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Legal Internalism In Modern Histories of Copyright

Shyamkrishna Balganesh

Taisu Zhang

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BOOK REVIEW

LEGAL INTERNALISM IN MODERN HISTORIES OF COPYRIGHT

Shyamkrishna Balganesesh & Taisu Zhang

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LEGAL INTERNALISM IN MODERN HISTORIES OF COPYRIGHT

AUTHORS AND APPARATUS: A MEDIA HISTORY OF COPYRIGHT. By Monika Dommann. Ithaca, N.Y.: Cornell. 2019. Pp. 282. \$41.95.

WHO OWNS THE NEWS? A HISTORY OF COPYRIGHT. By Will Slauter. Stanford, C.A.: Stanford. 2019. Pp. 268. \$30.00.

PIRATES AND PUBLISHERS: A SOCIAL HISTORY OF COPYRIGHT IN MODERN CHINA. By Fei-Hsien Wang. Princeton, N.J.: Princeton. 2019. Pp. 368. \$39.95.

Reviewed by Shyamkrishna Balganesh & Taisu Zhang***

Legal internalism refers to the internal point of view that professional participants in a legal practice develop toward it. It represents a behavioral phenomenon wherein such participants treat the domain of law (or a subset of it) as normative, epistemologically self-contained, and logically coherent on its own terms regardless of whether the law actually embodies those characteristics. Thus understood, legal internalism remains an important characteristic of all modern legal systems. In this Review, we examine three recent interdisciplinary histories of copyright law to showcase the working of legal internalism. We argue that while their interdisciplinary emphasis adds to the conversation about copyright, it also overlooks the centrality of legal internalism in the evolution of copyright, a domain that has always been understood as a creation of the law. The Review unpacks the core tenets of legal internalism, examines how it operates as an important variable of legal change, contrasts it with the idea of legal consciousness, and shows how legal internalism directs and regulates the entry of nonlegal considerations into different areas of law.

INTRODUCTION

Ever since its origins, copyright has been characterized by a deep disagreement over its underlying justification.¹ While some see the institution as driven by a model of market-based economic incentives, others relate it to notions of authorial labor and desert, and yet others see

* Professor of Law, Columbia Law School.

** Professor of Law, Yale Law School. Our thanks to Jane Ginsburg, Tomás Gómez-Arostegui, Sophia Lee, Gideon Parchomovsky, David Pozen, Stephen Sachs, and participants at the Penn Law Faculty Workshop, Chicago-Kent Law Faculty Workshop, and Notre Dame Private Law Theory Workshop, for helpful comments and suggestions.

¹ For some prominent accounts, see PETER BALDWIN, *THE COPYRIGHT WARS: THREE CENTURIES OF TRANS-ATLANTIC BATTLE* (2014); MARK ROSE, *AUTHORS AND OWNERS: THE INVENTION OF COPYRIGHT* (1993); Oren Bracha, *The Ideology of Authorship Revisited: Authors, Markets, and Liberal Values in Early American Copyright*, 118 *YALE L.J.* 186 (2008); and H. Tomás Gómez-Arostegui, *Copyright at Common Law in 1774*, 47 *CONN. L. REV.* 1 (2014).

it as a form of industrial policy and rent-seeking by the content industry.² And despite copyright (or something resembling it) having been in existence for multiple centuries, this disagreement is about as trenchant today as it was at copyright's very inception. Described by scholars as the "copyright wars,"³ the disagreement might even be said to be more obvious and consequential now than it ever was in the past.

While the disagreement itself is multilayered and has many nuances, an important strand within it pertains to the reasons why copyright was brought into existence as such and constructed in the image of property rights, an imagery that has exerted an indelible influence on the evolution and trajectory of the institution ever since.⁴ Attempting to resolve that strand of dispute, scholars and advocates have long relied on (and weaponized) the history of copyright's origins and evolution in an effort to generate normative claims about the institution in its present form.⁵ In the process, the historical study of copyright has remained an established subfield within the world of copyright scholarship.⁶

Copyright scholarship itself has however undergone an important transformation over the course of the last century. As legal scholarship

² For discussions of the incentives argument, which dominates U.S. copyright thinking and scholarship, see Shyamkrishna Balganesh, *Foreseeability and Copyright Incentives*, 122 HARV. L. REV. 1569, 1577–81 (2009); Christopher Jon Sprigman, *Copyright and Creative Incentives: What We Know (and Don't)*, 55 HOUS. L. REV. 451, 455–57 (2017); and Stewart E. Sterk, *Rhetoric and Reality in Copyright Law*, 94 MICH. L. REV. 1197, 1204–26 (1996). The authorial labor and desert accounts feature less frequently in the literature. See, e.g., Mala Chatterjee, *Lockean Copyright Versus Lockean Property*, 12 J. LEGAL ANALYSIS 136, 137–41 (2020); Alfred C. Yen, *Restoring the Natural Law: Copyright as Labor and Possession*, 51 OHIO ST. L.J. 517, 523–24 (1990); Lior Zemer, *The Making of a New Copyright Lockean*, 29 HARV. J.L. & PUB. POL'Y 891, 892–95 (2006). The treatment of copyright as industrial policy is a more recent development. See Julie E. Cohen, *Copyright as Property in the Post-industrial Economy: A Research Agenda*, 2011 WIS. L. REV. 141, 142–43; Joseph P. Liu, *Regulatory Copyright*, 83 N.C. L. REV. 87, 102–05 (2004).

³ BALDWIN, *supra* note 1; BLAYNE HAGGART, *COPYFIGHT: THE GLOBAL POLITICS OF DIGITAL COPYRIGHT REFORM* 242 (2014); WILLIAM PATRY, *MORAL PANICS AND THE COPYRIGHT WARS* (2009); see also ADRIAN JOHNS, *PIRACY: THE INTELLECTUAL PROPERTY WARS FROM GUTENBERG TO GATES* (2009).

⁴ See RONAN DEAZLEY, *ON THE ORIGIN OF THE RIGHT TO COPY: CHARTING THE MOVEMENT OF COPYRIGHT LAW IN EIGHTEENTH CENTURY BRITAIN (1695–1775)*, at 149–50 (2004); ROSE, *supra* note 1, at 5–8.

⁵ See Barbara Lauriat, *Copyright History in the Advocate's Arsenal*, in RESEARCH HANDBOOK ON THE HISTORY OF COPYRIGHT LAW 7, 7–8 (Isabella Alexander & H. Tomás Gómez-Arostegui eds., 2016). For an argument that one prominent recent work of copyright history engaged in such weaponization, see Jane C. Ginsburg, *Business of Their Lives*, TIMES LITERARY SUPPLEMENT, June 5, 2015, reviewing BALDWIN, *supra* note 1, and noting that its approach "betrays its bias."

⁶ Isabella Alexander & H. Tomás Gómez-Arostegui, *Introduction, to RESEARCH HANDBOOK ON THE HISTORY OF COPYRIGHT LAW*, *supra* note 5, at 1 ("[C]opyright history is clearly a discrete and popular field of academic inquiry . . ."); Martin Kretschmer, Lionel Bently & Ronan Deazley, *Introduction. The History of Copyright History: Notes from an Emerging Discipline*, in PRIVILEGE AND PROPERTY: ESSAYS ON THE HISTORY OF COPYRIGHT 1, 1–2 (Ronan Deazley, Martin Kretschmer & Lionel Bently eds., 2010).

has become more overtly interdisciplinary, copyright scholarship too has seen itself overrun by insights from the fields of economics,⁷ philosophy,⁸ political science,⁹ literary theory,¹⁰ sociology,¹¹ and psychology.¹² To be sure, this overt interdisciplinarity has undoubtedly enriched copyright thinking and theorizing. It has forced copyright scholarship to look beyond the simple doctrinal analysis of the law and examine the broader implications of authorship and the regulation of creativity. At the same time, though, the interdisciplinary turn has caused the *legal origins* of copyright to recede into the background in the scholarly discussion of the institution.¹³ The notion of “legal origins” is hardly some abstract metaphysical idea. Instead, it is simply a recognition that copyright is a system of rights rooted in the normative structure of the law.¹⁴ Copyright has always been a creation of the law, which presupposes the analytical priority of the law and legal institutions. All too often, modern interdisciplinary copyright scholarship loses sight of this reality and treats copyright’s legal roots as entirely contingent elements.

The historical study of copyright has embraced the interdisciplinary turn in copyright scholarship in no small measure. Whereas the leading histories of copyright from the last century were authored by law professors who framed their narratives through legal developments in the field,¹⁵ the most prominent recent histories of copyright readily adopt more nuanced interdisciplinary narratives to explain the origins and evolution of copyright.¹⁶ In so doing, they reveal the inadequacies of a narrow focus on legal developments in the field, and they highlight how many of these developments were intricately tied to important social,

⁷ See, e.g., RICHARD WATT, COPYRIGHT AND ECONOMIC THEORY: FRIENDS OR FOES? (2000); Christopher Buccafusco & Christopher Jon Sprigman, *The Creativity Effect*, 78 U. CHI. L. REV. 31 (2011); William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325 (1989); Christopher S. Yoo, *Copyright and Public Good Economics: A Misunderstood Relation*, 155 U. PA. L. REV. 635 (2007).

⁸ See, e.g., ABRAHAM DRASSINOWER, WHAT’S WRONG WITH COPYING? (2015); Anne Barron, *Kant, Copyright and Communicative Freedom*, 31 LAW & PHIL. 1 (2012); Kathy Bowrey, *The Outer Limits of Copyright Law — Where Law Meets Philosophy and Culture*, 12 LAW & CRITIQUE 75 (2001); Jon M. Garon, *Normative Copyright: A Conceptual Framework for Copyright Philosophy and Ethics*, 88 CORNELL L. REV. 1278 (2003).

⁹ See, e.g., Barron, *supra* note 8.

¹⁰ See, e.g., Zahr K. Said, *A Transactional Theory of the Reader in Copyright Law*, 102 IOWA L. REV. 605 (2017).

¹¹ See, e.g., Laura A. Heymann, *Reasonable Appropriation and Reader Response*, 9 U.C. IRVINE L. REV. 343 (2018).

¹² See, e.g., Shyamkrishna Balganes, Irina D. Manta & Tess Wilkinson-Ryan, *Judging Similarity*, 100 IOWA L. REV. 267 (2014).

¹³ For a fuller elaboration of this point, see Shyamkrishna Balganes, *The Obligatory Structure of Copyright Law: Unbundling the Wrong of Copying*, 125 HARV. L. REV. 1664 (2012).

¹⁴ *Id.* at 1671.

¹⁵ See BENJAMIN KAPLAN, AN UNHURRIED VIEW OF COPYRIGHT (1967); LYMAN RAY PATTERSON, COPYRIGHT IN HISTORICAL PERSPECTIVE (1968).

¹⁶ See, e.g., BALDWIN, *supra* note 1; RONAN DEAZLEY, RETHINKING COPYRIGHT: HISTORY, THEORY, LANGUAGE (2006); ROSE, *supra* note 1; MARTHA WOODMANSEE, THE AUTHOR, ART, AND THE MARKET: REREADING THE HISTORY OF AESTHETICS (1994).

economic, cultural, political, and technological currents of the time. Undoubtedly, the most enduring contribution of the interdisciplinary turn in copyright history has been its revelation that the institution of copyright has always had broader implications for society, culture, and public welfare than the implications that a narrow legal focus would suggest.

In this Review, we examine three recent histories of copyright, each of which adopts a different narrative methodology. In *Who Owns the News? A History of Copyright*, Professor Will Slauter attempts to tell the story of how news — principally factual information — sought protection through copyright since the earliest days of Anglo-American copyright law. Slauter frames his historical narrative as a political economy account of news publishing and its intersection with similar forces that have influenced the overall direction of copyright reform (p. 5). He thus looks to the role of special interest groups, conglomerates, influence merchants, lawmakers, and lawyers in the development of the system.

Pirates and Publishers: A Social History of Copyright in Modern China presents itself as developing a “new conceptual framework” to examine the social and cultural history of copyright in China (p. 4). In the book, Professor Fei-Hsien Wang sets out to dispel the idea that copyright was an altogether artificial construct that was transplanted to China and therefore never well received (p. 7). Instead of looking to formal sources of law, Wang examines the interactions among authors, publishers, and copiers between 1890 and 1950 to show how these actors developed their own mechanisms of exclusivity and control that paralleled the working of formal copyright law (p. 4), even if they operated entirely in the “shadow of the state” (and therefore the law) (p. 20).

