar got lost and went on foot to the river. But alas, we don't know if the poor mules made the crossing. 1 SUETONIUS 45–47 (J.C. Rolfe trans., 2d ed. 1951). Plutarch does not mention the mules at all. PLUTARCH, TWELVE LIVES 325–26 (John Dryden trans., 1950).

167. Because Caesar crossed the Rubicon with his army *when* he did, Pompey (the Senate's general) was forced to withdraw to Brindisi. As a result, Caesar entered Rome unmolested, and was able to break open the public treasury to obtain the funds he needed to wage a successful war. *See* STRINGFELLOW BARR, THE MASK OF JOVE: A HISTORY OF GRAECO-ROMAN

had nothing to do with Caesar's crossing. Either way, our unthematized causal intuition would orient our quest for the facts—a point to which I will return in section VII.

Lest we think that modest descriptions of legal history are immune from implicit causal statements of the sort described above, ponder these questions: Why does *Shepard's Federal Law Citations in Selected Law Reviews* show over 200 citations to John Marshall's opinion in *McCulloch v. Maryland,*[168] but nary a one to his boring land law opinion in *McArthur v. Browder,*[169] decided the same term? and Why do all but one of the 200 citations to *McCulloch* omit any reference to Associate Justice Thomas Todd's role in that decision?[170] Some widely shared criterion of importance—that is, *causal* significance—has made legal historians care about *McCulloch* (but not *Browder*), and about Marshall's (but not Todd's) role in deciding the *McCulloch* case. To give still another example, why has it taken so long for legal historians even to begin noticing that, yes indeed, women may have experienced the legal system differently than men?[171] Implicit causal claims are everywhere in legal historiography. We thus cannot escape the need to pay attention to methodology simply by eschewing theory in favor of description.

## VI

This section discusses how the essay's ideal-typical scholar draws upon her own experience in order to create a context of plausibility for all five methodologies and the causal types which they generate. Then

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CIVILIZATION FROM THE DEATH OF ALEXANDER TO THE DEATH OF CONSTANTINE 157 (1966).

168. 17 U.S. (4 Wheat.) 316 (1819).

169. 17 U.S. (4 Wheat.) 488 (1819).

170. Sanford Levinson, Book Review, 75 VA. L. REV. 1429, 1439 (1989) (questioning the propriety of Todd's participation in the case, given that he was an organizer, supporter, and original stockholder of the Bank of the United States). Levinson does not mention the following statement from the beginning of the volume in which *McCulloch* appears: "Mr. Justice Todd was absent the whole of this Term, on account of indisposition." 17 U.S. (4 Wheat.) iii n.1 (1883). Either way, why do most legal historians think that Todd is not worth mentioning in connection with the *McCulloch* decision, unless on the ground (a) they never thought about it, and hence their claims about the case implicitly suppress whatever causal role Todd played, or (b) they conclude that his presence on (or absence from) the Court was causally insignificant?

171. *See, e.g.,* Norma Basch, *Relief in the Premises: Divorce as a Woman's Remedy in New York and Indiana, 1815–1870,* 8 LAW & HIST. REV. 1 (1990); Elizabeth B. Clark, *Matrimonial Bonds: Slavery and Divorce in Nineteenth-Century America,* 8 LAW & HIST. REV. 25 (1990); Judith K. Cole, *A Wide Field for Usefulness: Women's Civil Status and the Evolution of Women's Suffrage on the Montana Frontier, 1864–1914,* 34 AM. J. LEGAL HIST. 262 (1990); Eileen Spring, *The Heiress-at-Law: English Real Property Law from a New Point of View,* 8 LAW & HIST. REV. 273 (1990).

I will state the basis on which she decides when one causal account is more plausible (i.e., "causally adequate") than others. The five methodologies are loosely grounded in the phenomenological tradition: that is, they attempt to describe being as it *appears* to consciousness.[172] The idea of causal adequacy is Weberian.

* * * *

Historical reality is like a loaf of bread. Each of the five methodologies cuts it at a different angle, but the resulting slices are all made of bread notwithstanding their disparate shapes. A methodology must "make sense" to a scholar—capture some aspect of reality that is comprehensible and meaningful to her—or else she will not perceive it to be a viable research tool. Our scholar reasons that each premise about human behavior informing the essay's five methodologies corresponds to some aspect of human experience which makes that premise seem at least plausible to anyone who has ever had the experience. Thus:

(1) We sometimes want what we can't get, or feel that although there must be a better way to live, we simply can't figure out what it is—hence the plausibility of *obstructionism.*

(2) We sometimes feel that a course of action is natural or inevitable, that our preferences have been influenced or manipulated by others, or that we are required to do things because our beliefs tell us they are right, rather than expedient—hence the plausibility of *determinism.*

(3) We sometimes feel that we figure out and then coolly choose the course of action that is best suited to achieving our aims in life (or, as Weber put it, overstating his case, "we associate the highest measure of an empirical 'feeling of freedom' with those actions which we are conscious of performing rationally")[173]—hence the plausibility of *rationalism.*

(4) We sometimes feel ourselves reacting emotionally or unpredictably to a situation about which we have conflicting attitudes, and then picking a course of action that we can't fully rationalize or justify to ourselves—hence the plausibility of *dialectical individualism.*

(5) Finally, we sometimes believe that we understand why *other* people do things, based on what we think we "know" about their par-

172. *See* HEIDEGGER, *supra* note 100, at 49–63; Gabel, *supra* note 33, at 604 n.4. They also integrate Durkheim and Weber in the manner suggested by Peter Berger: "[The] affirmation of introspection as a viable method for the understanding of social reality *after* successful socialization may serve to bridge the apparently contradictory propositions of Durkheim about the subjective opaqueness of social phenomena and of Weber about the possibility of *Verstehen.*" BERGER, SACRED CANOPY, *supra* note 46, at 189 n.21.

173. WEBER, METHODOLOGY, *supra* note 8, at 124.

ticular life circumstances—hence the plausibility of *particularism,* and indeed, the plausibility of *any* kind of history-writing that isn't purely autobiographical.

Our scholar notices that in each of the foregoing cases from everyday life, we impute the outcome to something which we have subjectively experienced in terms that we could and often do *describe* as causal. Experience in this context does not necessarily mean conscious and ex ante reflection. For instance, the unreflective acceptance of things as they are is no less an experience (a phenomenon) than the deliberate calculation of ends and means. As Heidegger put it, a person *always* acts in such a manner that his being is an issue for him, "even if this is only [in] the mode of fleeing *in the face of it* and forgetfulness *thereof.*"[174] Thus, our scholar concludes that all five methodological types are "real" in one very important sense of the word: Each captures a phenomenological reality that must have been present (at least once) in the subjective experiences of any legal historian who finds the methodology plausible enough to use in researching the past. If the methodological types capture what the *historian* has experienced, it seems but a small step to conclude that they might capture what was "present" in the experience of the actors whose behaviors the historian wants to impute to a cause. And although that which an actor experiences as a cause is not *the* cause (since no one thing ever is), at least it can be used to construct *a* causal account. Moreover, as I explained in parts III and IV, the ultimate theoretical structure to which all five methodological types refer *as a whole* is not the experience of an isolated, asocial self—it is always the experience of a self who is embedded in a social context.

Most actual legal historians would admit to having experienced all five of the imputational feelings noted above. But the essay's ideal-typical scholar not only has experienced all of these feelings, she is self-conscious about their implications for her work. *She believes that any type of cause that has been experienced in causal terms by an observer in her own life can become a plausible foundation on which the observer can construct a causal narrative about the actions of those who lived in the past.* Each of the five methodologies interprets the conduct of past legal actors in a manner that Weber called "subjectively adequate" (or "adequate on the level of meaning"). That is to say, the component parts of any interpretation grounded in one of the methodologies, "taken in their mutual relation, are recognized [by an observer] to constitute a 'typical' complex of meaning;" and the ade-

174. HEIDEGGER, supra note 100, at 69.

quacy of the observer's "recognition" is always (and inevitably) judged *"according to our habitual modes of thought and feeling."*[175]

An account's adequacy on the level of meaning is the application of an ideal type to the subjective processes of historical actors. It is probably true, as Weber noted, that "[i]n the great majority of cases actual action goes on in a state of inarticulate half-consciousness or actual unconsciousness of its subjective meaning."[176] Still, the construction of an account "as if" the relevant actors were proceeding on the basis of self-conscious meaning is the only way the question Why? can be *coherently* answered by a legal historian. Structuralism becomes incoherent without some conception of human agency because humans are necessary to keep structures alive: There was no public/private distinction, for example, during the Age of Dinosaurs. The archetypical structuralist's rejection of the individual's capacity to generate meaning independently, and his claim that surface or conscious meanings are but artifacts thrown off by structure,[177] make sense only because they are plausible reconstructions of at least some kinds of subjective experience. If no human being ever *felt* constrained by social products, then structuralism as a technique for understanding social life would have no plausibility—indeed, it probably never would have occurred to anyone in the first place. Seen from the standpoint of structuralism, therefore, the concept of adequacy on the level of meaning is an effort to make explicit the behavioral assumptions that make structuralism coherent; it is an effort to retrieve the agent who instantiates structure.