Lastly, in *Authors and Apparatus: A Media History of Copyright*, Professor Monika Dommann adopts a novel interdisciplinary approach to the history of copyright that attempts to meld the history of communications media with the history of legal norms surrounding such media (pp. 7–8). Dommann’s account picks discrete developments in the history of technology to assess the evolution of copyright rules against norms surrounding technology. She does so comparatively, focusing on the evolution of the European (primarily German) and U.S. copyright systems.

Each of these narratives offers a fresh and unique perspective on the evolution of copyright over time, showcasing the wide range of influences on the institution during its lifespan. They each also highlight the points of convergence and divergence in the domestic development of copyright by individual nations, and the myriad sociocultural contingencies that generated vastly different approaches to identical questions in different countries. And, when taken together, they produce an exceptionally rich cross-methodological account of copyright’s history, since their individual narratives complement each other.

All the same, they are each also profoundly incomplete in one crucial respect. Just as the interdisciplinary turn in copyright scholarship has come to underplay the legal origins of the institution, historical accounts of copyright that are steeped in interdisciplinary insights neglect the influence of what we herein describe as *legal internalism* on the structure and evolution of copyright. Put simply, legal internalism refers to the internal point of view that regular participants in a legal practice usually develop toward it that sees it as normative, epistemologically self-contained, and logically coherent. Very importantly, legal internalism represents a behavioral and social phenomenon rather than a theoretical construct, which renders it distinct from abstract claims about the autonomy of the law.¹⁷ Translated to the evolution of copyright, legal internalism suggests that the direction, speed, and form of change in copyright law depends on the reality of copyright as a legal creation with its terms and scope delineated by legal rules.

Recognizing a role for legal internalism is far from denying the influence of other factors on the historical evolution of copyright. Yet legal internalism is distinct from other variables insofar as it posits a particular mindset seen among the principal agents of change within the institution. Legal internalism reflects the existence of a two-way relationship between law and social contingency, emphasizing that law is itself necessarily constitutive of consciousness.¹⁸ Professor Robert Gordon, who famously developed the connection between law and consciousness, argued that the role of the law in this mechanism is less through its threat of coercion but instead through its persuasive imagery, where law suggests that “the world described in its images and categories is the only attainable world in which a sane person would want to live.”¹⁹ Legal internalism, which we argue is a behavioral formalization of Gordon’s core theoretical insight, therefore posits that the entrenchment of an identifiable set of concepts, principles, and analytical ideas for an institution within the law plays a crucial role in steering its evolution. In other words, the reality of copyright having a formal legal origin and a commitment to the idea of exclusive rights played no small role in the pattern of change seen in its development.

Legal internalism thus defined does not fully exist on the same analytical plane as the other socioeconomic or political factors identified in

¹⁷ See Ernest J. Weinrib, *Legal Formalism: On the Immanent Rationality of Law*, 97 YALE L.J. 949, 953–57 (1988). For an extension to copyright law, see Shyamkrishna Balganesh, *The Immanent Rationality of Copyright Law*, 115 MICH. L. REV. 1047, 1061–68 (2017) (reviewing DRASSINOWER, *supra* note 8).

¹⁸ The seminal account of this interaction is Robert W. Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57, 109–13 (1984). For a fuller elaboration and retrospective assessment of its impact, see Susanna L. Blumenthal, *Of Mandarins, Legal Consciousness, and the Cultural Turn in U.S. Legal History: Robert W. Gordon, 1984. Critical Legal Histories*. Stanford Law Review 36:57–125, 37 LAW & SOC. INQUIRY 167 (2012).

¹⁹ Gordon, *supra* note 18, at 109.

the three books. It refers more to the mental processes and logic through which legal actors internalize external factors into their perception of the law than it does to the substantive outcomes of such internalization. In other words, it refers to a set of “procedural” intellectual commitments rather than to a set of substantive values. From this perspective, there is very little substantive incompatibility between a legally internalist account of copyright and the historical accounts offered by each of the books. Nonetheless, adding this “procedural” dimension presents much of that material in a qualitatively distinct light. The same substantive socioeconomic and political forces appear and function very differently when filtered through an internalist view, rather than operating directly on legal institutions.

As we explicate more fully in what follows, legal internalism is also very distinct from both simplistic claims about the autonomy of law and a myopic focus on sources described in some formal sense as “law.” Some historians of copyright have defended the interdisciplinary turn in the field as a move away from the “orthodox method” of looking exclusively (or primarily) to legal sources and methods for historical analysis.²⁰ In so doing, they urge that “[c]opyright history is not just another branch of positive law.”²¹ Internalism does not demand limiting the sources of historical analysis; nor does it require adopting a narrow conception of law. Instead it merely posits that the framing of copyright as a legal institution carries intellectual significance, one that interacts with other influences on the development of copyright to cast them in new light and accord them relevance. While internalism does not suggest that copyright history is a matter of positive law, it nevertheless emphasizes that the law — understood as the framework of normativity underlying the institution — remains a reference point for understanding what copyright is, even when one’s specific focus is on “customs” or “social norms.”

In this Review, we develop a new behavioral theory of legal internalism and explore its potential explanatory power in the historical narrative of copyright through the three books previously mentioned. We emphasize the central role that the cognitive tendencies and behavioral incentives of legal actors play in promoting legal internalism, thereby arguing for internalism as a likely determinant of legal change across highly diverse institutional, sociopolitical, and cultural terrain. To varying degrees, each of the books neglects the explanatory potential of legal internalism in its overall narrative and in the process disengages copyright from its legal roots. We show that the inclusion of legal internalism as an explanatory variable in the narrative need not be to the exclusion of other influences, but that it can instead enrich the account in important ways.

²⁰ Kretschmer et al., *supra* note 6, at 6.

²¹ *Id.*

Part I begins with a brief summary of each of the books chosen, focusing on how their historical narratives deal with the role of law and legal institutions in explaining the evolution of copyright. It unpacks the structure of each narrative individually, and then shows how in attempting to underplay the role of law in the narrative, the books each embrace a vision of causality in the development of copyright. Part II moves to what we argue is the missing component of the narratives: legal internalism. This Part describes the basic idea behind legal internalism as a behavioral phenomenon in the evolution of law and then disaggregates it into its central components. Part III then returns to the three books to show how interjecting a greater emphasis on legal internalism into the narrative would enrich their explanations, without detracting from their chosen methodologies.

I. THE ROLE OF LAW IN COPYRIGHT'S EVOLUTION

A readily discernible trend in the historiography of copyright over the last few decades has been its embrace of the idea that the law is but one part of the institution's complex evolutionary story.²² This belief has manifested itself in a variety of ways, including the use of nonlegal sources relating to copyright, the recognition of law as a largely dependent variable in the narrative, and the examination of the behavior and practices that emerged as responses to get around — rather than conform to — the formal law. All the same, this interdisciplinary turn has been careful to avoid denying any role for the law in the overall arc of the narrative, even upon acknowledging the inadequacy of the law as the exclusive focus for the study of copyright.²³

This Part provides an overview of three recent examples of this interdisciplinary turn in the history of copyright. It does so by focusing on each of their attempts to complicate the role of law in copyright history by examining the interaction between law and other explanatory variables. As such, the discussion that follows focuses on how each book attempts to integrate legal and nonlegal ideas, rather than undertaking a detailed summary of each book.

As is to be expected, we see a few analytical moves that are common to all three books. The most obvious of these common moves is the

²² See, e.g., ROSE, *supra* note 1, at 1–8; RICHARD B. SHER, *THE ENLIGHTENMENT & THE BOOK* 26–27 (2006); WOODMANSEE, *supra* note 16, at 5. For discussions of this trend and its benefits, see Kathy Bowrey, *Law, Aesthetics and Copyright Historiography: A Critical Reading of the Genealogies of Martha Woodmansee and Mark Rose*, in *RESEARCH HANDBOOK ON THE HISTORY OF COPYRIGHT LAW*, *supra* note 5, at 27, 51–52; and Kretschmer et al., *supra* note 6, at 5–6.

²³ See, e.g., Kretschmer et al., *supra* note 6, at 6. As they observe:

'Copyright law' needs to be understood as having been only one mechanism for the articulation of proprietary relationships: other legal norms (personal property, contract, bailment), and, more interestingly, other social norms, allowed for systems of ascription and control, flows of money, as well as the transfer and sharing of ideas and expression.

Id.

early identification of copyright *law* as but a component of copyright's overall history. Each of the three books goes to some length to explain the basis of the law's inadequacy as an explanatory variable for copyright. Another move that is common to all three is the examination and use of sources that are altogether unconnected to the law, to explain the interests and motivations of the principal actors in the story.

Beyond these basic similarities however, each of the books adopts a very distinctive approach in introducing nonlegal explanatory variables into the narrative. And in so doing, they each attempt to integrate the nonlegal (or extralegal) parts of the story with the formal legal part in different ways.

A. *Political Economy History*

While self-styled as a history of copyright, Professor Will Slauter's *Who Owns the News?* is in reality a history of copyright in relation to newspapers. Instead of telling the story of copyright's evolution in the abstract — as several others have done before — Slauter attempts to narrate the evolution of Anglo-American copyright through the lens of the newspaper industry, a segment of the market that has always remained at the peripheries of the copyright system. This perspective adds a degree of hitherto unappreciated complexity to the story of copyright's evolution, insofar as it showcases both the outsized influence that a marginal segment came to exert on multiple core issues within copyright as well as the manner in which the newspaper industry itself developed in response to its marginalization within copyright.

In seeking to fit newspaper publishing into the established narrative of copyright, Slauter's account takes as a given the standard political economy explanation that is commonly offered for copyright's evolution.²⁴ As a direct consequence, the book takes a decidedly equivocal stance on the overall relevance of copyright for newspapers, a position that inflects the entire narrative. At times, Slauter sees newspapers as overly dependent on some form of exclusivity to maintain their business practices, reflected in the impassioned arguments that they make for inclusion within the copyright system (p. 146). Yet at other times — especially after each successive marginalization — newspapers are portrayed as resilient characters whose clamoring for inclusion within copyright was a largely rhetorical (and symbolic) exercise rather than one with serious practical import (pp. 85–86, 162–69). As such, this conscious equivocation is hardly a demerit of the book, even though it on occasion results in a somewhat jagged narrative. Instead, the ambivalence highlights a theme that is indeed central to copyright's very story,

²⁴ For an overview, see Gillian K. Hadfield, *The Economics of Copyright: An Historical Perspective*, 38 COPYRIGHT L. SYMP. 1, 4–6 (1988).

and that turns out to be true for newspapers no less so than it is for industries firmly within copyright's reach: the mismatch between the rhetoric of copyright justifications and the reality of its actual value and significance to the growth of an industry.²⁵

Chapters one through three of the book examine the role of newspapers and news publishing in Britain and early America (pp. 15–116). The narrative begins with an interesting paradox: newspapers obtained greater exclusivity and rights prior to the invention of copyright in the English-speaking world than they did after its emergence (p. 17). Slauter then traces how British newspapers functioned and dealt with the problem of copying during the early days of copyright. He describes how the industry operated in a space of ambiguity about copyright but concludes that this perceived lack of protection was perfectly compatible with the practices of journalism at the time, which favored copying and reproduction (pp. 85–86). Chapter three then describes early American news publishing, where Slauter sees a similar dynamic of copying and exchanging (pp. 86–97) eventually giving way to concerns about credit, accuracy, and competition (p. 114).

Continuing the exploration of American news publishing, chapter four then turns directly to copyright law and attempts to somewhat overtly weave doctrine and adjudication into the broader narrative about attitudes toward copyright (pp. 117–42). The book's first attempt to integrate law into the prevailing understanding of copyright at the time is seen in its discussion of the notable 1829 case of *Clayton v. Stone*²⁶ (pp. 118–19, 123–31). And this is where cracks begin to emerge.

Clayton v. Stone was the first reported decision where a U.S. court considered a copyright infringement claim brought by a newspaper, a price current.²⁷ In deciding the case, the court thus had to consider the copyrightability of the plaintiff's price current, which it rejected.²⁸ The case was heard by then–district court Judge Thompson, who later became a Supreme Court Justice. Slauter tells us that Judge Thompson had penned an opinion barely a few months prior to *Clayton*²⁹ where he had ruled that a nautical chart had a valid copyright, relying on the logic of labor (p. 128). A few years after *Clayton*, and after he had joined the Supreme Court, Justice Thompson was also a key figure in the Court's famed copyright decision of *Wheaton v. Peters*,³⁰ which rejected

²⁵ For prior accounts of this mismatch and efforts to remedy it, see Balganes, *supra* note 2, at 1573–76; Sara K. Stadler, *Incentive and Expectation in Copyright*, 58 HASTINGS L.J. 433, 435 (2007); and Sterk, *supra* note 2, at 1198.

²⁶ 5 F. Cas. 999 (C.C.S.D.N.Y. 1829) (No. 2,872).

²⁷ See *id.* at 1000.

²⁸ *Id.*

²⁹ Blunt v. Patten, 3 F. Cas. 763 (C.C.S.D.N.Y. 1828) (No. 1,580).

³⁰ 33 U.S. (8 Pet.) 591 (1834).

the idea of common law copyright for published works in the United States.³¹ In *Wheaton*, Justice Thompson authored a powerful dissent, relying extensively on the logic of labor as the basis of copyright at common law.³² Despite all of this, the logic of labor played no part in the court's reasoning in *Clayton*. Instead, in Slauter's reading of the decision, the court treated the question as "not whether a work was factual or creative but whether it contributed to the advancement of learning" (pp. 130–31).

This reading of *Clayton* is not without controversy, which Slauter does not sufficiently acknowledge. Legal scholars have disagreed on Judge Thompson's logic in denying the plaintiffs protection for their price currents. Some see in the opinion an analysis of "substantive merit" underlying the work seeking protection, and others see it as motivated by a rigid distinction between science and commerce.³³ Adding to these layers of potential meaning is another source of interpretation that Slauter also does not address and that is relevant to the discussion of internalism that we develop later. And this is how *Clayton* came to be understood within the legal lore of copyright after it was decided and digested.

As Slauter acknowledges (p. 118), *Clayton*'s prominence rose exponentially after the Supreme Court relied on the decision in the canonical copyright case of *Baker v. Selden*.³⁴ Yet *Baker* did not draw on *Clayton* for either of the positions advanced in today's scholarly readings of the case. Instead, *Baker* found in *Clayton* the logic that copyright maintained a distinction between protecting a work against copying for explanation and copying for use, holding that the latter ought to be protected by "letters-patent."³⁵ In drawing on *Clayton*, *Baker* appeared to be alluding to the possibility that then-Judge Thompson had rejected the plaintiff's claim therein because of the functionality of the claimed subject matter. In a similar vein, it is worth noting that a few decades after the decision, copyright lawyers themselves came to understand *Clayton*'s logic as questionable and potentially unconnected to the subject matter at issue. Eaton Drone, author of an extremely influential

³¹ *Id.* at 661, 663. For more on the case and its impact, see Craig Joyce, "A Curious Chapter in the History of Judicature": *Wheaton v. Peters and the Rest of the Story (of Copyright in the New Republic)*, 42 HOUS. L. REV. 325, 326–28 (2005).

³² *Wheaton*, 33 U.S. (8 Pet.) at 669–70 (Thompson, J., dissenting) ("The great principle on which the author's right rests, is, that it is the fruit or production of his own labour, and which may, by the labour of the faculties of the mind, establish a right of property, as well as by the faculties of the body . . .").

³³ Compare Bracha, *supra* note 1, at 205–06 (making the case for the substantive-merit interpretation), with Robert Brauneis, *The Transformation of Originality in the Progressive-Era Debate over Copyright in News*, 27 CARDOZO ARTS & ENT. L.J. 321, 334–36 (2009).

³⁴ 101 U.S. 99 (1880).

³⁵ *Id.* at 106; see also *id.* at 105–06.

late nineteenth-century treatise on copyright, saw in *Clayton* little more than a recognition that it would have been impracticable for newspapers to comply with the statute's rigid requirements of publication for four or more weeks.³⁶ To Drone, the "ephemeral[ity]" referenced in *Clayton* was an allusion to the four-week publication period, rather than a subject-matter discussion.³⁷ When the statute was modified to eliminate the rigidity of the formalities, *Clayton*'s logic became irrelevant in this reading.³⁸ Whether then-Judge Thompson intended to introduce a subject-matter restriction in his opinion or not, the reality remains that by the turn of the century, *Clayton* had come to be dissociated from any such restriction.³⁹ In attempting to weave *Clayton* into the story of newspaper publishing and copyright, Slauter's account underappreciates the evolutionary independence of legal precedents.

The second half of *Who Owns the News?* engages legal precedents and law reform efforts much more directly than does the first half. Moving back to Britain in chapter five, the book documents the efforts to introduce a special law for newspaper copyright and the ways in which these attempts brought different types of coalitions and frictions to the surface (pp. 144–66). As part of this narrative, Slauter examines several key copyright decisions of relevance to newspapers. And again, the narrative appears to force these cases into the political economy story that Slauter attempts to tell about protection being a binary between full protection and no protection, in the process glossing over the jurisprudential nuances that they embody. For instance, in discussing the case of *Cox v. Land & Water Journal Co.*⁴⁰ and its exclusion of newspapers from the categories of "book" and "periodicals" in the statute, Slauter appears to suggest that the decision was ambivalent about recognizing newspapers as copyrightable subject matter (pp. 167–69). Yet scrutiny of the actual decision reveals a few important things. First, its author was attempting to finesse the statute's requirements of registration by affording newspapers a seemingly equivalent nonstatutory right that

³⁶ EATON S. DRONE, A TREATISE ON THE LAW OF PROPERTY IN INTELLECTUAL PRODUCTIONS IN GREAT BRITAIN AND THE UNITED STATES EMBRACING COPYRIGHT IN WORKS OF LITERATURE AND ART, AND PLAYRIGHT IN DRAMATIC AND MUSICAL COMPOSITIONS 169 n.1 (1879).

³⁷ *Id.* As we shall see later, treatise writers closer in time to *Clayton* also adopted this view. See *infra* p. 1124.

³⁸ See DRONE, *supra* note 36, at 169 n.1 ("The statutory requirement just mentioned has been long obsolete.")

³⁹ See, e.g., *Mutual Advert. Co. v. Refo*, 76 F. 961, 963 (C.C.D.S.C. 1896) (citing *Clayton* for the proposition that a pamphlet was copyrightable); *Harper v. Shoppell*, 26 F. 519, 519 (C.C.S.D.N.Y. 1886) (citing *Clayton* for the idea that a single sheet may qualify as a book under copyright law); *United States ex rel. Schumacher v. Marble*, 14 D.C. (3 Mackey) 32, 45–46 (1883) (citing *Clayton* for the need to take essential steps to obtain copyright protection); *Clemens v. Belford, Clark & Co.*, 14 F. 728, 730 (C.C.N.D. Ill. 1883) (citing *Clayton* for the requirement that authors comply with copyright laws to obtain property rights in their published works).

⁴⁰ [1869] 21 LT 548 (Eng.).

would get around the registration prerequisite.⁴¹ Second, the opinion came from a court of equity (the Court of Chancery, right before the fusion of law and equity⁴²), where circumventing needless formalities was a key objective. *Cox* was therefore giving newspapers supra-copyright protection, a move that the U.S. Supreme Court would attempt to replicate a half century later.⁴³ In Slauter's narrative about protection, these nuances — which paint a more complex picture — recede into the backdrop.

Shifting back to the United States, the book then details how the American newspaper publishing world sought to reform and then use copyright law to regulate copying — with very little success (pp. 198–221). Complicating the story is the emergence of structured newsgathering cooperatives in this time, which engaged the rhetoric of “monopolies” (p. 197). In Slauter's account, what appears to have scuttled the reform effort was the fracturing of interests among newspapers of varying sizes (pp. 201–02, 205–07). This rupture in turn led newspapers to push for the idea of an independent property right in news, which produced the decision in *International News Service v. Associated Press*.⁴⁴

The book's discussion of the buildup to the Supreme Court litigation is thoroughly researched and particularly well developed (pp. 229–46). Slauter ably walks readers through the key parts of the litigants' legal strategies and the successes of these strategies. However, when it comes to the Court's actual decision, the narrative once again abbreviates the nuances of the opinion in pursuit of its overall arc (pp. 246–50). Given the centrality of the case to newspapers and intellectual property in the United States, one might have expected the book to delve deeper into its legal complexities, even while remaining true to Slauter's narrative. His treatment of “unfair competition” and “quasi property” in the book comes across as caricatured (p. 247), suggesting that these ideas have little analytical content of their own.⁴⁵ Slauter portrays the author of

⁴¹ See *id.* at 550. For an understanding of the case along these lines, see DRONE, *supra* note 36, at 172–73.

⁴² See *Cox*, 21 LT at 550. For more on the law-equity fusion and its analytical ramifications, see Michael Lobban, *What Did the Makers of the Judicature Acts Understand by “Fusion”?*, in EQUITY AND LAW: FUSION AND FISSION 70 (John C.P. Goldberg, Henry E. Smith & P.G. Turner eds., 2019).

⁴³ See *Int'l News Serv. v. Associated Press*, 248 U.S. 215 (1918).

⁴⁴ 248 U.S. 215.

⁴⁵ A fairly robust body of literature has attempted to show that the majority opinion drew these ideas from existing doctrines and principles. See, e.g., Shyamkrishna Balganesh, “Hot News”: *The Enduring Myth of Property in News*, 111 COLUM. L. REV. 419, 422 (2011); Shyamkrishna Balganesh, *Quasi-property: Like, but Not Quite Property*, 160 U. PA. L. REV. 1889, 1891 (2012); Rudolf Callmann, *He Who Reaps Where He Has Not Sown: Unjust Enrichment in the Law of Unfair Competition*, 55 HARV. L. REV. 595, 602 (1942); Rudolf Callmann, *Unfair Competition in Ideas and Titles*, 42 CALIF. L. REV. 77, 80 (1954); Rudolf Callmann, *What Is Unfair Competition?*, 28 GEO. L.J. 585, 588 (1940); Zechariah Chafee, *Unfair Competition*, 53 HARV. L. REV. 1289, 1309–

the majority opinion, Justice Pitney, as something of a compromiser, while he treats the dissenting opinions in the case — by the more famous Justices Holmes and Brandeis — as driven by more coherent philosophical positions (pp. 248–50). Again, the narrative glosses over legal nuances that explain a lot.

Since the plaintiff in the case was seeking only an injunction — and no damages — the Court was exercising its equitable jurisdiction, which it was acutely aware of.⁴⁶ (A comparison to the English case of *Cox* would have been particularly valuable here, an opportunity that Slaughter misses.) Equitable jurisdiction afforded the Court broad substantive and procedural discretion in the case, which the majority seized on to craft a new substantive right and remedy. Justice Pitney's ideas of unfair competition and quasi-property were hardly mere "neologism[s]" (p. 247) but instead were ideas with considerable intellectual pedigrees, even if one disagrees with their suitability for the dispute before the Court. Slaughter's reading of the case misses all of this.

As a history of the Anglo-American newspaper publishing industry and its efforts to obtain inclusion within copyright law, *Who Owns the News?* is well executed and successful. Yet as a history of how newspapers navigated the *legal* institution of copyright over time, the book is somewhat rushed and the narrative too unidimensional. The narrative consistently portrays copyright as representing something of a binary between protection and nonprotection when the legal machinery embodies multiple intermediate options, many of which remain submerged in the narrative. By glossing over nuances that are not just idiosyncratic details but instead core components of copyright's legal foundations, the book makes the law of copyright — as it relates to newspapers — seem like little more than a distillation of the myriad political and economic influences that operated on the industry at any given point in time. While that may have well been how newspapers *perceived* their marginalization within copyright, one suspects it does not capture how the world of copyright perceived its interaction with the news.

B. Social History

More so than the other two books, Professor Fei-Hsien Wang's *Pirates and Publishers* looks beyond law to less formal sources of economic coordination and regulation. The book seeks to "shift attention from the copyright legislations to their potential users" (p. 4). It therefore examines how these users "received, appropriated, practiced, and contested the very concept of copyright [*'banquan'*] . . . from the 1890s,

11 (1940); W. Edward Sell, *The Doctrine of Misappropriation in Unfair Competition*, 11 VAND. L. REV. 483, 486–87 (1958).

⁴⁶ See *Int'l News Serv.*, 248 U.S. at 236 ("In order to sustain the jurisdiction of equity over the controversy, we need not affirm any general and absolute property in the news as such.").

when this term was first introduced in the Chinese cultural community, to the 1950s, when it gradually faded from public discussion” under the new Communist regime (p. 4).

In making this examination, the book pushes back against the old and persistently influential belief that the Chinese population simply lacked “a sense of copyright” (p. 2). This conventional story portrays the development of intellectual property law, and especially of copyright, in modern China as a “failure”⁴⁷: intellectual piracy remains rampant in contemporary China, more than a century after the Chinese state first introduced a modern intellectual property law into its legal apparatus, and legal enforcement remains uneven and often nonexistent. The story then blames this “failure” on the fact that “Chinese tradition and political culture privilege imitation over innovation, community over the individual” (p. 3).