Duncan Kennedy's article *Freedom and Constraint in Adjudication: A Critical Phenomenology* is an excellent example of what I mean. An actual left-leaning federal judge asked by an employer to enjoin a union's lie-in campaign may or may not engage in the kind of elaborately self-conscious thinking that Kennedy describes; but the phenomenology of judging which Kennedy depicts—of feeling both constrained by legal structures, yet at the same time free to play in their interstices—is exactly what one would expect a judge to experience *if* he were fully conscious of the meaning of his action in a case where his initial perception of "The Law" is in conflict with "How I Want to Come Out."[178] Kennedy notes that there may very well be "no experience of legality that's constant without regard to role and initial posture of the case;" still, he feels the need to reconstruct "*some*

175. 1 WEBER, ECONOMY AND SOCIETY, *supra* note 46, at 11 (emphasis added).
176. 1 *id.* at 21.
177. *See, e.g.*, Heller, *supra* note 34, at 144.
178. Kennedy, *Critical Phenomenology, supra* note 46.

particularization" of judging as a benchmark for comparison with actual, lived historical reality.[179] Without a benchmark of subjective meaning "connecting" the way Judges *A, B, C, D, E,* and *F* responded to situations which the historian thinks were similar, legal history takes on the appearance of a mass of unrelated and meaningless individual occurrences. And while legal history may very well "be" utterly meaningless from a nonhuman perspective, legal historians ask Why? precisely because they wish to understand, not simply gaze at, the past.

A concrete illustration will help clarify the concept of an account's adequacy on the level of meaning. Consider the interesting way that published American appellate decisions from the nineteenth century solved the problem of how to measure damages in suits brought by public officials who were improperly denied the right to serve their full term of office. By and large the cases held that, first, public officials were entitled to their positions as quasi-property owners, not as mere "employees;" second, public officials who were denied their rightful offices, unlike all other kinds of wrongfully discharged workers, had no duty to mitigate damages by taking another job; and third, public officials who were wrongfully ousted or prevented from taking office were thus automatically entitled to recover all the wages they would have earned had they served out their terms.[180] Since the judges who decided these cases were themselves public officials who might have feared that some day they would be ejected from their rightful office by spiteful politicians, an account which imputed their decisions to a rational choice to protect their own interests would be adequate on the level of meaning. In other words, it makes *sense* to our scholar that these judges could have wanted to safeguard the security of their own jobs (didn't she seek academic tenure for the same reason?), and that they could have adopted a "neutral" legal rule, which created a strong disincentive for the government to fire *any* state official, as a subtle means of accomplishing their end. But this account is not the only one that would be adequate on the level of meaning. Also adequate would be an account imputing judges' decisions in these cases to their having followed an ideology of bureaucratic status honor,[181] or one in

179. *Id.* at 518.

180. *See, e.g.,* Jones v. Graham, 21 Ala. 654 (1852); Andrews v. Portland, 10 A. 458 (Me. 1887); People *ex rel.* Benoit v. Miller, 24 Mich. 458 (1872); Everill v. Swan, 57 P. 716 (Utah 1899); Kendall v. Raybould, 44 P. 1034 (Utah 1896). For an account of the mitigation rule as it was applied to "employees" in nineteenth century decisions, see Wolcher, *Privilege of Idleness, supra* note 32.

181. *See, e.g.,* 3 WEBER, ECONOMY AND SOCIETY, *supra* note 46, at 959 ("[T]he modern official . . . always strives for and usually attains a distinctly elevated *social esteem* vis-à-vis the

which the judges were depicted as feeling bound (irrespective of their interests) to adhere to the "logic" of earlier cases, like *Marbury v. Madison,*[182] holding that public officials had "vested" rights to their offices.

All three of the foregoing accounts would be adequate on the level of meaning, but not because they capture what really was going on in judges' minds when they decided these cases. If our scholar knew how the judges subjectively experienced their relationship to these cases, as they decided them, then only one (or none) of the foregoing accounts would be an accurate depiction of subjective meaning.[183] But since she does not have access to this data (indeed, even the judges in question did not), all three accounts are adequate on the level of meaning because each of them relies on what Weber called a "theoretically conceived *pure type* of subjective meaning attributed to the hypothetical actor or actors in a given type of action"[184] —that is, each relies on a (different) causal mechanism which *could* have been "present" in the judges' experience and which is *comprehensible to our scholar in causal terms, given her own experience as reconstructed phenomenologically.* Of course, that which is comprehensible to our scholar in causal terms may be incomprehensible to someone else—for example, circumstances allowed the women (but not the men) in Susan Glaspell's short story, *A Jury of Her Peers,* to impute a man's death to his having abused his wife one too many times.[185] And I hasten to say that an account's "adequacy on the level of meaning" and its "causal ade-

governed."). For a useful definition of "status group," see 1 *id.* at 306–07. Granted that the *existence* of the ideology could be imputed to the "interests" that were shared by all members of the bureaucratic status group, once in place the ideology easily could have obscured its direct connection to self-interest in the minds of the *individual judges* on whom it acted in particular cases. If the account said that the judges who rejected any mitigation requirement for public officials did so because they thought this was the "right" thing to do (in light of their beliefs about the exalted nature of the state bureaucracy), then it would be deterministic, not rationalistic, even though the judges' decisions may have had the effect of advancing their own interests.

182. 5 U.S. (1 Cranch) 137, 161 (1803).

183. As Weber puts it, although an observer must reason "as if action actually proceeded on the basis of clearly self-conscious meaning[, t]he resulting deviation from the concrete facts must continually be kept in mind whenever it is a question of this level of concreteness, and must be carefully studied with reference both to degree and kind." 1 WEBER, ECONOMY AND SOCIETY, *supra* note 46, at 22.

184. 1 *id.* at 4.

185. Susan Glaspell, *A Jury of Her Peers* (1917) (short story, on file with the *Washington Law Review*); *see* Marijane Camilleri, Comment, *Lessons in Law from Literature: A Look at the Movement and a Peer at Her Jury,* 39 CATH. U. L. REV. 557, 592 (1990) ("In *A Jury of Her Peers,* the reader confronts the moral alternatives posed by the masculine and feminine perspectives . . . ."). *See generally* THEORETICAL PERSPECTIVES ON SEXUAL DIFFERENCE (Deborah L. Rhode ed., 1990); Catharine MacKinnon, *Feminism in Legal Education,* 1 LEGAL

quacy" are two different properties—an extremely important distinction that will be made clear below. For the moment, however, it is enough to note that whatever her personal context (race, gender, class, individual upbringing, etc.) may be, our scholar's self-consciousness concerning the partial but plausible character of all five methodologies empowers her, ex ante, to view historical reality from multiple perspectives. For reasons already given, she does not believe that it is possible to acquire what Weber described as a "monistic knowledge of the totality of reality in a *conceptual* system of metaphysical *validity.*"[186] The essay's legal historian, being acutely self-conscious about methodology, never conflates her causal explanation with the "true cause" of the judicial outcomes she is investigating. She feels free to "try out" multiple points of view, oriented to different dimensions of reality, and she is not prepared to reject out of hand any cause assigned by the perspective she adopts. Her ontological attitude gives her the cognitive capacity to do this whether or not she thinks, ex ante, that any one methodological point of view will generate more rewarding insights than another.

It should be clear by now that the concept of "false consciousness" in its most vulgar epistemological form[187] plays no part in how our scholar goes about reconstructing legal history. She denies that any observer could ever attain a neutral position (utterly unfettered by "false consciousness") from which to comprehend the total objective reality that was the situation in which historical figures lived and acted—a global situation which (so the concept of false consciousness implies) the historical figures themselves *could* have seen if only their interests and ideologies hadn't hidden it from them.[188] All consciousness is false consciousness, in the sense that human categories always fall short of comprehending reality as it is;[189] or, to borrow Duncan

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EDUC. REV. 85, 87 (1989) (defining feminism as "the theory of [women's] standpoint" for perception and understanding).

186. WEBER, METHODOLOGY, *supra* note 8, at 85.

187. *See* Phillip E. Johnson, *Do You Sincerely Want to Be Radical?,* 36 STAN. L. REV. 247, 289 (1984) (ridiculing the view that there is a " 'true consciousness' in comparison to which all differing world views are degrees of 'false consciousness' ").