Wang’s book dismantles this essentialist narrative by thickening the history of copyright in modern China: it shows how state actors, publishers, and authors alike made active, often aggressive, use of copyright institutions to further their own interests and political objectives, thereby refuting the portrayal of Chinese intellectual and economic culture as somehow fundamentally incompatible with the idea of individualized intellectual property rights. Up until the Communist era, China had a vibrant and highly commercialized private publishing industry that inevitably relied heavily on institutionalized rules and norms to coordinate its activities. As Wang capably demonstrates, such an industry could not have had a wholly negative relationship with the institution of copyright.

There is a rich and growing literature on pre-twentieth-century Chinese publishing practices that argues for the existence of a robust publishing industry in China since at least the late seventeenth century.⁴⁸ Whether this premodern indigenous industry possessed something functionally similar to intellectual property has been the subject of fierce debate. Prudently, Wang chooses not to engage this debate, “suspend[ing] judgment as to whether imperial China had its indigenous ‘copyright’” (p. 9). Instead, she begins her narrative in the late Qing dynasty, just as political elites were making a major push to “modernize” Chinese law in the image of Western — and, later, Japanese — law.

Preexisting scholarship has often characterized these attempts as political and legal transplant programs, given that they sought to introduce Western institutions, often filtered through Japanese adaptations, into

⁴⁷ *E.g.*, WILLIAM P. ALFORD, *TO STEAL A BOOK IS AN ELEGANT OFFENSE: INTELLECTUAL PROPERTY LAW IN CHINESE CIVILIZATION* 2 (1995).

⁴⁸ *See, e.g.*, CYNTHIA J. BROKAW, *COMMERCE IN CULTURE: THE SIBAO BOOK TRADE IN THE QING AND REPUBLICAN PERIODS* 1–2 (2007).

China.⁴⁹ Wang argues, however, that this history “should not be seen merely as another case of legal transplantation or legal modernization; it is also a point of encounter and exchange between two systems of textual reproduction and knowledge economy” (p. 10). In other words, she argues that the history of copyright in twentieth-century China is far more complicated than one country passively “receiving” the legal institutions of another, but was instead a process where an enormous amount of local institutional entrepreneurship emerged in China alongside higher-level attempts to introduce foreign law.

Chapter one gives an intellectual and textual history of the term “copyright,” tracing its movement from Japanese political and legal discourse in the aftermath of the Meiji Restoration to elite Chinese discourse in the late Qing dynasty (pp. 21–61). Chapters two through four discuss the incentives and goals of politicians, authors, and publishers in the midst of these institutional changes (pp. 62–157). The explosion of intellectual interest in “New Learning” — Western science, philosophy, and sociopolitical thought — shook up the old intellectual infrastructure through which intellectuals had long verified the authenticity, credibility, and value of publications (pp. 62–63). This profound shift created new incentives for all sides: for the state to regulate and control, for publishers to pursue and secure economic profit, and for authors to claim new sources of wealth, social status, and influence — all of which converged on the new legal institution of copyright (p. 18).

Chapters five to seven illustrate the localized functionality of the new copyright regime, focusing on the ability of Shanghai booksellers to establish and reinforce “their own private *banquan*/copyright regulations when the Chinese central state and its law were unable or unwilling to do so” (p. 18). As historians have long argued, the coercive capacities of the late Qing and Republican governments were consistently limited due to a combination of low taxes, weak administrative capacity, and often crippling political instability.⁵⁰ It therefore comes as no surprise that

⁴⁹ See, e.g., Peter K. Yu, *The Transplant and Transformation of Intellectual Property Laws in China*, in GOVERNANCE OF INTELLECTUAL PROPERTY RIGHTS IN CHINA AND EUROPE 20, 20–29 (Nari Lee, Niklas Bruun & Mingde Li eds., 2016); Liguozhang & Niklas Bruun, *Legal Transplantation of Intellectual Property Rights in China: Resistance, Adaptation and Reconciliation*, 48 INT’L REV. INTELL. PROP. & COMPETITION L. 4, 5 (2017). On the general history of legal transplants in modern China, see Taisu Zhang, *The Development of Comparative Law in Modern China*, in THE OXFORD HANDBOOK OF COMPARATIVE LAW 228 (Mathias Reimann & Reinhard Zimmermann eds., 2d ed. 2019) [hereinafter Zhang, *Development of Comparative Law*].

⁵⁰ For background on the administrative weakness in the late imperial era, see, for example, T’UNG-TSU CH’Ü, LOCAL GOVERNMENT IN CHINA UNDER THE CH’ING (1962); BRADLY W. REED, TALONS AND TEETH: COUNTY CLERKS AND RUNNERS IN THE QING DYNASTY (2000). On the Republican era, see, for example, PRASENJIT DUARA, CULTURE, POWER, AND THE STATE: RURAL NORTH CHINA, 1900–1942 (1988); and HUAIYIN LI, VILLAGE GOVERNANCE IN NORTH CHINA, 1875–1936 (2005). On fiscal weakness, see Taisu Zhang, *Fiscal Policy and Institutions in Imperial China*, in OXFORD RESEARCH ENCYCLOPEDIA: ASIAN HISTORY (2020).

their control over copyright was similarly limited and often superseded by customary institutions like guild regulations. These regulations effectively constituted a separate domain of rules, procedures, and enforcement mechanisms that were often more in tune with the economic circumstances of the time than they were with formal law. This parallel customary regime continued to operate in Shanghai and Beijing through the early 1950s, when the new Communist regime's overwhelming desire for political and intellectual control gradually brought an end to the regulatory independence of local publishers (pp. 252–88).

As social history, Wang's book is a significant achievement: it is sophisticated, richly documented, and skillfully narrated. As discussed in somewhat more detail below, its unpacking of the personal and political incentives of lawmakers, writers, and publishers is uncommonly compelling and deep, combining interpretive nuance with great analytical clarity.

As a social history of a *legal institution*, however, the book leaves something to be desired. To be fair, on its own terms, the book does not attempt to present anything close to a comprehensive institutional history of copyright but instead focuses on its reception, transformation, and use within a specific sociopolitical and geographical range. It is therefore not a failure of the book that it leaves large swathes of macro-level legal, political, and economic development uncovered. That said, given the book's clear institutional ambitions, it is entirely fair to ask whether its institutional narrative, within its own stated parameters, covers the necessary bases.

From this perspective, a visible gap in the book is that its *substantive* account of copyright laws and customs is thin. The book clearly demonstrates that there was a customary copyright regime in Republican China, operating "under the shadow" of the formal legal system (p. 20). When it comes to the substantive rules that governed economic behavior, however, the book offers only a bare-bones description: it discusses, for example, the conditions for the initial recognition of a customary "*banquan*," without laying out how the "*banquan*" could be transferred, licensed, waived, or terminated, all of which are critical to understanding how copyrights actually functioned, economically and socially (pp. 171–77). This is also true of the book's account of formal legislation, which covers only a few pages and discusses its content in a very abstract manner, glossing over most facets of the substantive legal regime (pp. 194–204).

As a result, the book fails to give a satisfying account of how custom interacted with formal legal institutions. It does persuasively argue that the two regimes were jurisdictionally distinct, but the lack of a fuller, more substantive description of the regulatory content of either regime effectively precludes the possibility of looking more deeply into their *intellectual* interactions. Concepts, substantive rules, and procedures of formal law may well have influenced customary legal institutions even

while functioning largely independently of these formal legal institutions.

Wang notes that, for much of the early twentieth century, state power was too limited for formal intellectual property law to be effectively enforced (pp. 198–99). Many scholars have indeed argued that the Qing state was too weak to consistently enforce its “civil” laws at the local level and that local customs tended to carry greater weight than formal law in everyday socioeconomic activity.⁵¹ Even so, many of the concepts and institutional structures employed in customary property and contract law were often consistent with those found in formal legal codes and regulations,⁵² suggesting that the formal law retained some measure of intellectual influence even if it lacked coercive force.

One would expect such intellectual influence to be even stronger in the context of early twentieth-century intellectual property law. Late Qing and Republican-era legal reforms drew their intellectual authority not only from the backing of the state, but also from the sociopolitical prestige afforded to Western and Japanese institutions.⁵³ Copyright, in particular, was a domain in which the most visible and influential actors were prominent authors and major publishers who often shared these political sensitivities (pp. 90, 118). A formal legal regime that, content-wise, played into these sensitivities would likely have possessed a substantial amount of intellectual prestige even if it was poorly enforced in practice. That such prestige was limited begs the question, therefore, of how much substantive overlap there truly was between customary and formal copyright law.

Wang’s book does not go deeply enough into the substantive rules supplied by either regime to answer this kind of question. The book does state that customs operated “under the shadow” of formal legal institutions (p. 20), but this potentially intriguing claim is left, for the most part, at a relatively superficial level.

These institutional gaps also affect the book’s sociopolitical narrative. The book’s later chapters give a comparatively thin account of the institutional — and legal — consciousness that emerged from the other end of this process. How did publishers and sellers understand and internalize the copyright rules they created for themselves “under the shadow” of formal law? Did they approach the copyright rules purely from a functionalist mindset, or was there something deeper and more intellectually transformative going on? A more systemic treatment of the substantive interaction between custom and formal law would have

⁵¹ *E.g.*, PHILIP C.C. HUANG, CIVIL JUSTICE IN CHINA: REPRESENTATION AND PRACTICE IN THE QING 51–75, 110–37 (1996); TAIJU ZHANG, THE LAWS AND ECONOMICS OF CONFUCIANISM 58–59 (2017).

⁵² Zhang discusses one major example: the substantive rules of law for selling and mortgaging differed significantly between customary and formal law, but the conceptual structure was broadly similar. *See* ZHANG, *supra* note 51, at 41–52.

⁵³ Zhang, *Development of Comparative Law*, *supra* note 49, at 232–33.

gone a long way toward answering such questions. It also would have helped answer one of the central questions the book poses in its introduction: How, if at all, did the “encounter” with foreign law change the understanding of copyright among those nominally subject to the new legal regime (pp. 9–10)?

Ultimately, Wang’s book is a fine work of scholarship that persuasively demonstrates that, beyond the narrow confines of the formal law, there was a vast and socioeconomically significant dimension of institutional agency in early twentieth-century Chinese copyright practices. The book introduces much social complexity and nuance to a topic that has all too often lacked both. Nonetheless, it is hard to escape the impression that a fuller engagement with the law could have better served both the book’s sociopolitical narrative and its institutional analysis.

C. *Media History*

Professor Monika Dommann’s *Authors and Apparatus* is easily the most methodologically ambitious of the three books. Dommann’s approach in the book is best captured by her observation that the “history of copyright is a legal history of media as well as a media history of legal norms” (p. 7). While the book describes itself as a “media history” of copyright, the narrative in essence advances a new theoretical framework for understanding the evolution of copyright, for which it relies on a variety of historical sources. Dommann attempts to situate the book’s method as a novel intervention in the fields of copyright and media history. Unlike purely abstract accounts of law, Dommann’s book seeks to directly engage the material nature of communication media and technologies, examining the actual workings of such media and their effects on different participants in the sector (p. 8).

Perhaps most telling in the book’s account of its method is its effort to tie legal history to the history of legal knowledge (pp. 8–9). Dommann purports to do this by embracing something of a reflexive relationship between legal doctrine and the social reality of its effects. She thus observes that her approach “regards legal concepts not just as the history of dogma or ideas but also as scientific, economic, and social practices” (p. 9), echoing Gordon’s view of critical legal histories, which we explicate later.⁵⁴ Here Dommann appears to suggest that legal doctrine influences social reality by crystallizing norms pertaining to new media (pp. 9–10). While the theory is commendable in the abstract, the book’s application of the theory to its own historical narrative falls short. The narrative references legal ideas at various points in distilling the development of copyright, yet it never fully grapples with the influence of such legal ideas *qua* doctrine on practices surrounding technology in society, an interaction that is central to the notion of legal internalism.

⁵⁴ See *infra* pp. 1117–18. For Gordon’s view, see Gordon, *supra* note 18, at 109.

Instead of a chronological account of copyright's evolution, *Authors and Apparatus* adopts an approach that moves through the development of what it sees as key technologies of communication, and in so doing examines the influence that each had on established copyright dogma. And the book does so from a comparative perspective, looking at this evolution in Western Europe (France and Germany) and the United States. Each of the book's chapters revolves around a core theme — or evolutionary idea — which Dommann illustrates rather deftly through the discussion of the historical narrative surrounding a new technology and its acceptance within copyright.