188. *See* SAYER, *supra* note 126, at 51 (citing 1844 Paris Manuscripts to show that Marx believed in the existence of an objective core of human "species being"—the need and capacity to create—from which capitalism alienated workers); Leonard Kaplan, *Without Foundation: Stanley Fish and the Legal Academy,* 16 LAW & SOC. INQUIRY 593, 609 (1991) (book review) (noting Marx's "crypto-idealism").

189. As Jon Elster puts it, alienation—the phenomenon in which human objectivations come to dominate their makers as things—"is, inevitably, embedded in the human condition." ELSTER, *supra* note 15, at 481; *cf.* Allan C. Hutchinson & Patrick J. Monahan, *Law, Politics, and the Critical Legal Scholars: The Unfolding Drama of American Legal Thought,* 36 STAN. L.

Kennedy's apt phrasing, "we're all hallucinating, all the time."[190] For example, an ideology of free labor was prevalent in late nineteenth century American judicial circles. The ideology specified (to grossly oversimplify one of its versions) that workers were and should be completely free from government interference with their constitutional liberty to sell their labor on whatever terms, short of illegality, that they chose. Suppose our scholar concludes that this ideology probably prevented judges from seeing or appreciating the degraded and slave-like conditions in which a goodly portion of the industrial proletariat of that era actually worked and lived.[191] The consciousness that this ideology produced was undoubtedly "false" in the narrow sense that it obscured the capacity of judges to comprehend certain kinds of experience. But granted that the ideology had this effect, our scholar nonetheless does not suppose that if the ideology had been otherwise (say, if judges believed in a "republican" version of the free labor ideology, in which freedom entailed the ownership of productive property),[192] the resulting perceptions of social arrangements would have been any more "true" or any less "false" than the perceptions of social arrangements that actually existed. (Whether the social arrangements themselves would have been better or worse is, of course, another question altogether.)[193] Rather, it is enough for our scholar to know that the resulting social arrangements would have been *different* because of the different ways the two versions of the free labor ideology would have structured judges' perceptions of reality. To the extent, therefore, that the concept of false consciousness means merely that human beings always construct their own versions of reality, and that as individuals they often, even usually, "forget" that their categories are constructed and thus contingent human products,[194] it adds nothing that is not

REV. 199, 230 n.132 (1984) ("[a]ll consciousness is false consciousness. . . ."). For contrary viewpoints, see Gabel, *supra* note 43, at 314 ("true needs of the human heart" juxtaposed against "distorted needs which have emerged from the operation of a market organized for profit"), and Don Herzog, *I Hear a Rhapsody: A Reading of* The Republic of Choice, 17 LAW & SOC. INQUIRY 147, 156 (1992) (book review) (defining ideology as "a set of beliefs true enough to supply a reasonably accurate account of society but false enough to make society look better than it really is").

190. Gabel & Kennedy, *supra* note 24, at 40.

191. *See* McCurdy, *supra* note 81, at 29.

192. *See* William E. Forbath, *The Ambiguities of Free Labor: Labor and Law in the Gilded Age*, 1985 WIS. L. REV. 767, 769.

193. *Cf.* Gabel & Kennedy, *supra* note 24, at 40 (Although "we're all hallucinating, all the time," this does not mean that an observer can't say: " 'You're having a yucky hallucination.' 'Why are you choosing to hallucinate it that way?' ").

194. "It is not the immutable natural reality assumed by positive science that is concealed [by legal ideologies] . . ., but alternative social constructions forged from diverse experiences and competing visions. By rejecting alternative interpretations, legal ideologies are powerful to the

already captured by the methodologies of obstructionism, determinism, and dialectical individualism.

* * * *

Our scholar does not think that "anything goes" in writing legal history. But she does think that her own (necessarily selective) research was what constructed the historical text in the first place. Awareness of this fundamental point teaches the essay's ideal-typical scholar humility. She knows that if bread is bread, then no one slice of it is prima facie any more breadlike than another.

For example, when those many antebellum Northern judges who believed that slavery was immoral and should be abolished handed down decisions returning fugitive slaves to their masters, did they behave this way because their sense of judicial "role" demanded that they suppress their personal beliefs (as Robert Cover claimed in *Justice Accused*)?[195] Or did they act that way because they calculated that this strategy (due to the abhorrence they thought it would provoke in public opinion)[196] would bring an end to slavery much faster than if they found loopholes to let go as many individual slaves as possible? The first cause may seem more plausible to us than the second, but that is because (in part) we have knowledge about what actually happened that these judges lacked—knowledge which exerts a sort of hydraulic pressure on our causal judgment notwithstanding our best efforts to resist its influence. We think that the hypothesized strategy to draw attention to slavery's brutality (if it was a strategy) failed to hasten slavery's demise. But its failure in fact (and how are we sure that it failed?) does not mean that it wasn't a strategy. And if it *was* a strategy (a reasoned choice as opposed to an ideological kneejerk) then it could be made into a plausible cause of these judges' decisions—much as Justice Powell imputed Chief Justice Burger's extravagant majority opinion protecting the snail darter against extinction to a strategy to provoke Congress into amending or repealing the Endangered Species Act.[197]

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extent that they also deny that they are themselves constructions." *From the Special Issue Editors, supra* note 115, at 633; *cf.* UNGER, FALSE NECESSITY, *supra* note 46, at 32.

195. COVER, *supra* note 111, at 6–7.

196. *Cf.* Daniel R. Ernst, *Legal Positivism, Abolitionist Litigation, and the New Jersey Slave Case of 1845*, 4 LAW & HIST. REV. 337, 364–65 (1986).

197. Tennessee Valley Auth. v. Hill, 437 U.S. 153, 210–11 (1978) (Powell, J., dissenting). Shortly after the Supreme Court rendered its decision in *Tennessee Valley Authority*, Congress amended the Endangered Species Act. *See* ROBERT V. PERCIVAL ET AL., ENVIRONMENTAL REGULATION: LAW, SCIENCE, AND POLICY 1098 (1992). *See also* L. Gordon Crovitz, *Rescuing Contracts from High Weirdness*, WALL ST. J., Aug. 3, 1988, at 18 (imputing "conservative Judge Alex Kozinski['s]" opinion in Trident Ctr. v. Connecticut Gen. Life Ins. Co., 847 F.2d 564 (9th

Thus, for example, if old letters recently found in attics were to reveal that some antislavery judges thought their decisions enforcing the Fugitive Slave Act would open people's eyes to the need to abolish slavery, rationalism would give our scholar an acceptable basis on which to impute these judges' decisions to a calculated strategy. But given enough knowledge about the content of the judges' abolitionist beliefs, our scholar could also deterministically impute their decisions to the utopian thought system that made them want to do away with slavery in the first place. And finally, if our scholar were to discover that most Northern abolitionists also believed that blacks were fundamentally different from (if not inferior to) whites,[198] obstructionism would permit her to construct an account imputing these decisions to judges' inability to "see" the full measure of human suffering that their strategy inflicted on the individual black people whom they sent South in chains. Given enough evidence to support them, no one of these causal accounts would be "truer" than any other; rather, each account would be *partially* true. Indeed, all three versions of causation strung together would do far more to satisfy our scholar's curiosity about why these decisions happened than any one account standing alone. This illustration shows why she continues to subscribe to both *The Journal of Legal Studies* (that rationalistic rag!) and *Science & Society* (that font of Marxist structuralism!).

Rationalism, determinism, and obstructionism complemented one another in the foregoing example. Although each methodology examined the total reality that "was" these antebellum decisions from a different perspective, the causal stories they told were not inconsistent with one another. In any given case, multiple methodologies thus may be capable of generating accounts which are all adequate on the level of meaning. However, it will not always be the case that several accounts of the same historical event will be equally plausible. The facts may render some accounts more "causally adequate" than others.

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Cir. 1988), refusing to enforce the parol evidence rule in a diversity case, to a strategy which was designed to "embarass the judicial activists [in California] into retreat").

198. *See, e.g.*, DAVID M. POTTER, THE IMPENDING CRISIS, 1848–1861, at 36 (1976) (noting prevalence of "Negrophobia" among most antislavery whites); Richard L. Aynes, *The Antislavery and Abolitionist Background of John A. Bingham*, 37 CATH. U. L. REV. 881, 932 n.406 (1988) (noting the racism of Northern abolitionists). Compare the following remarks by Lincoln during one of the Lincoln-Douglas debates: "What next? Free [the slaves], and make them politically and socially, our equals? My own feelings will not admit of this; and if mine would, we well know that those of the great mass of white people will not." Abraham Lincoln, Speech at Peoria, Illinois (Oct. 16, 1854) *in* II THE COLLECTED WORKS OF ABRAHAM LINCOLN 256 (Roy P. Basler ed., 1953).

Our scholar borrows the concept of causal adequacy from Weber. As I will explain in a moment, an account's causal adequacy, like its adequacy on the level of meaning, is grounded ultimately in an observer's own personal experiences and knowledge. Nevertheless, the causal adequacy of an account imputing particular judicial outcomes to a cause always depends, in the first instance, on there being enough empirical evidence (enough text) to support it. The words "empirical evidence" should not be read to avow the existence of a one-to-one correspondence between facts and reality: Our scholar knows that the facts she uses to assess the causal adequacy of an account are the product of a dialectic between the historical archives she reads and the meaning she gives the archives by applying one or more of the five methodologies. Facts, in short, are neither more nor less than ideal types. (Remember Caesar and the Rubicon?) The procedure by which our scholar discovers and gives meaning to the facts will be discussed in the next section. For the moment, however, it is sufficient to state that she is able to distinguish phenomenally between a condition in which she is conscious that there are facts before her concerning the causes of past judicial outcomes, and a condition in which her ignorance leads her to conclude that she hasn't the slightest idea what the causes were.

As Weber put it, only facts (interpreted in light of "established generalizations from [her] experience") allow an observer to draw an adequate causal inference—that is, an inference, "always in *some* sense calculable, that a given observable event (overt or subjective) will be followed or accompanied by another event."[199] Calculability in this context does not imply that the degree of an account's causal adequacy can be stated "scientifically," in the sense of that term as it is sometimes employed in the physical sciences, whereby causal relationships are stated as numerical propositions. Rather, the notion of calculability appeals to what Weber called an observer's "nomological" knowledge: knowledge "relating to the ways in which human beings are prone to react under given situations" and deriving from "our own experience and our knowledge of the conduct of others."[200] This phenomenally rooted knowledge provides our scholar with the basis on which she reaches her judgments about when an account is causally adequate: "judgments which assert that as a result of certain situations, the occurrence of a type of reaction, identical in certain respects,

199. 1 WEBER, ECONOMY AND SOCIETY, *supra* note 46, at 11, 12 (emphasis added).

200. WEBER, METHODOLOGY, *supra* note 8, at 174.

on the part of those persons who confront these situations, is 'favored' to a more or less high degree."[201]

Thus, for example, generalizations from experience might allow our scholar to conclude that, although antislavery judges may have acted strategically when they returned runaway slaves to their masters, the weight of known evidence better supports (i.e., makes more plausible) an interpretation which is based on judges having sacrificed their moral principles to their sense of judicial "role." The truth is that no letters confessing strategic thinking on the part of antislavery judges have yet been located, while the documents to which our scholar does have access express these men's strong commitment to the principle that judges should do their impersonal duty by following the law, regardless of what their consciences demanded.[202] So our scholar performs a crucial thought experiment involving the one fact (in this case an ideology) that she does have grounds to believe existed in the consciousness of antislavery judges: If she assumes that the ideology of judicial restraint did not exist, or was modified to permit greater judicial activism in the service of an individual judge's conception of morality, would "the course of events, in accordance with [her knowledge of] general empirical rules, have taken a direction in any way different in any features which would be *decisive* for [her] interest?"[203]

Our scholar's own experience (as lawyer and law professor) reveals to her how powerful the demands of a role can be—Why is it, for example, that year after year she teaches the rules of contract formation (however artfully) to her first-year classes, when she would much rather be teaching them about how people really do exchanges in the extralegal world, or even about how contracting behavior is portrayed in poetry?[204] Moreover, she has seen strong evidence (in the context, for example, of German judges' complicity with the Nazi regime) that otherwise upright people can reach results that horrify them by subordinating their personal moral beliefs to their conception of what the judicial office demands of them. Release or lessen the constraints of a role, she knows from experience, and personal preferences stand a greater chance of being expressed and acted upon. If these Northern antebellum judges hated slavery as much as they said they did (in their

201. *Id.* at 183.

202. *Cf.* COVER, *supra* note 111, at 226–29, 238–56 (evidence concerning the responses of antislavery jurists Joseph Story, John McLean, Lemuel Shaw, and Joseph Swan).

203. WEBER, METHODOLOGY, *supra* note 8, at 180.

204. *Cf. Essay: Selected Poems on the Law of Contracts,* 66 N.Y.U. L. REV. 1533 (1991) (Douglass Boshkoff ed.); Louis E. Wolcher, *Annotated Contracts Haiku,* 42 J. LEGAL EDUC. 141 (1992).

private lives), our scholar reasons, they *probably* never would have forced people back into bondage unless their moral beliefs had not been countermanded by a stronger belief in the ideology of judicial restraint. Her conclusion is stated in terms of probability because she knows it is entirely possible that antislavery judges would have sent runaway slaves South even if the ideology of judicial restraint did not exist. She can imagine many scenarios in which this might have been so,[205] but she agrees with Robert Cover that these scenarios are "entirely speculative, fictional really, given the data we have for these judges."[206] She has thus "proved" in her mind that but for the ideology of judicial restraint, these decisions probably would have turned out differently. Employing a methodology (say, dialectical individualism), she now feels justified in imputing the actual decisions to the cognitive dissonance that she supposes was engendered in judges' minds by the unbearable conflict between their strong antislavery beliefs and their strong commitment to judicial restraint.[207] And this account has proved itself to be more causally adequate than a strategy-based account *not* because the same kind of thought experiment couldn't be performed with the latter, but because there are no facts (no text she has constructed) which suggest that such an experiment ought to be run in the first place.

Thus it is that the attributes of "adequacy on the level of meaning" and "stating the facts" must coalesce in an historical interpretation before our scholar can judge whether it is relatively more plausible than some other interpretation. The presence of one attribute alone will not suffice for this purpose, as this passage from Weber's *Economy and Society* makes clear:

> If adequacy in respect to meaning is lacking, then no matter how high the degree of uniformity [of the facts] and how precisely its probability can be numerically determined, it is still an incomprehensible statistical probability, whether we deal with overt or subjective processes. On the other hand, even the most perfect adequacy on the level of meaning has causal significance . . . only insofar as there is some kind of proof for the

205. *Cf.* COVER, *supra* note 111, at 227 n.*:

> [I]t may have been the case that 'deep' urges to hurt, to exercise power, to cause suffering existed in some antislavery judges; that their antislavery ideology represented a defense mechanism against their own threatening urges; and that the compulsion to obey role norms where they led to enslavement was at once a gratifying opportunity to hurt a victim with ostensible justification, and a threat to the defense structure of antislavery ideology.

206. *Id.*

207. *Cf. id.* at 226–29 (offering "The Dissonance Hypothesis" to account for these decisions).

> existence of a probability that action in fact normally takes the course which has been held to be meaningful.[208]

To illustrate: We imagine, plausibly, that judges (just like us and most other people we know) want to get paid for their work and do things to increase the chances that they will be paid. But this interpretation of what we suppose judges' motivations to be, no matter how adequate on the level of meaning, explains no facts and thus is causally inadequate. On the other hand, suppose we observe that on the first work day of every month, month after month, 99.9% of all judges personally scurry to their courthouse mailboxes at 10:00 a.m., take out an official-looking envelope, rip it open, and remove a document (entitled "Check") on which is written their name and a significant sum of money. These empirical observations alone, no matter how regular and predictable they make the judges' behavior seem, explain nothing, since they fail to impute the judges' behavior to a cause. For an historian, only when "facts" and "meaning" are combined, through the *use of a methodology* (in this case methodological rationalism seems the most obvious—but by no means the only—candidate), does an account of the judges' curious envelope-ripping behavior become causally adequate: They did it, for example, because they wanted their pay. Causation, in short, implies a connection between concrete individual behavior and some antecedent condition which is comprehensible to the historian because she imagines that it could have been experienced in causal terms by human beings.

Historical facts are the nuggets that our scholar digs and weighs. But the *meaning* she gives the facts—through the self-conscious practice of one or more methodology—is the scale by which she measures the causal adequacy of her account. Facts plus methodology (nuggets plus scale) are thus our scholar's answer to John Dewey's query, "[u]pon what grounds are some judgments about a course of past events more entitled to credence than are certain other ones?"[209] However, our scholar's five methodologies are far more than just scales to weigh pre-methodological "facts." The use of a methodology also generates new facts, and new meanings for old facts. For example, why did we even notice judges' envelope-ripping behavior, unless our antecedent choice to practice, say, methodological rationalism drew the behavior to our attention as a fact which tends to confirm that judges tend to pursue their individual economic interests (at least sometimes)? Our scholar thus knows, to continue the mining meta-

208. 1 WEBER, ECONOMY AND SOCIETY, *supra* note 46, at 12.