In part one of the book (chapters one through four), Dommann focuses on the technologies of writing and recording. Chapter one narrates how the emergence and ubiquity of mechanical music challenged copyright's conception of "reprinting" (p. 28) and forced it to adopt a broader understanding of "reproduction" (p. 27). In this move, she argues that copyright underwent a subtle transformation from being about "aesthetics and law" to "economics and law" (p. 19). In the actual narrative, however, the "and law" part of the transformation is presented in an unduly abbreviated manner, which legal readers will likely find wanting.

Chapter two continues along the same lines, focusing on the emergence of photocopying and microfilm technologies (pp. 29–39). Chapter three then shifts to voice recording mechanisms (pp. 40–53). To set the stage for this technology, the book attempts to draw parallels to another technology of recording that had preceded it: photography. And here it approaches the comparison — both technological and jurisdictional — with an astonishing level of simplicity, one that is inaccurate and glosses over much. Dommann notes that "[w]hile photography offered no opportunity to reflect on legal theory and aesthetics in Anglo-Saxon law and was quickly integrated into copyright (in Great Britain in 1862 and in the U.S. in 1864), in Germany it first had to be declared an art" (p. 40). Dommann's observation may well be true of Germany, but it wholly disregards the complexity and the debates surrounding the integration of photography into U.S. copyright law, where it was not until 1884 and the celebrated Supreme Court case of *Burrow-Giles Lithographic Co. v. Sarony*⁵⁵ that copyright law fully came to accept photography as a form of artistic endeavor that was eligible for copyright protection as a "writing."⁵⁶ Indeed, the controversies surrounding this integration have featured prominently in scholarly commentary in

⁵⁵ 111 U.S. 53 (1884).

⁵⁶ *Id.* at 58.

recent years.⁵⁷ Dommann's elision of this episode is troubling, not because it specifically affects her own technology-mediated narrative (which it doesn't), but because it causes one to ask whether the dense comparativism packed into the entire narrative misses other key nuances that could in fact affect the narrative.

Dommann's treatment of photography reveals a deeper issue with the book's comparative orientation and its approach toward common law jurisdictions. And this is its use of the somewhat pedantic dichotomy between the making of law and its application and enforcement by courts.⁵⁸ Courts, in this dichotomy, are not seen as lawmaking bodies but rather as mere interpreters of statutory law. While this perspective may hold true for continental legal systems, it is far from descriptive of common law jurisdictions where courts have long played a crucial role in the incremental development of the law. Indeed, this lawmaking role is well documented to have been the story of Anglo-American copyright law through much of the nineteenth (and early twentieth) century.⁵⁹ We see this resurfacing in the book again in chapter four, which deals with "canned music" (p. 58). In the chapter's discussion of how American law dealt with the issue of talking machines and the role of John Philip Sousa therein, Dommann does acknowledge the critical role that the Supreme Court played in 1908, with its decision that mechanical piano rolls were not copies (pp. 56–61). Yet the narrative does so with a level of simplicity that just does not capture the true dynamics of lawmaking in a common law system. She thus observes that "law is not only clarified through law-making but also enforced in case law, particularly in the Anglo-American tradition" (p. 60). The making-enforcement dis-

⁵⁷ See, e.g., Christine Haight Farley, *The Lingering Effects of Copyright's Response to the Invention of Photography*, 65 U. PITT. L. REV. 385, 402–32 (2004); Justin Hughes, *The Photographer's Copyright — Photograph as Art, Photograph as Database*, 25 HARV. J.L. & TECH. 339, 343–68 (2012).

⁵⁸ The idea that courts do not make the law, but instead merely apply it or find it, has long been identified as a myth in the common law. See, e.g., 2 JOHN AUSTIN, LECTURES ON JURISPRUDENCE OR THE PHILOSOPHY OF POSITIVE LAW 655 (Robert Campbell ed., London, John Murray 3d rev. ed. 1869).

⁵⁹ See KAPLAN, *supra* note 15, at 40–41; Jessica D. Litman, *Copyright, Compromise, and Legislative History*, 72 CORNELL L. REV. 857, 858 & n.10 (1987); Liu, *supra* note 2, at 94–102. For further background, see generally Shyamkrishna Balganesh, *Copyright as Legal Process: The Transformation of American Copyright Law*, 168 U. PA. L. REV. 1101 (2020). Much of this judicial lawmaking occurred under the influence of the Legal Process School, which saw that courts and legislators are both involved in the lawmaking process. For a foundational text from that movement, see HENRY M. HART, JR. & ALBERT SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF THE LAW (1958).

inction that she sets up is unrepresentative of the richness that characterized the dynamic between courts and legislatures in U.S. copyright law until the mid-twentieth century.⁶⁰

As one progresses through the book's narrative, it becomes increasingly clear that Dommann's engagement with the epistemic and normative aspects of legal reasoning is fairly rudimentary, contrary to the promise that the book's initial description of its methodology held. This issue extends well beyond the book's treatment of Anglo-American law. At one point in her discussion of German phonograph law, Dommann notes how many German jurists criticized the law for abandoning "legal logic" when compulsory licenses and purely commercial motivations came to dominate (p. 64). Attributing this critique to the naive beliefs that the worlds of law and socioeconomic considerations are independent and that the law must be timeless and immutable, she concludes that the jurists were wedded to the idea that "the law should remain the same" (p. 64). The description oversimplifies the constant tension between continuity and change that is endemic to all legal reasoning and attributes the resistance to a wooden idea of immutability in the law.⁶¹ In so doing, Dommann disregards the subtle — but lasting — effect that legal ideas have on social constructions of an issue, something that is especially true for social institutions and practices that originate in the law, such as copyright.

Chapters five through eight of the book exhibit these methodological problems far less than the first part. These later parts provide a riveting economic and institutional history of some of the key organizationally influenced organs of the global copyright system, and the extent to which these entities interacted with (and often generated) new norms of use, reproduction, and control. In narrating this history, the book does an excellent job, and its transnational comparisons are particularly insightful.

In Chapter nine, Dommann then turns her attention back to the law and more specifically to the period between 1950 and 1980, perhaps the most consequential period for modern copyright law, and one that she describes as the era of "information explosion" (p. 149).⁶² She also moves her focus back to the United States, where the most comprehensive copyright reform in history took place during this period. The chapter, however, adopts a somewhat intriguing framing, insofar as it attempts to see the copyright discourse and the growth of science and technology

⁶⁰ See KAPLAN, *supra* note 15, at 40 (noting how the Copyright Act of 1909 left "the development of fundamentals to the judges"); Pierre N. Leval, Keynote Address, *An Assembly of Idiots?*, 34 CONN. L. REV. 1049, 1061–62 (2002) (discussing and critiquing this shift).

⁶¹ See EDWARD H. LEVI, AN INTRODUCTION TO LEGAL REASONING 1–2 (1949).

⁶² The author quotes Robert W. Kastenmeier, *The Information Explosion and Copyright Law Revision*, 14 BULL. COPYRIGHT SOC'Y U.S.A. 195, 195 (1967).

as being at loggerheads. In Dommann's reading of the events that produced the Copyright Act of 1976,⁶³ "[s]cientific methods of establishing the truth had defied legal decision-making processes" (p. 150).

This is a fairly controversial framing of the subject, since it implies that copyright's efforts — the "legal decision-making processes" — were all about locking up, controlling, and impeding the flow of information, activities that were obviously anathema to the advancement of science and technology. And this framing inflects the narrative of legal reform at multiple points. Moving to the Supreme Court's failure to reach a decision in the landmark case of *Williams & Wilkins Co. v. United States*,⁶⁴ as well as Congress's decision to refer the question of new technologies to a specialized commission — the National Commission on New Technological Uses of Copyrighted Works (CONTU)⁶⁵ — the chapter suggests that these events enabled science to develop independent of copyright regulation (p. 168). Once again, this narrative overlooks several key aspects of the case and the legal landscape that followed it.

To Dommann, when the Supreme Court affirmed the lower court's decision in *Williams & Wilkins* because the Justices were equally divided, it was merely "confirming the verdict of the lower court" (p. 166), suggesting that the lower court's decision had no real substantive value. To the contrary, the opinion of the Court of Claims in *Williams & Wilkins* is often hailed as deeply influential (regardless of whether one agrees with the decision).⁶⁶ In the case, the lower court classified the photocopying practices of the defendant as a form of fair use.⁶⁷ And it reached this conclusion by doing something that no court has seriously done when determining fair use since: looking to the treatment of the same question in seventeen other countries to imply that the United States should adopt a similar position too.⁶⁸ The court, in short, was self-consciously engaged in a form of international harmonization of the law. When Congress enacted the modern fair use provision into law, it was therefore acutely aware of this background, as well as the lack of specific guidance contained in the Court of Claims' opinion. Yet even when referring the broader question to CONTU, Congress passed what is today the open-ended fair use provision,⁶⁹ as well as a more specific safe harbor for libraries and archives engaged in reprography.⁷⁰ And

⁶³ Pub. L. No. 94-553, 90 Stat. 2541 (codified as amended in scattered sections of the U.S. Code).

⁶⁴ 420 U.S. 376 (1975).

⁶⁵ See S. REP. NO. 94-473, at 71 (1975) (discussing the reasons for enacting § 108 of the Copyright Act of 1976 into law).

⁶⁶ See, e.g., DAVID L. LANGE & H. JEFFERSON POWELL, *NO LAW: INTELLECTUAL PROPERTY IN THE IMAGE OF AN ABSOLUTE FIRST AMENDMENT* 50 (2009); Paul Goldstein, *The Private Consumption of Public Goods: A Comment on Williams & Wilkins Co. v. United States*, 21 BULL. COPYRIGHT SOC'Y U.S.A. 204, 204-05 (1974).

⁶⁷ See *Williams & Wilkins Co. v. United States*, 487 F.2d 1345, 1362 (Ct. Cl. 1973).

⁶⁸ *Id.* at 1361-62.

⁶⁹ 17 U.S.C. § 107.

⁷⁰ *Id.* § 108.

Congress did so with full knowledge that it was not overruling the decision in *Williams & Wilkins*, which it was of course fully empowered to do.

Dommann takes the law's lack of definitive guidance as the absence of law, when to those familiar with the working of the common law of fair use and the role of judicially crafted (yet open-ended) principles therein, the fair use doctrine, despite all its idiosyncrasies, represents a deliberate regulatory choice. Choosing to regulate through flexibility and analogy is hardly an abdication, which Dommann's characterization in the chapter misses.

In the conclusion to the book, Dommann observes that "historical scholars . . . use legal sources as seismographs while researching the history of other phenomena" (p. 180). This observation is telling, and it aptly captures both the strengths and weaknesses of *Authors and Apparatus*. While theoretically novel, the book attempts to condense an inordinate amount of material around key evolutionary arguments, each associated with a distinctive technology. As a scholarly contribution, this effort is quite commendable since it significantly moves the ball on *theorizing* copyright's evolution. The condensation, however, accompanies oversimplifications in the *historical* narrative, some of which produce inaccuracies, while others caricature the complexities at issue. In so doing, the book fails to fully deliver on its promise to showcase the entire connection between the legal and nonlegal foundations in copyright's historic evolution.

D. Causality and Copyright Law

Each of the books discussed in this Review structures its historical narrative to present the evolution of copyright as a complex phenomenon. Undoubtedly, much of the impetus for this complexity comes from the desire to see copyright as more than just a product of formal (or positive) legal rules, as the orthodox approach presumed.⁷¹ With varying degrees of candor, each book therefore sets out to look beyond the law in developing its narrative, without of course disavowing the relevance of the law to copyright as such. And, as the previous summaries describe, the books each take this relevance to mean different things in the actual narratives themselves. This conscious effort to underplay the role of the law in the evolution of copyright misses something, which we point to and develop in the next Part. The deliberate effort to de-emphasize the law, however, also introduces an important feature into each of these narratives, even when viewed on their own terms: a disjointed conception of *causality* in the evolutionary story.

⁷¹ Kretschmer et al., *supra* note 6, at 5.

Causation is a controversial subject in historiography, and historical analyses routinely deny the existence of a causal emphasis in their narration of events.⁷² Much of this undoubtedly originated in the ways in which the analysis of causation came to be associated with (or at least derived from) the natural sciences.⁷³ Events, institutions, and human agency were seen to be far too idiosyncratic and subjective to allow historians to draw a causal link between them.