209. Dewey, *supra* note 125, at 163.

phor, that a methodology is simultaneously the pickax that extracts the facts, and the scale that weighs them.

## VII

This section provides an illustration to show how the concept of methodological self-consciousness "works" in practice. Our scholar first defines the content of the causal type each methodology finds significant and then combines that causal type with a particular assumption about human behavior. The behavioral assumption knowingly exaggerates one or more ways in which an acutely self-conscious individual would experience causation in her daily life. The net effect in every case is that our scholar expresses what caused particular judicial outcomes from the past in terms of an ideal-typical *process.*

* * * *

Suppose our scholar suspects that Doctrine *X* precluded legal actors from reaching Outcome *Y* during a particular historical period. To illustrate, she might hypothesize that for many years the tort doctrines of "proximate cause" and "duty" blocked the possibility that lawyers in this country would argue for, and judges would implement, a tort system that was relatively less obsessed with the perspective of the perpetrator of a harm, and relatively more "victim-oriented."[210] She has no named historical figure in mind, and thus can draw upon the biography of no one in particular to aid her in this investigation. Anyway, she wants to investigate Outcome *Y's* non-occurrence as a general phenomenon, rather than as the unique product of this or that named individual's idiosyncratic obtuseness. How might she use methodological obstructionism to generate a causal explanation of Outcome *Y's* non-occurrence? Regardless of what the ultimate details of her explanation may be, her use of this methodology entails three distinct steps: First, she must describe the content of Outcome *Y* (the explanandum); second, she must describe the content of Doctrine *X* (the explanans); and third, she must connect the two by expressing *how* it was that Doctrine *X* acted upon the historical figures who failed to reach Outcome *Y*. In steps one and two our scholar describes more or less static social facts (a "doctrine" and its "consequence" within the judicial process). Step three involves her in describing a dynamic

210. *See, e.g.,* Richard L. Abel, *A Socialist Approach to Risk,* 41 MD. L. REV. 695 (1982); Horwitz, *supra* note 148; Sanford Levinson, *Escaping Liberalism: Easier Said Than Done,* 96 HARV. L. REV. 1466, 1480–84 (1983) (discussing conflict between "perpetrator" and "victim" perspectives in tort law).

social process (how the doctrine caused the relevant individuals not to reach a certain result).

Outcome *Y*, since it never did exist, is unreal by definition. It is only one outcome plucked from a set which includes a well-nigh infinite number of outcomes that in some sense could have happened during a particular historical period, but didn't. Outcome *Y* is neither more nor less than our scholar's own mental construct, which in its original form probably came to her as a question—for example, Why didn't the legal system change (or change more rapidly) in response to the advent of mass production and its concomitant greater potential for inflicting personal injuries on workers and consumers? But she might just as easily have asked some other question—for example, Why wasn't the tort system Kaldor-Hicks efficient?[211] or Why didn't the legal system completely do away with suits by workers and consumers against manufacturers of defective products, as a crude but arguably effective means of subsidizing capitalists as a class? In other words, something about our scholar's values and interests caused her to ask the question she did;[212] but whatever it was that caused the question to arise in her mind, the very act of asking it ipso facto defines Outcome *Y*. The hypothesis is that Outcome *Y* (say, a "victim-oriented tort system") was stuck on the dark side of Doctrine *X*—invisible or unreachable for those who were transfixed by *X's* brightness. Outcome *Y* (what didn't happen) acquires *its* meaning and content in our scholar's mind only in contrast to Doctrine *X* (what did happen). The latter's historical content thus generates them both. How, then, does our scholar go about describing Doctrine *X*?

The relationship between a legal historian's descriptive reconstruction of a doctrine and the empirical reality of that doctrine in its time and place is much like the relationship between the meaning a reader gives a text and the meaning that the text had for its author. If a reader's purpose is to reconstruct the *author's* meaning (as is the case, for example, when a judge attempts to interpret the "intent" of the parties to a contract or of a legislative enactment), the reader should

211. *Cf.* A. MITCHELL POLINSKY, AN INTRODUCTION TO LAW AND ECONOMICS 97–106 (2d ed. 1989); George L. Priest, *The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law*, 14 J. LEGAL STUD. 461 (1985).

212. Compare this passage, written by Robert Gordon:

> How can one identify the counterfactual trajectories, the roads not taken? From the experience of other societies, from the hopes of those who lost the struggle, from routine practices that the same society has tried in other spheres of life without ever dreaming they might be applied to the situation at hand, and from imagination disciplined, as one hopes, by the knowledge of past failures.

Gordon, *supra* note 3, at 112–13.

know that the physical text is only evidence of the author's meaning.[213] So too, the written statements a legal historian finds in old opinions, legal treatises, law review articles, etc., about what a doctrine "was" are at best evidence of the meaning that the doctrine had in the minds of the legal actors whose behaviors the historian is trying to impute to a cause. Her purpose is to achieve what Weber called an "understanding" of what caused their failure to reach a certain result, and to do that her description of the doctrine which she suspects was the culprit has to be expressed on their terms. And, I might add, it must be on their terms, "right or wrong:"

> The means employed by the method of "understanding explanation" are not *normative* correctness, but rather, on the one hand, the conventional habits of the investigator and teacher in thinking in a particular way, and on the other, as the situation requires, his capacity to "feel himself" empathically into a mode of thought which deviates from his own and which is normatively "false" according to his own habits of thought.[214]

Our scholar's description of Doctrine *X* will draw from many different sources—indeed, any source which she has reason to believe may have affected how historical actors perceived the doctrine is potentially relevant for her purposes. Some of these sources are from inside the legal system (e.g., the surrounding rule-system in which this doctrine was embedded, and the prevailing modes and patterns of legal reasoning), and some are from outside the legal system (e.g., the social and economic context in which the doctrine was applied).[215] Her access to these sources, the time which she has set aside for this project, her capacity to imagine what is relevant, and her expressive abilities are all factors that she knows constrain her description of Doctrine *X's* content. Moreover, our scholar realizes that she cannot

213. *Cf.* Towne v. Eisner, 245 U.S. 418, 425 (1918) (Holmes, J.) ("A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used."). As the editors of a leading contracts casebook succinctly put it (in the context of their discussion of the parol evidence rule), "[a]n object is never the same as a person's attitude toward it, though the object may provide evidence as to what that attitude is and help to make it interpretively accessible to us." FRIEDRICH KESSLER ET AL., CONTRACTS: CASES AND MATERIALS 824 (3d ed. 1986).

214. WEBER, METHODOLOGY, *supra* note 8, at 41; *cf.* GADAMER, *supra* note 51, at 269 (advocating self-conscious awareness of one's "fore-meanings" in approaching a text, and reader's openness to the text's presenting itself "in all its otherness").

215. *See* Williams, *supra* note 9, at 746:

> [A legal historian's task] involves identifying that combination of factors (jurisprudence, the doctrine itself, the characteristics of the area of social life the law addresses, national political mood, regional considerations, socioeconomic characteristics of the bar and the bench, etc.) which will offer a convincing explanation for the scope of the thinkable within the rules of the game as it was played.

hope to have access to the infinitely complex and contradictory thoughts going on in the minds of the thousands (or tens of thousands) of legal actors who gave meaning and significance to Doctrine *X* when they actually employed it in their multifarious endeavors throughout the historical period in question. In the end, therefore, she knows that no matter how thorough her research has been, her description of Doctrine *X* is *synthetic* (that is, drawn from many different sources, and present as an integrated whole in none of them) and *ideal-typical* (that is, her creation for heuristic purposes, and not the "real" Doctrine *X* as it existed phenomenally in the minds of the legal actors who failed to reach Outcome *Y*).