All the same, as some philosophers and theorists of history continue to point out, causality remains an inevitable part of any historical analysis that presents itself as a narrative account, rather than as a purely descriptive summary of events, which is referred to as a “chronicle.”⁷⁴ Historiographers thus differentiate between a narrative and a chronicle, recognizing that in the former the events are presented with the assumption that there is a coherence to them.⁷⁵ Additionally, in a narrative, the direction of the whole influences the constituent parts of the story. Narratives thus have a “plot,” which one historiographer describes as “a structure of relationships by which the events contained in the account are endowed with a meaning by being identified as parts of an integrated whole.”⁷⁶ The coherence of the plot embodied in a narrative is, however, not a purely aesthetic or logical one; it is instead a coherence that attempts to draw a chain through different events. In other words, it is a form of *causal* coherence that differentiates a historical narrative from a simple chronicle.

Merely identifying the existence of causality in a coherent historical narrative does not imply that the idea of causation underlying history maps onto — or indeed resembles in any meaningful way — the notion of causation commonly used in the natural (and social) sciences. Historical narratives remain specific to the identified subject at issue and consciously disavow grand generalization in a decontextualized

⁷² See, e.g., Mendel F. Cohen, *Causation in History*, 62 PHIL. 341, 344 (1987); Morris R. Cohen, *Causation and Its Application to History*, 3 J. HIST. IDEAS 12, 12 (1942) [hereinafter Cohen, *Application to History*]; Paul K. Conkin, *Causation Revisited*, 13 HIST. & THEORY 1, 9 (1974); E.J. Tapp, *Some Aspects of Causation in History*, 49 J. PHIL. 67, 68–69 (1952); W.H. Walsh, *Historical Causation*, 63 PROC. ARISTOTELIAN SOC'Y 217, 217–20 (1963). For the continuation of this controversy over legal history, see Charles Barzun, *Causation, Legal History, and Legal Doctrine*, 64 BUFF. L. REV. 81, 81–82 (2016); John Henry Schlegel, Commentary, *Philosophical Inquiry and Historical Practice*, 101 VA. L. REV. 1197, 1198 (2015); and Christopher Tomlins & John Comaroff, “Law As . . .”: *Theory and Practice in Legal History*, 1 U.C. IRVINE L. REV. 1039, 1043 (2011).

⁷³ See, e.g., Cohen, *Application to History*, *supra* note 72, at 12.

⁷⁴ A.C. Danto, *Mere Chronicle and History Proper*, 50 J. PHIL. 173, 173 (1953); Anton Froeyman, *Concepts of Causation in Historiography*, 42 HIST. METHODS 116, 120 (2009); see also MICHAEL STANFORD, AN INTRODUCTION TO THE PHILOSOPHY OF HISTORY 219 (1998).

⁷⁵ See HAYDEN WHITE, METAHISTORY: THE HISTORICAL IMAGINATION IN NINETEENTH-CENTURY EUROPE 5–6 (1973).

⁷⁶ Hayden White, *The Value of Narrativity in the Representation of Reality*, 7 CRITICAL INQUIRY 5, 13 (1980).

manner. To speak of a historical event of a certain kind (for example, a war) and narrate the events leading up to it is not the same as a grand theory of wars arising among nations when similar events or factors emerge. Thus, while historical narratives are not “causal claims” as such, their coherence is entirely a product of individual statements that imply an inevitable causality for the narrative to work.⁷⁷ In short, historical narratives must embody some element of causality for their own success.

None of this should be particularly controversial. Yet translated to the historiography of copyright, the recognition of a nascent causality in extant historical narratives reveals something about the three books under review. Orthodox historical accounts of copyright, prominent prior to the interdisciplinary turn that today dominates, rooted their narrative in the formal law of copyright. In so doing, the plot of their narratives was inevitably a *legal* one. This meant a few interrelated things. It meant that the historical narrative focused entirely on the role of legal doctrine, institutions, and actors to explain the evolution and transformation of copyright. Changes in copyright law were seen to come about because of inadequacies within the existing framework, brought about by external factors — such as new ideas, technologies, or political economy shifts — and the chain of the narrative was built up around the sequence of such changes. *An Unhurried View of Copyright* is a perfect illustration of this form of narrative.⁷⁸ In it, Professor Benjamin Kaplan presents a chronologically linear historical narrative of copyright, and he does so by moving from one crucial legal development in copyright to another through the chain of technological and nontechnological events that triggered them. The chain of coherence that he constructs in the narrative is one that is strongly tied to the endurance of *copyright law* as a coherent unit of analysis.

Put another way (and in more general terms), such orthodox legal histories of copyright locate their account of causal coherence in the idea of *law as a normative enterprise*. The legal nature of copyright as an institution is seen to produce machinations that trigger a cascade of events, producing the evolutionary account. The *telos* of the narrative, so to speak, is invariably rooted in the idea of copyright law, either in its application, invocation, or modification.

Interdisciplinary accounts such as those of Slauter, Wang, and Dommann self-consciously underplay the explanatory power of law in the narrative of copyright. While unproblematic as such, this has the effect of de-anchoring the narrative from an account of causality that is traditionally associated with copyright: the law. In its place, the narrative has to find an alternative basis for its coherence to avoid being a simple chronicle of events surrounding the institution of copyright. In

⁷⁷ Froeyman, *supra* note 74, at 122.

⁷⁸ See KAPLAN, *supra* note 1559.

one reading, each of the books actively resists anchoring itself to a new causal account for reasons that are never made explicit. One might speculate that the historian's resistance to causation represents one reason. Another might be the unwillingness to abandon the causality of law altogether. All the same, in pushing to jettison the centrality of the law, each of the accounts implicitly endorses an alternative account of causality in the narrative about copyright's evolution. To Slauter, it is the political economy of book publishing. Its dynamics explain why newspapers are seen as being outside the domain of influence on copyright evolution, even when they interface with the legal regime. In Wang's account, the causality lies in sociocultural forces in turn driven by the self-interest of publishers who are able to exercise control through market power, quite independent of the law. And according to Dommann, the causal driver is technological change, which calls into question some of copyright's core assumptions at each turn.

The effort to locate causal coherence for the copyright narrative outside the domain of law, while perhaps commendable for its ambition, nevertheless weakens the narrative. And this is because however hard each account tries to distance itself from the law by complexifying the set of variables that it considers, it inevitably falls back on the law — either formal or informal — as the pivot for the narrative. To put the point most bluntly, for each of the accounts to be seen as an integral whole, that is, as a narrative, it needs to recognize a central role for something called copyright law, which is exerting a direct or unstated influence on the direction of behavior.

What this produces in these narratives is an interesting hybrid. The *explanatory* coherence of the narrative is identified through nonlegal forces and variables, while the *causal* coherence of the account is implicitly provided by copyright law. In the three books, changes in political economy, sociocultural reality, or technology provide a sufficient explanation for each of the individual events in the narrative, tying them together under the rubric of a unified explanation. Yet the individual events themselves cohere only because they represent efforts to engage formal copyright law. None of the three books makes a convincing effort to integrate the two, with the result that explanation and causation do not always point in the same direction, and appear to be contradictory at times (as illustrated in some of the criticisms of the narratives offered previously). The challenge then is whether such an integration is indeed possible. While we do not pretend to have a complete answer to this question, we suggest that acknowledging a greater role for the influence of legal thinking in the narrative presents one important solution to the problem.

II. LEGAL INTERNALISM

Each of the books does an admirable job marshalling a variety of nonlegal factors and variables into its narrative about the evolution of copyright. All the same, they also miss something crucial in their effort to underplay the role and salience of copyright *law* in the overall narrative. In this Part, we argue that this missing component is the role of *legal internalism* in the story about copyright's evolutionary trajectory. Legal internalism, as we describe it, remains a crucial explanatory variable for a variety of different institutions and domains that have a legal origin and see themselves as areas of law. This Part therefore sets out the central tenets of legal internalism both as (1) a behavioral phenomenon that operates in legal domains, and (2) an explanatory variable that influences the direction of legal evolution. The next Part shifts back to extending these insights to copyright.

The theory of legal internalism we present here is a fundamentally behavioral one. There are, of course, many influential theories of internalism (or the "internal" point of view) that are jurisprudential or normative, arguing that law is inherently autonomous and self-contained, or that law should be understood from an internal point of view because it is normatively correct to do so.⁷⁹ Our approach here is different; we seek instead to understand the very emergence of legal internalism as a social and behavioral phenomenon and thus its influence in directing the evolution and growth of a legal area.

Our basic argument is that legal internalism is an innate behavioral characteristic of mature legal systems: there are inherent incentives and biases in how law and legal professions operate in these systems that drive judges, lawyers, and many legal scholars, wherever they emerge, toward seeing the law as (i) normative, (ii) epistemologically self-contained, and (iii) internally logically coherent. We characterize viewing (and treating) the law in terms of these three attributes as legal internalism. Very importantly, in our account, internalism of this form emerges not because law is, by nature, normative, epistemologically self-contained, and logically coherent — far from it, in many cases — but because the acquisition of legal expertise tends to behaviorally nudge individuals in that direction, and because it is very often in the material self-interest of legal professionals (and legally equipped elites) to see it as such, whether or not it actually is.

We should, before proceeding any further, define what we mean by "normative," "epistemologically self-contained," and "internally logically coherent." The first two are relative straightforward: Following conventional definitions, "normative" simply means that the law imposes rules that ought to be followed according to a value position. "Epistemologically self-contained" refers to the conscious belief that

⁷⁹ See *infra* pp. 1106–10.

laws should be interpreted with reference only to other laws, and that external sources of interpretation are allowed only insofar as they are expressly incorporated by legal rules. This does not necessarily mean that internalists will actively deny the existence of external linguistic conventions that can influence legal interpretation — although some may — but rather that such conventions do not register as the subject of conscious intellectual analysis and study in their cognitive worldview. In other words, they cognitively ignore them, unless they become part of the domain of law.

“Internally logically coherent” is perhaps the most difficult concept of the three to define. Here, we apply a behavioral definition that relies on the subjective mindset of legal professionals, rather than a conceptually substantive one that seeks to explicitly define the content of “legal logic”: we claim only that legal professionals subjectively prefer to understand the law as “internally logically coherent,” but make no claim as to what kind of logic they apply. That is, legal professionals tend to believe that the law does not contain — or, at least, should not contain — internal contradictions. What constitutes an internal contradiction, however, depends on the kind of legal logic that any given group of lawyers, or any individual lawyer, has subjectively embraced, and is therefore a social fact, rather than a universal standard. There is, of course, a wide variety of scholarly opinions as to what this “legal logic” contains, and we take no sides in this debate.⁸⁰ Our claim is merely that lawyers have a strong cognitive preference for systemic coherence, however they understand it.

From the perspective of behavioral theory, there are two ways to understand the appeal of internalism to legal professionals. First, the development of intellectual expertise in a field tends to cognitively encourage a certain kind of tunnel vision that exists in many areas of intellectual expertise, including but certainly not limited to law.⁸¹ Furthermore, the self-representation of law as a *normative* system reinforces the professional bias toward internal coherency. Given that legal professionals are more likely to take law’s claim to normativity very seriously, they are also more likely to insist on its internal logical cohesion.⁸² Second, internalism is enormously appealing to the sociopolitical and economic self-interest of legal professionals. It tends to significantly strengthen their expertise monopoly, thereby creating large incentives

⁸⁰ Much of this literature is summarized in Julie Dickson, *Interpretation and Coherence in Legal Reasoning*, in STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., Winter 2016 ed.), <https://plato.stanford.edu/archives/win2016/entries/legal-reas-interpret> [<https://perma.cc/FE7M-7626>].

⁸¹ See *infra* section II.A, pp. 1096–106.

⁸² See William Baude & Stephen E. Sachs, *The Law of Interpretation*, 130 HARV. L. REV. 1079, 1083 (2017).

for them to buy into internalism, either consciously or subconsciously.⁸³ As a large amount of cognitive scholarship has argued, human beings tend to be intellectually self-serving, and legal professionals are no different.⁸⁴

Consequently, we argue that the emergence of law as an expert profession tends to go hand in hand with the emergence of legal internalism.⁸⁵ The theory of legal internalism that we advance here has significant implications for accounts of legal change and evolution. We share a great deal of common ground with other theories of internalism in how we utilize the concept: legal internalism as we define it is not a theory about the substantive content of law, but rather about its intellectual structure and processes of change. Internalism tends to create institutional focal points for legal change, through which external factors, whether social, political, economic, or cultural, are funneled into the legal system. All of these external factors still exert major influence on the shape and substance of legal change, but they often do so through institutional channels constructed under the heavy influence of legal internalism.