Weber's discussion of the way that anyone who is seriously interested in the historical importance of the "state" must first go about defining what the state was aptly describes the process by which our scholar employs methodological obstructionism to generate a content for any social institution, including doctrine, which interests her:

> [W]hen we inquire as to what corresponds to the idea of the "state" in empirical reality, we find an infinity of diffuse and discrete human actions, both active and passive, factually and legally regulated relationships, partly unique and partly recurrent in character, all bound together by an idea, namely, the belief in the actual or normative validity of rules and of the authority-relationships of some human beings towards others. This belief is in part consciously, in part dimly felt, and in part passively accepted by persons who, should they think about the "idea" in a really clearly defined manner, would not first need a "general theory of the state" which aims to articulate the idea. The scientific conception of the state, however it is formulated, is naturally always a synthesis which we construct for certain heuristic purposes. But on the other hand, it is also abstracted from the unclear syntheses which are found in the minds of human beings. The concrete content, however, which the historical "state" assumes in those syntheses in the minds of those who make up the state, can in its turn only be made explicit though the use of ideal-typical concepts.[216]

The idea of Doctrine *X* in empirical reality included its conception in the minds of everyone who ever thought about it, and thus our scholar can approach it only by means of something like an ideal type. That much is clear. But our scholar also knows that the thoughts of some historical actors were more significant, from a causal standpoint, than the thoughts of others. For instance, what the drafters of the various Restatements have conceived the common law to be may have had quite considerable causal significance in the production (and non-

216. WEBER, METHODOLOGY, *supra* note 8, at 99.

production) of judicial outcomes over the years, given the quasi-public standing and high prestige of the American Law Institute and certain of its members. And what these high-status people thought and said about, say, reliance-based contract liability (in 1932),[217] or strict liability in tort for defective products (in 1965),[218] is plainly more significant, causally, than any beliefs on these subjects that are held or expressed by, say, the author of this essay. So it is that the ideas of Doctrine *X* in the minds of the undifferentiated mass of people whose hands are, to a greater or lesser degree, on the levers of the legal system (*all* judges, *all* lawyers, *all* law professors, etc.) may themselves be imputed to the expression of those much smaller number of ideas concerning what Doctrine *X* is or should be that are present in the minds of a few "important" legal actors (Williston, Cardozo, etc.).[219] In other words, important legal scholars and judges ongoingly create their own syntheses of Doctrine *X,* and a legal historian may properly regard some of *these* syntheses as causally significant in their own right.

Here too, however, the content of any causally significant historical synthesis of Doctrine *X* itself can be gotten at only by means of ideal types, since what is involved is a description of the *meaning* of the synthesis in the minds of the thousands of legal actors who were influenced by it. Weber's remarks on this subject (in the context of his discussion of what the "state" is) are a valuable reminder of how a scholar's ideal types often are syntheses of syntheses:

> [T]he manner in which those syntheses are made (always in a logically imperfect form) by the members of a state, or in other words, the "ideas" which *they* construct for themselves about the state . . . is of great practical significance. In other words, here too the *practical idea* which should be *valid* or *is believed to be valid* and the heuristically intended, theoretically ideal type approach each other very closely and constantly tend to merge with each other.[220]

The "merging" phenomenon to which Weber referred creates the acute danger that a legal historian will conflate the expression of the causally significant idea of a doctrine, originating in an important person's mind, with the ideas of that doctrine which were present in the

217. RESTATEMENT OF CONTRACTS § 90 (1932).

218. RESTATEMENT (SECOND) OF TORTS § 402A (1965).

219. *Cf.* Robert Wagner, *Foreword to* LAW *Is* JUSTICE: NOTABLE OPINIONS OF MR. JUSTICE CARDOZO at vii (A.L. Sainer ed., 1938) ("The lawyer will review with deep satisfaction the work of the master craftsman, recognizing more clearly than all others the range of its genius and the self-restraint that marked perhaps its finest flowering.").

220. WEBER, METHODOLOGY, *supra* note 8, at 99.

minds of those less important persons on whom the causally significant idea acted to produce judicial outcomes. What Samuel Williston thought and said a contract was (and was not) had undeniable historical significance; anyone who doubts this should try making a list of the published decisions in which his name appears as authority. But what he thought and said are not the same as the idea of contract, say, "in the American common law circa 1932." Just as what Williston himself "really thought" about contracts can be understood only through the construction of one or more ideal-typical Samuel Willistons (remember our scholar's three Holmeses?), our scholar knows that what the mass of legal actors *understood* Williston's expressions to mean also can only be expressed in ideal-typical terms.

* * * *

Imagine that our scholar has elaborated what she takes to be a satisfactory ideal-typical description of Doctrine *X* (including all of its subrules and exceptions). Now she must reconstruct the *way* that it acted upon the legal actors who failed to reach Outcome *Y* during the historical period in question. In other words, although our scholar thinks that *X* was a cause, as yet she has not described the mechanism by which *X* blocked the path to *Y*. Our scholar could invoke many different mechanisms, depending on which legal actors and which aspects of their various transactions she chose to highlight. For example, her explanation of why clients usually took their lawyers' "well reasoned" advice not to sue during a particular historical period (rather than, say, seeking another opinion from a more "radical" lawyer, or filing a pro se lawsuit) might be quite different from her explanation of why the lawyers gave such advice in the first place.[221] So for simplicity's sake, suppose that our scholar has chosen to describe how *lawyers* were blocked by *X* from advocating *Y*. Having narrowed her focus in this way (in order to achieve clarity), there are two primary mechanisms which she might invoke to depict how Doctrine *X* blocked the path to Outcome *Y* in the minds of lawyers: Either *X* made *Y* appear *unfeasible,* or *X* made *Y* be *unimaginable.*

At this point it would be useful to give a more concrete illustration to show how our scholar might go about expressing these two different mechanisms. Suppose that our scholar has described, in ideal-typical terms, the way the tort concept of "duty" (measured in terms of fault and foreseeability) was articulated and applied in published decisions

221. *Cf.* Austin Sarat & William L.F. Felstiner, *Law and Social Relations: Vocabularies of Motive in Lawyer/Client Interaction,* 22 LAW & SOC'Y REV. 737, 740 (1988) (noting that clients' "maintaining their own interpretive scheme, or using a different vocabulary of motive, is one way in which clients can resist the exercise of professional power").

from New York State involving the question of negligence during the fifty years that followed Cardozo's famous opinion in *Palsgraf v. Long Island Railroad Co.*[222] By digging very hard into the old archives of hundreds of New York law offices, she also discovers that on ten separate occasions during this period people who had been hit by falling meteorites sought legal advice concerning any recourse they might have on account of their injuries.[223] All ten times, the records show, lawyers told these would-be clients that they had no claim against anyone, and no legal action was ever filed on their behalf. Although our scholar thinks that the duty rule was responsible for the non-filing of "victim-oriented" legal actions in these ten cases, she knows nothing at all about the participants' biographies, and she has no other evidence to guide her in reconstructing their states of mind.

Given the evidence that our scholar does have, one account of the duty rule's causal significance in these ten cases would accentuate the way it made legal recourse seem unavailable. That is, given their presumed knowledge of *Palsgraf* and its progeny, the lawyers who advised these victims knew that any claim they might file would be dismissed out of hand. The lawyers, by this account, could and may have imagined the common law being many ways other than what it was. For example, the idea of a fault-based claim against the owner of the land on which the meteorite fell for his negligent failure to erect a celestial safety screen—indeed, even the idea of a no-fault "Claim for Compensation on Account of Falling Meteorite" against all property owners in the State of New York—may very well have entered their consciousness as they sat listening to their clients' stories. Our scholar knows that just because there is no record of their having imagined alternative legal regimes—even regimes that were utterly victim-oriented, by her definition—does not mean that they really did not imagine them. After all, *she* has imagined one or more of them, and even Joe Hill's hegemonized and hegemonizing preacher possessed enough imagination to tell the slave about his future reward: "pie in the sky when you die."[224] But at the same time, our scholar reasons, the lawyers in these ten cases also might have believed that actually to externalize any such thoughts in the form of a lawsuit against someone

222. 162 N.E. 99 (N.Y. 1928).

223. *See Invasion from Space: 30-pound Meteorite Hits Car*, SEATTLE TIMES/SEATTLE POST-INTELLIGENCER, Oct. 11, 1992, at A-7; *cf.* Leslie Holdcroft, *The Sky Falls in Family's Parlor*, J. AM., Oct. 20, 1992, at A-1 ("blue ice" (frozen human waste) ejected from a commercial airplane flying overhead).

224. *Work and pray, live on hay, You'll get pie in the sky when you die.* Joe Hill, *The Preacher and the Slave*, *in* BARTLETT, *supra* note 26, at 764.

would be at best a quixotic waste of time and money and at worst a course of action that would expose them and their clients to the risk of monetary sanctions and a countersuit for malicious prosecution.

Now it is clear that *other* scholars (but not ours) might be interested in extrapolating from this perfectly plausible ideal-typical account of the duty rule's effect on the consciousness of the meteorite victims' lawyers. For example, some scholars might deduce that similar historical effects must have been produced in other transactions where people were injured (whether by meteorites or something else) but no obvious culprit could be found to blame; these scholars would, in short, claim that the ideal-typical cause of *these* ten victims' obtaining no legal recourse provides an acceptable basis for constructing a generic ideal-typical account whose explanatory scope is system-wide. Indeed, time constraints and empirical gaps probably make this sort of extrapolation absolutely necessary for anyone whose research interests run to the system as a whole. (One bag of tea per cup unquestionably makes a stronger, more satisfying brew, but when there's only one bag left in the cupboard, we sometimes are forced to dunk it into many cups.) Alternatively, other scholars might be interested in extending the vector of the duty rule's effect in these ten cases beyond the sphere of "law conceived as the effect of a cause." Thus, for example, some scholars might claim that these cases show how the duty rule, coupled with the availability of a claim for malicious prosecution against those who file frivolous complaints, conserved scarce resources in the extralegal components of society; if being injured on someone else's property through no fault of one's own were enough in itself to have provided a plausible basis for a lawsuit, they might argue, then a goodly portion of the resources that went into making the New York economy grow between 1928 and 1978 would have been diverted into prosecuting and defending the hordes of additional lawsuits that this regime would have induced and into wasteful and excessive expenditures for precautions by property owners. Still other scholars might point out that the duty rule, by shaping legal actors' perceptions of what was normal, just, and feasible, tended to stabilize and perpetuate existing inequalities in the distribution of power and wealth in society; the hegemony of New York property owners, they might argue, was reinforced by the duty rule's tendency to narrowly focus victims' attentions on trying to find someone in particular to blame for having done some particular bad act, thereby diverting them away from contemplating and acting against the injustice of the compensation system as a whole.

Our scholar is an intelligent person. Certainly she suspects that the absence of claims filed on behalf of the ten meteorite victims, together with the absence of analogous claims filed on behalf of many, many other kinds of victims, had extralegal consequences that were extremely profound.[225] Indeed, her suspicion that this was so probably was one of the reasons she became interested in these victims' experiences in the first place. However, in order to achieve clarity in her thinking and expression, for the moment she has chosen not to pursue a line of inquiry in which legal outcomes are conceived to be the causes of extralegal outcomes. In contrast to the scholars who were described in the preceding paragraph, our scholar wants to know, purely and simply, what caused these ten meteorite victims to come away empty-handed from their legal consultations.

Our scholar's first causal account had the duty rule foreclose the filing of lawsuits in these ten cases by making such a strategy seem a waste of time and money to the victims' lawyers, given the constraints under which they operated. Now she puts that ideal-typical account aside (on her workbench, as it were) and proceeds to construct another. In the second account, the lawyers who heard the meteorite victims' tales of woe not only thought and said "you have no claim," but they *couldn't even imagine a theory that might be asserted on the victims' behalf.* In other words, the duty rule shaped and occupied these lawyers' consciousness so completely that it never occurred to them that anything other than a fault-based common law system could exist, absent legislation establishing it. For example, the thought of asserting a "Claim for Compensation on Account of Falling Meteorite" against all the property owners in New York (as the most efficient risk-spreaders for this type of unfortunate accident), never did or could have entered their minds. This account is phenomenologically plausible and is consistent with the known facts: Our scholar knows that sometimes creative ideas just won't come into her head, no matter how hard she tries to make them happen; and the absence of a record that the lawyers contemplated any sort of test case is perfectly consistent with their not having done so.

The second ideal-typical account of how the duty rule caused the absence of legal action in the ten meteorite cases is plainly different from the first. A lawyer who can imagine asserting a novel claim, but doesn't, is not the same as a lawyer who can't imagine such a claim in

225. *Cf.* Martin Shapiro, *On the Regrettable Decline of Law French: Or Shapiro Jettet le Brickbat,* 90 YALE L.J. 1198, 1201 (1981) ("[L]aw is not what judges say in the reports but what lawyers say—to one another and to clients—in their offices.").

the first place. That is to say, the two lawyers are not the same *in terms of causation.* Existing legal rules and practices cause them to forbear from suing in both cases, but by means of a different cognitive mechanism. Drawing attention to this difference is not mere pettifoggery. There are many historical contexts in which the difference in mechanism can produce the profoundest sorts of consequences for the legal system: History shows that a radical new claim may actually succeed *if it is asserted,* thereby causing the law itself to change;[226] but such a claim stands no chance whatever of succeeding if no one ever thinks of it.[227] The difference in cognitive mechanism thus touches upon a matter which should be of vital concern to any historian who is interested in the question, What are the conditions of legal change?

But even though the lawyers from whom the meteorite victims sought counsel all advised inaction (that is, no legal change happened in *these* cases), it still makes a difference to our scholar whether the mechanism by which the duty rule blocked the way to the assertion of radical and victim-oriented claims was "unimaginability" *or* "imaginability-but-calculated-unfeasibility." The two mechanisms would have been experienced differently by the lawyers in question, and thus would have *been* different causes in the phenomenological sense of causation which our scholar employs. Since our scholar's ultimate end is to satisfy her intellectual curiosity, it makes a difference to her which mechanism is more plausible, given what is known about these cases. Maybe nothing else will ever be known, in which case our scholar, having constructed these two ideal-typical accounts of causation as heuristic aids, must be content to present them to her readers as her alternative versions of reality.[228] But that is not the only use to which ideal types can be put. The mere exercise of constructing these two accounts has given our scholar valuable leads on possible directions for future empirical research, as well as insights into the meaning of any new facts that may come to light.

To illustrate: Given the heavy emphasis that her ideal types place on the cognitive capacity of lawyers to imagine radical new arguments,

226. *See, e.g.,* Sindell v. Abbott Lab., 607 P.2d 924 (Cal.) (adopting new concept of "market share" liability for all manufacturers of a defective product sold generically to consumers who have no way of proving which particular manufacturer was responsible for their injuries), *cert. denied,* 449 U.S. 912 (1980).

227. *Cf.* Local 1330, United Steel Workers of Am. v. United States Steel Corp., 631 F.2d 1264, 1279–82 (6th Cir. 1980) (taking seriously, but ultimately rejecting, "community property" argument asserted by lawyers representing workers who were adversely affected by the closure of a steel plant).

228. See, for example, the multiple narratives contained in Simon Schama's "The Many Deaths of General Wolfe" and "Death of a Harvard Man." SCHAMA *supra* note 73.

our scholar might choose to investigate the manner in which lawyers (or these lawyers in particular) were educated in law schools during the years in question. *How* were law, the legal system, and the lawyer's role portrayed in old casebooks, hornbooks, treatises, lecture notes, etc., and *who* were the law students who heard these messages?[229] For example, to what extent was law portrayed in terms of a "liberal theory of justice" (law exists to secure people their rights), and to what extent was it cast as a "vehicle for the transformation of society" (law exists to empower the powerless)? Of course, these or other conceptions of legal education themselves would have to be expressed (as always!) in ideal-typical terms. Nevertheless, any empirical findings that these conceptions of legal education helped to generate could then be given meaning with reference to the two ideal-typical accounts of legal inaction in the meteorite cases which our scholar already constructed. The contrast provided by those two accounts originally focused our scholar's attention on the manner in which lawyers were socialized into their profession.[230] In light of what our scholar knows about the two prima facie plausible (but different) mechanisms by which the duty rule induced legal inaction in the ten meteorite cases, she can now judge which mechanism seems *more* plausible given the new facts she has located on how lawyers from this era were taught to view the nature of law and their roles within the legal system.

Suppose our scholar finds that between 1928 and 1978 the intellectual core of legal education in America was the distinction between law and policy. Her empirical inquiry (her construction of the historical text) leads her to conclude that during this half century most law professors sought to convince their students that legal reasoning—defined as the derivation of "correct" results from legal rules alone—was what lawyers did and were supposed to do most of the time. Policy analysis either was relegated to narrow "policy-oriented" courses like administrative law or was portrayed as argumentatively available to lawyers only in those rare instances when doctrines left gaps to be filled. Generally speaking, law students learned that whatever politi-

229. *Cf.* William E. Nelson, *Contract Litigation and the Elite Bar in New York City, 1960–1980,* 39 EMORY L.J. 413, 461 (1990) (imputing increases in civil rights and business litigation since 1960 to admission of new social groups into law and business).