The belief that law is epistemologically self-contained narrows the range of sociopolitical entities and actions that are authorized and seen as legitimate, in this worldview, to change the law. Such a worldview often leads to some version of legal formalism, but need not do so in an absolutist fashion. The belief that law is normative and internally coherent, on the other hand, drives legal professionals to understand new rules against the intellectual background of preexisting ones — assuming that those are still considered legally legitimate — and to merge them in as logically consistent a way as possible. This often produces a structural bias against radical change, although it can also push legal professionals who desire radical change to propose unusually sweeping changes to the legal infrastructure. While scholars have written — and

⁸³ See Morton J. Horwitz, *The Rise of Legal Formalism*, 19 AM. J. LEG. HIST. 251, 256 (1975).

⁸⁴ See, e.g., Linda Babcock & George Loewenstein, *Explaining Bargaining Impasse: The Role of Self-Serving Biases*, 11 J. ECON. PERSPS. 109, 110–11 (1997); Dan M. Kahan & Donald Braman, Essay, *Cultural Cognition and Public Policy*, 24 YALE L. & POL'Y REV. 149, 154 (2006).

⁸⁵ While our argument operates principally at a theoretical level, we believe its core empirical prediction — that legal professionals in nearly all early modern and modern societies that developed relatively sophisticated legal systems eventually embraced some version of internalism — is well demonstrated by modern legal history, including, and perhaps especially, the historical episodes examined in the three books we are reviewing. See, e.g., NEIL DUXBURY, PATTERNS OF AMERICAN JURISPRUDENCE 9–61 (1995); Li Chen, *Legal Specialists and Judicial Administration in Late Imperial China, 1651–1911*, 33 LATE IMPERIAL CHINA 1, 25–27 (2012); Kristoffel Grechenig & Martin Gelter, *The Transatlantic Divergence in Legal Thought: American Law and Economics vs. German Doctrinalism*, 31 HASTINGS INT'L & COMP. L. REV. 295, 340–48 (2008); Horwitz, *supra* note 83, at 252 (1975); Zhang, *Development of Comparative Law*, *supra* note 49, at 238.

continue to write — about these features, we examine and explicate their behavioral foundations.

The remainder of this Part is organized as follows. Section A lays out the behavioral foundations of the theory of legal internalism outlined above in greater detail, while section B discusses how our theory of legal internalism interacts with more general questions of legal change and development. Section C then compares legal internalism to other internal accounts of law, and specifies how it differs from the idea of legal consciousness on which it builds.

A. *The Behavioral Foundations of Legal Internalism*

As many scholars have argued, modern academic research suffers from “hyperspecialization.”⁸⁶ The range of knowledge that most scholars possess has become narrower as their expertise has deepened, and they have often tended to exclude other, intellectually related fields from their toolkit as they specialize. The reason for this phenomenon is very simple: scholars have a limited amount of time and energy, and as they dig deeper into a field, they necessarily devote less attention to things that fall outside of it. When progress in human knowledge places greater demands on the depth of academic expertise, breadth inevitably suffers.

This is the basic tradeoff that the development of expertise generally entails. Experts become experts by focusing on one area of study to the exclusion of others. This has a number of cognitive consequences. First, experts usually become better at identifying connections within their field of research than at connecting things within the field to things outside of it, for the very basic reason that they know less about the latter.⁸⁷ Medical specialists have, for example, sometimes been accused of misdiagnosing illnesses because they are biased toward “diagnosing cases outside their own domain as being within that domain.”⁸⁸ This tendency often produces a worldview that highlights more connections between internal factors than connections between internal and external

⁸⁶ ELIJAH MILLGRAM, *THE GREAT ENDARKENMENT: PHILOSOPHY FOR AN AGE OF HYPERSPECIALIZATION* 29 (2015); see also, e.g., *id.* at 21–53; Thomas W. Malone, Robert J. Laubacher & Tammy Johns, *The Age of Hyperspecialization*, HARV. BUS. REV. July–Aug. 2011, at 56, 58 (2011) (discussing the phenomenon of hyperspecialization in the context of the labor market).

⁸⁷ The debate over the relative merits of intradomain specialization and interdomain general knowledge is an old one. See, e.g., Florenta Teodoridis, Michaël Bikard & Keyvan Vakili, *Creativity at the Knowledge Frontier: The Impact of Specialization in Fast- and Slow-Paced Domains*, 64 ADMIN. SCI. Q. 894, 895 (2007) (providing an overview of scholarship on either side of this debate since 1947). The scholarship reveals that there is a trade-off between those two modes of thought. See *id.* at 895–96.

⁸⁸ Ahmad Hashem, Michelene T.H. Chi & Charles P. Friedman, *Medical Errors as a Result of Specialization*, 36 J. BIOMED. INFORMATICS 61, 68 (2003).

ones, which can easily lead to a certain kind of habitual intellectual belief that laws can be understood primarily, and perhaps only, with reference to other laws. In short, expertise naturally encourages a belief that there is some sort of “internal logic” to one’s field of study.⁸⁹

Second, and more problematically, expertise can often breed a sense of dogmatism, a belief that the way things have been done within the field should be largely inoculated against methodological critique from the outside.⁹⁰ After all, experts are only experts insofar as they “know better” about their own field. As many studies have shown, human social norms generally favor open-mindedness over the opposite,⁹¹ but this social expectation is often discarded when it comes to experts operating in their own field.⁹² Experts and nonexperts alike often believe that, by virtue of investing so much time and energy in a specific field, experts deserve a relatively wide berth of deference — and therefore that their instinctive intellectual closed-mindedness should not be challenged in conventional ways. As a result, if and when groups of experts develop a collective inclination toward some kind of intellectual internalism, it is extraordinarily difficult to change their minds.

When it comes to law, these general cognitive tendencies are significantly amplified by the fact that modern legal systems tend explicitly to present themselves as exclusively authoritative, which, in turn, encourages the perception that they are epistemologically self-contained. Most modern legal systems operate on the stated premise that the only valid social rules that can be enforced through the legitimate use of coercive force are those expressly contained within a limited and tightly controlled set of authoritative legal texts issued or sanctioned by the state or its agencies.⁹³

⁸⁹ The term “internal logic” has, of course, been applied very often to legal interpretation. *E.g.*, Esin Öricü, *An Exercise on the Internal Logic of Legal Systems*, 7 *LEGAL STUD.* 310, 311–12 (1987); Joseph Raz, *On the Autonomy of Legal Reasoning*, 6 *RATIO JURIS.* 1, 1 (1993) (rejecting arguments that legal reasoning should be seen as immune to moral considerations because of the “internal logic of the law”).

⁹⁰ See, *e.g.*, Erik Dane, *Reconsidering the Trade-Off Between Expertise and Flexibility: A Cognitive Entrenchment Perspective*, 35 *ACAD. MGMT. REV.* 579, 583 (2010); Victor Ottati, Erika D. Price, Chase Wilson & Nathanael Sumaktoyo, *When Self-Perceptions of Expertise Increase Closed-Minded Cognition: The Earned Dogmatism Effect*, 61 *J. EXPERIMENTAL SOC. PSYCH.* 131, 131–32 (2015).

⁹¹ See, *e.g.*, Herman H.M. Tse & Rebecca J. Mitchell, *A Theoretical Model of Transformational Leadership and Knowledge Creation: The Role of Open-Mindedness Norms and Leader–Member Exchange*, 16 *J. MGMT. & ORG.* 83 (2010) (discussing the significance of open-mindedness norms in leadership).

⁹² See Ottati, Price, Wilson & Sumaktoyo, *supra* note 90, at 131, 136.

⁹³ For Max Weber, at least, the status of a rule as law and its enforceability via coercive force are mutually constitutive. MAX WEBER, *ON LAW IN ECONOMY AND SOCIETY* (Max Rheinstein ed., Edward Shils & Max Rheinstein trans., 1954); see also E. ADAMSON HOEBEL, *THE LAW OF PRIMITIVE MAN* 26 (1954).

In comparison, premodern legal systems often coexisted with multiple systems of authoritative rules and norms, several of which, including the formal law, were treated with roughly the same amount of deference by political elites, and even by the legal system itself. One notable example is the ritual-law (“li”-“fa”) distinction in imperial China, in which “rituals” that governed many aspects of public conduct were formally recognized by most political elites to be both outside of the legal system and at least equal — if not superior — to the law in terms of normative stature.⁹⁴ Another example would be the legal pluralism that existed in most medieval and early modern European societies, under which state-issued law openly coexisted with and, in many instances, formally accommodated other systems of rules, including canon law, local customs, merchant customs, and so on.⁹⁵

Now one might object to the above characterization by arguing that it applies an overly narrow concept of “law.” If “rituals” had a similar normative status as “laws” in the Chinese political system, then perhaps the proper notion of “imperial Chinese law” should incorporate both rules that were nominally called “rituals” and rules that were nominally called “laws.” This possibility is beside the point for our account, since nothing turns on the precise boundaries of the idea or conception of “law” in a given society.

Instead, the point we are trying to make is simply that, more often than not, modern states claim to possess a much stronger monopoly over legitimate rulemaking and rule enforcement than did premodern ones. Premodern political elites may have recognized other kinds of social rules as normatively and authoritatively equivalent — or perhaps even superior — to state-made law, but that does not change the fact that those rules were not state-made. In contrast, modern, secular states rarely, if ever, acknowledge that any extralegal or nonlegal system of rules possesses the same normative stature as the law they issue.⁹⁶ As an enormous academic literature reaching back to Max Weber has argued, modern states tend to monopolize, at least nominally, the instrumental use of violence and coercive force.⁹⁷ This tendency naturally

⁹⁴ See R.P. Peerenboom, *Law and Ritual in Chinese Philosophy*, in ROUTLEDGE ENCYCLOPEDIA OF PHILOSOPHY (1998). For a recent study on how rituals operated as a government institution, see generally MACABE KELIHER, *THE BOARD OF RITES AND THE MAKING OF QING CHINA* (2019).

⁹⁵ See, e.g., R.C. VAN CAENEGEM, *LEGAL HISTORY: A EUROPEAN PERSPECTIVE* 118–19 (1991); F.W. Maitland, *A Prologue to a History of English Law*, 4 L.Q. REV. 13 (1898) (charting the evolution of early European folk laws and religious laws and their influence on English law).

⁹⁶ The transition from medieval legal pluralism to the hegemony of unified state-made law in the modern era is briefly discussed in Brian Z. Tamanaha, *Understanding Legal Pluralism: Past to Present*, *Local to Global*, 30 SYDNEY L. REV. 375, 378–81 (2008).

⁹⁷ See Max Weber, *Politics as a Vocation*, in FROM MAX WEBER: ESSAYS IN SOCIOLOGY 77, 78 (H.H. Gerth & C. Wright Mills eds. & trans., 1946).

facilitates and encourages the nominal monopolization of rulemaking authority, which can be delegated to other entities, but only under express legal terms, and subject to the state's verification and legitimation.⁹⁸

There are some obvious caveats to these claims that should be flagged immediately. Needless to say, the use of premodern versus modern here is meant to highlight a functional distinction — legal systems that claim a normative monopoly within their geographical jurisdictions versus those that do not — rather than a strict chronological one. There are many examples of chronologically earlier legal regimes that claim a much stronger normative monopoly than chronologically later ones: within the contours of Chinese history, for example, the “legalist” Qin dynasty was much more normatively monopolistic than most of its successors, including the heavily decentralized Ming and Qing regimes.⁹⁹ Moreover, the fact that some legal systems openly *coexisted* with other systems of rules that were understood to be equally authoritative does not necessarily mean that they did not present themselves as *epistemologically self-contained*: that the English common law normatively coexisted with canon law within England's borders does not imply that the substantive content of the former must somehow be understood *by reference* to the latter, or vice versa.¹⁰⁰

More importantly, we suggest that a legal system that presents itself as exclusively authoritative strongly encourages the perception that it is epistemologically self-contained. On its own terms, a legal system that claims to be the exclusive law of the land would seem to deny the possibility that any set of external interpretive rules could be inherently *authoritative* in any true sense. Instead, the only legally binding interpretations are those that are recognized as authoritative by the legal system itself.

As a purely logical matter, it is impossible for any legal system to be entirely hermeneutically sealed, just as it is not logically possible for any formal system of axioms to be logically complete.¹⁰¹ The rules of any legal system must be interpreted according to certain linguistic or sociopolitical conventions that are themselves external to the legal system.