230. Compare Weber's account of how the traditional apprentice method of legal training in common law countries helped "support the capitalistic system:" "Legal training," he wrote, "has primarily been in the hands of the lawyers from among whom also the judges are recruited, i.e., in the hands of a group which is active in the service of propertied, and particularly capitalistic, private interests and which has to gain its livelihood from them." 2 WEBER, ECONOMY AND SOCIETY, *supra* note 46, at 891–92.

cally transformative potential law had lay beyond the pale of most lawyers' day-to-day responsibilities. In contrast, the basic rules of property, contract, and tort were presented in classrooms as constituting the very foundation of a free society. These basic rules, most law teachers stressed, flowed from precedent and legal reasoning alone, rather than from the ongoing negotiation and renegotiation of political or economic conflict. The overwhelming message, she concludes, was that lawyers should help people protect their existing rights, but should not meddle in politics by trying to invent new ones (though a mini-message did allow some invention in certain narrowly defined "policy" contexts).[231] Although our scholar remains utterly open to the possibility that the lawyers involved in these ten meteorite cases unlearned this message after leaving law school, or heard a different message in the course of their individual law school experiences, or slept through their classes and heard no message at all, etc., she concludes that the weight of the known evidence makes her "unimaginability" account more causally adequate than her "imaginable-but-unfeasible" account. That is, having been droned at for three years concerning what law is, and about what their professional roles were, these lawyers probably acted and thought according to type: Their actions and thoughts would have floated down the channels and tributaries set by the duty rule in its various manifestations. And although smart lawyers from this era might have been able to find and navigate more tributaries than mediocre ones, rarely would even smart lawyers' thoughts and actions have flooded onto the uncharted plain of utopian claim-making.[232]

Thus it is that "unreal" versions of reality, constructed as heuristic aids through the practice of methodological obstructionism, help our scholar both define her research agenda, and express her conclusions. And although the conclusions may come across on the page as strong statements about the reality that was these ten cases, our scholar knows that they are *her* projections of meaning onto an uncertain and ultimately unknowable past.[233]

231. The paragraph to this point is a highly abbreviated version of KENNEDY, REPRODUCTION OF HIERARCHY, *supra* note 46, at 14–32. For more on the passivizing tendencies of law school, see Gabel & Kennedy, *supra* note 24, at 33–35, and Morton Horwitz, *Resist Cult of Complexity, Paralyzing Skepticism,* HARV. L. REC., Sept. 19, 1986, at 6.

232. *See* Sarat & Felstiner, *supra* note 221, at 756, 763 n.12 (noting from empirical observation that "[l]awyers compare their clients' feelings or actions with what is 'common' or with what they have seen in other cases," and that "[l]awyers regularly explain what they can and cannot do in a case . . . in light of circumstances beyond their control").

233. As the historian Simon Schama recently put it:

## VIII

It should be apparent by now that the real problem besetting legal historians is the beguiling question Why? itself. Why? asks us to state an answer that is politics all the way down: It asks us to organize the past into a pattern of coherence which is at once situated (*our* pattern) and contestable (not necessarily the same as someone *else's* pattern). There comes a point in Jack Kerouac's semi-autobiographical novel *The Dharma Bums* when the protagonist, Ray Smith, asks his friend Japhy Ryder why God made the world:

> "Well it says in the sutra that God, or Tathagata, doesn't himself emanate a world from his womb but it just appears due to the ignorance of sentient beings."
>
> "But he emanated the sentient beings and their ignorance too. It's all too pitiful. I ain't gonna rest till I find out *why,* Japhy, *why.*"
>
> "Ah, don't trouble your mind essence. Remember that in pure Tathagata mind essence there is no asking of the question why and not even any significance attached to it."[234]

Zen masters like Japhy Ryder know that no matter how one answers the question Why? (or, for that matter, What, Where, Who, or When) it comes out as a distortion. Tradition has it that Bodhidharma walked from India to China over a thousand years ago, bringing Zen Buddhism with him and establishing it in the Far East. But in response to the famous koan "Why did Bodhidharma come to China?" the truly enlightened either do things like pointing, burping, or throwing sticks at the questioner, or say things like "I don't care," or "the fir tree over there."[235] Christmas Humphreys once said that "[a]ll that is said about Zen is necessarily untrue."[236] Nevertheless, there is at least one lesson that legal historians might learn from the nature of such responses to the question Why? In a world where

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> [H]istorians are left forever chasing shadows, painfully aware of their inability ever to reconstruct a dead world in its completeness, however thorough or revealing their documentation. Of course, they make do with other work: the business of formulating problems, of supplying explanations about cause and effect. But the certainty of such answers always remains contingent on their unavoidable remoteness from their subjects. We are doomed to be forever hailing someone who has just gone around the corner and out of earshot.

SCHAMA, *supra* note 73, at 320. Schama's observations plus this Jamesian epigram complete the point made in the text: "[A]lthough all men will insist on being spoken to by the universe in some way, few will insist on being spoken to in just the same way." JAMES, *supra* note 49, at 21.

234. JACK KEROUAC, THE DHARMA BUMS 201–02 (1958).

235. *See, e.g., id.* at 16; JANWILLEM VAN DE WETERING, A GLIMPSE OF NOTHINGNESS: EXPERIENCES IN AN AMERICAN ZEN COMMUNITY 32–33 (1975).

236. CHRISTMAS HUMPHREYS, STUDIES IN THE MIDDLE WAY 129 (4th ed. 1976).

everything is related causally to everything else, any verbal answer to the question Why? necessarily distorts the relationship among those realities in the world which simply are in all of their thusness—realities which Japhy Ryder's Tathagata knows but feels no need to explain. To state why something happened is always to leave too much out and to place too much emphasis both on the things that are put in and on the way those privileged things are phrased. Too much, I hasten to say, from the standpoint of Tathagata. It would appear that humans can't resist asking, and seeking answers to, questions about causation. People in general, and legal historians in particular, seem to have an innate need to understand the past on terms which make it seem coherent and meaningful to them, given their contexts. And the well-nigh universal presence of *some* kind of "wherefore" in all human discourse about the past is a fact which demands respect.

History—the sum of all that was—is an acausal and holistic totality. "The subject did it" and "The structure did it": Neither statement is ever the complete truth. They *both* did it, in every case, and in ways which resist our best efforts to state exactly what their relationship was. Viewed from a long way off, the horizons of the conceivable to legal actors appear rigidly constrained by what went before; but viewed close up, legal actors very often break out of structure in wildly unpredictable ways. We need only consult our own experience to confirm that the other humans who went before us—including those old-time judges whose consciousness we have reduced to formulas such as "laissez-faire individualist" or "New Deal realist"—might have had feelings of constraint *and* freedom that were similar to ours, and might very well have acted on the basis of either or both of them in the cases that interest us. The dilemma that legal historians face is to reconcile this ultimate truth with our efforts to give some coherent meaning to the subject matter of our investigations.

If the past itself cannot be recreated objectively and scientifically, at least the method by which we do the recreation can be made explicit. Thomas Heller has written that "the status of the subject is now the most interesting and pressing issue for all Critical theories."[237] This essay has been an effort to construct *a* (not "the") set of meanings for approaching questions of causation about the past, in which the subject's experience of constraint and freedom is brought to the forefront. The subject is brought to the forefront for the reason that historical structures are of interest (matter) only because real people gave the structures whatever shape and meaning they had: real people like us

237. Heller, *supra* note 34, at 129.

who had to decide what is to be done. In honoring the subject, we honor ourselves. In talking about the historical subject's lived experience of both constraint and freedom, we make a clearing where it is possible to imagine that there is room for our own chances to act. But we can also see that those chances are neither limitless nor without consequences. If historiography (like law) is politics, as I think it is, a heterogeneous and diffident approach to practice is better politics than a totalizing and authoritative approach. As respected professional custodians of the law's past, legal historians who use the rhetoric of certainty in their claims are perhaps more effective single-issue politicians than those who undercut the authority of their own causal claims even as they assert them. But in an age of pluralism and polyphony, remaining open to the multiple truths embedded in the past is good practice for keeping us open to the multiple truths that are unfolding in the present. The utility of this essay's methods for finding meaning in the past will be proved, if at all, only in an ongoing dialectic with competing constructions. But it is absolutely essential that each of us make the effort to construct, self-consciously, our own set of assumptions about how history works. In this regard, this essay's five methodological types, and its one ideal-typical legal historian, should be seen as neither good nor bad, correct nor incorrect. They are meant to be, purely and simply, useful means to an end. That end is to enhance our level of awareness about, and sensitivity to, the following two questions:

(1) What relationship, exactly, do we mean to establish between our causal claims and the concrete historical reality we are trying to understand? and

(2) Whatever the substance of our accounts may be, if we don't mean (methodologically) the same kinds of things that my ideal-typical scholar means when we frame and answer the question Why? in connection with our inquiries into the past, then what *do* we mean, and why do we mean it?

Given that there are as many different contexts as there are scholars, differing interpretations of history are a foregone conclusion. But notwithstanding that interpretive and methodological pluralism is inevitable, even desirable, this essay was written in the belief that methodological *confusion* is neither desirable nor inevitable. The more attention we pay to what we mean when we make causal assertions, the better able we will be to account, *sympathetically,* for a curious fact that all but the most doctrinaire of us have observed at one time or another: Occasionally other scholars, who appear to be just as intelligent, decent, and undeluded as we are, seem to think that our most

firmly held conviction about law's reality is simply another point of view. And being able to account for that fact is, from my point of view, good politics and good historiography.