⁹⁸ See *id.*

⁹⁹ See generally DINGXIN ZHAO, *THE CONFUCIAN-LEGALIST STATE: A NEW THEORY OF CHINESE HISTORY* (2015) (summarizing the transformation of the Chinese state from the legalist Qin regime to the hybrid Confucian-legalist regimes of later dynasties).

¹⁰⁰ That said, scholars have long argued that canon law openly influenced both the common law and the law of equity. See R.H. HELMHOLZ, *CANON LAW AND THE LAW OF ENGLAND* 1–19 (1987); Charles P. Sherman, *A Brief History of Medieval Roman Canon Law in England*, 68 U. PA. L. REV. 233, 241–46 (1920).

¹⁰¹ See H.L.A. HART, *THE CONCEPT OF LAW* 100, 110, 121 (3d ed. 2012) (explaining why the rule of recognition must be a “matter of fact,” *id.* at 121, that is “unstated” within the law itself, *id.* at 110).

Even so, it is not difficult to see why a system that claims to be exclusively authoritative can push, or perhaps nudge,¹⁰² most lawyers and judges toward internalist cognitive habits. Very few people who either work within the legal system or study it will regularly encounter the higher-order interpretive rules that cannot be understood internally. For the great majority of the legal profession (and those in constant engagement with it), the exclusive nature of legal authority essentially enables a mental habit of interpreting legal rules only by reference to other legal rules, which can easily encourage a more general belief that the law is epistemologically self-contained.

In addition, legal rules, principles, and institutions present themselves quite explicitly as normative. Significant amounts of modern legal scholarship have attempted to deviate from this notion toward the idea that the law is merely a system of coordination,¹⁰³ but the basic fact remains that a large array of legal enforcement actions, particularly those that are backed with the strongest levels of coercive force, are explicitly presented as mechanisms for redressing — either publicly or privately — normative infractions. Regardless of whether legal rules actually *are* normative in nature, the general sociopolitical image that modern legal systems project continues to be a predominantly normative one: following the law is supposed to be an obligation. This reality has an important corollary, which is relevant for our purposes: given the obligatory status of legal rules, classifying something as *law* is believed to produce an important set of behavioral modifications among individuals.¹⁰⁴

Additionally, the image of the law as a normative system creates a strong intellectual presumption that it is internally coherent. Nonnormative systems of coordination signals and socioeconomic focal points may or may not be internally coherent in a heuristic sense, but normative systems *must* be internally coherent if they wish to retain their normative authority. If one segment of the law prevents me from doing something under certain circumstances, but another segment

¹⁰² We use “nudge” in a behavioral sense, referring to a subconscious cognitive influence. See RICHARD H. THALER & CASS R. SUNSTEIN, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS* 6 (2009).

¹⁰³ This idea is most commonly associated with law and economics. See, e.g., Gillian K. Hadfield & Barry R. Weingast, *What Is Law? A Coordination Model of the Characteristics of Legal Order*, 4 J. LEGAL ANALYSIS 471, 476 (2012). But see Jules L. Coleman, *Economics and the Law: A Critical Review of the Foundations of the Economic Approach to Law*, 94 ETHICS 649, 649 (1984) (arguing that law and economics scholarship “has had both analytic and normative dimensions”).

¹⁰⁴ There is a large literature on whether designating a rule as law produces behavioral change. See, e.g., Kenworthy Bilz & Janice Nadler, *Law, Moral Attitudes, and Behavioral Change*, in THE OXFORD HANDBOOK OF BEHAVIORAL ECONOMICS AND THE LAW 241, 247–58 (Eyal Zamir & Doron Teichman eds., 2014).

obligates me to do that very thing under fundamentally similar circumstances, then the law is normatively inconsistent and, therefore, at least one of these segments cannot be normatively authoritative. If, in contrast, the law is merely a system of coordination, then there may well be some sort of functional logic behind the nominal inconsistency that justifies its existence.¹⁰⁵ These conceptions may or may not be true of any real-world circumstances, but the point here is simply that normative systems carry an especially strong logical presumption of internal coherency.

All in all, although many forms of intellectual expertise can nudge those who pursue them toward some form of cognitive internalism, legal expertise is, at least in theory, unusually likely to do so: other intellectual systems rarely present themselves as exclusively authoritative, whereas legal systems regularly do. Moreover, most other forms of intellectual expertise do not carry the explicitly normative connotations that law and legal practice regularly do. As a result, legal experts who take the self-representation of the law seriously are unusually likely, even compared to experts in other fields, to understand their subject matter from an internal point of view.¹⁰⁶

What this predilection for internalism in law further suggests is that, to a large extent, legal expertise is not a truly *intellectual* form of expertise at all: with the exception of some legal scholars, most legal professionals acquire legal expertise not for the sake of seeking metaphysical truth, but rather to provide professional services to clients, or perhaps to society at large.¹⁰⁷ If the majority of legal experts see the law from an internal point of view, then it is exceedingly likely that the legal system as a whole will operate in a fashion that is highly accommodating of internalist beliefs. Even if, as a matter of social truth, the law is not epistemologically self-contained, lawyers and judges, who nonetheless think it is, are unlikely to encounter any significant difficulty in their professional work. The legal profession wields far greater control over the operation of the law than do doctors over the human body, or economists over the economy. As a result, if legal professionals become cognitively biased toward internalism, social reality is unlikely to effectively challenge their biases — quite the opposite, their biases are rather more likely to remake social reality in their own image.

¹⁰⁵ In particular, if human behavior exhibits no systemic rationality but is instead segmented into different kinds of contextual logic, then it may well be behaviorally optimal for the law to issue normatively and textually contradicting rules in different legal contexts.

¹⁰⁶ Members of the legal profession regularly participate in and opine on the state of the law. In comparison, “[s]cientists assume that a participant in a practice cannot be impartial — to participate is to be biased,” which “has the effect of automatically disqualifying participants.” Brian Z. Tamanaha, *The Internal/External Distinction and the Notion of a “Practice” in Legal Theory and Sociological Studies*, 30 LAW & SOC’Y REV. 163, 184 (1996).

¹⁰⁷ On the intellectual differences between legal practice and the social sciences, see *id.* at 186.

In summary, there is a long list of reasons to believe that legal professionals, especially those operating in modern legal systems, are unusually likely to become cognitively biased toward internalism. These cognitive biases are further reinforced by the existence of very strong material incentives that align the self-interest of legal professionals with the proliferation of legal internalism. Legal internalism tends to increase the knowledge and expertise gap between legal experts and nonexperts. As a result, a world in which people generally embrace legal internalism affords legal professionals far greater rent-seeking capacities than a world that does not.

Consider, first, the claim that the law is epistemologically self-contained. It effectively shields legal experts from certain kinds of external critiques. If, for example, the law were instead understood to be the direct product of sociopolitical or economic forces, and needed to be interpreted with explicit reference to those forces, then sociologists, politicians, political scientists, and economists would all have some claim to sometimes having a better understanding of what the law demands than would someone who possesses only legal expertise. Therefore, the greater the number of people who consider the law epistemologically self-contained, the lower the likelihood that legal experts can be effectively challenged by nonexperts about their interpretations of legal content.

Second, the perception of law as normative clearly and significantly enhances the sociopolitical status of legal experts: it elevates them from mere technicians to normative agents who prevent wrongdoing and promote justice. The law carries far more sociopolitical weight as a normative system than as a mere system of coordination¹⁰⁸ — the latter would render it qualitatively indistinguishable from government propaganda — which further elevates the stature of those who possess expertise in it.

Finally, and perhaps most importantly, the notion that the law is internally coherent significantly increases the knowledge and competence gap between legal experts and nonexperts. If there were no presumption of internal coherence, then, taken to its logical conclusion, there would be little pressure when interpreting a legal rule to make sure that one's interpretation of that rule also dovetailed with reasonable interpretations of related rules. Instead, legal rules could be interpreted and applied largely independently from each other, perhaps by some straightforward application of "plain meaning" readings.¹⁰⁹ In contrast, the assumption of internal coherence forces all legal rules to be read

¹⁰⁸ For a discussion of the law as a normative system, see Bilz & Nadler, *supra* note 104, at 253–58.

¹⁰⁹ Unsurprisingly, legal scholars are often skeptical of whether "plain meaning" jurisprudence is truly logically possible. See, e.g., Frederick Schauer, *Statutory Construction and the Coordinating Function of Plain Meaning*, 1990 SUP. CT. REV. 231, 252.

together as a system. This consequence immediately elevates the interpretation of even a single rule from a basic linguistic exercise to a full-blown jurisprudential one: To accurately understand the meaning of that single rule, one must possess a reasonably strong knowledge of the legal system in its entirety, which is, needless to say, an immensely costly endeavor. Consequently, it becomes virtually impossible for nonexperts to speak of “what the law is” with any level of confidence. Instead, they must defer to the judgment of professionals, thereby enhancing both the sociopolitical status and economic rent-seeking capacities of those professionals.

These material incentives are behaviorally symbiotic with the cognitive biases discussed above in two crucial ways. First and foremost, as a great deal of research has shown, material incentives tend to create powerful cognitive biases themselves, which mutually reinforce other cognitive biases in the same direction.¹¹⁰ Most individuals are far more likely to hold intellectual positions that are materially advantageous to themselves than positions that are not,¹¹¹ and there is no reason to believe that legal professionals are any different.¹¹² Second, the existence of other cognitive preferences for internalism gives legal professionals a certain kind of psychological cover for their pursuit of material self-interest — if they do choose to pursue it: few professionals would presumably like to think of themselves as openly self-interested. Instead, their basic professional identity often encourages them to think of their professional work as conducted in the service of some greater good. From this perspective, the existence of other reasons to believe in internalism — a genuine belief that law contains an internal logic, and that it should be interpreted independently of external considerations — significantly alleviates the mental anxiety that may arise from the recognition that their belief in internalism is self-serving. To some extent, legal professionals can psychologically “hide behind” these nominally more intellectual reasons.

So much for basic behavioral theorizing. Given that this Review deals with historical narratives of sociolegal change, the next step is to translate these behavioral arguments into more concrete hypotheses about the direction of historical change. We maintain, of course, that there is a positive correlation between the emergence of professionalized modern legal systems and the rise of internalism among legal professionals, but this prediction needs to be fleshed out in more concrete terms

¹¹⁰ See sources cited *supra* note 90.

¹¹¹ See Kirsten Weir, *Why We Believe Alternative Facts*, 48 *MONITOR ON PSYCH.* 24, 24 (2017) (“People are capable of being thoughtful and rational, but our . . . motivations often tip the scales to make us more likely to accept something as true if it supports what we want to believe.”).

¹¹² Cf. Ottati, Price, Wilson & Sumaktoyo, *supra* note 90, at 131 (“Individuals induced to believe they are experts tend to overestimate the accuracy of their beliefs.”).

before it can usefully be applied to actual historical episodes such as the story of copyright and its evolution.

Our basic claim is that the ascendancy of law as the dominant system of sociopolitical ordering, coupled with escalating levels of legal complexity that elevate legal knowledge to the status of true expertise,¹¹³ will likely lead to the widespread embrace of internalism among legal professionals. To some extent, the latter condition alone is probably sufficient to sustain the rise of law as an expert profession, and therefore fuel the rise of legal internalism; but as argued above, this process is greatly amplified by the existence of the former condition, which portrays law as *the* exclusive authoritative source of sociopolitical rules, and therefore strongly encourages the perception that law is normatively and epistemologically self-contained. The rise of the former condition also tends to strengthen the latter condition: the assertion that law is the dominant system of sociopolitical ordering carries with it the need to expand law to cover most areas of sociopolitical activity. To some extent, this echoes the “Spiderman Doctrine” of “with great power comes great responsibility.”¹¹⁴ This ethos of expansion tends to push the law toward ever-increasing levels of complexity and breadth, both of which escalate the sociopolitical demand for “pure” legal expertise.

Historically, the growth of legal complexity — and with it, the emergence of law as an expert profession — did not necessarily synchronize with the sociopolitical ascendancy of law. Early modern human history is riddled with examples of legal systems that coexisted with other systems of normative social rules but nonetheless became complex enough to sustain highly sophisticated legal professions. Chinese and Ottoman law in the eighteenth and nineteenth centuries are two examples that have garnered significant amounts of academic attention in recent

¹¹³ Needless to say, these are vague criteria — vague by design, in fact. We have no intention of making more specific claims about when expert legal professions tend to arise. Simple customary law regimes like those found in most premodern rural communities are almost certainly insufficient, whereas highly sophisticated early modern legal regimes like those found in Western Europe or, according to recent scholarship, in late imperial China, *see* Chen, *supra* note 85, at 1–2, are likely sufficient. Modern legal systems create robust demand for expert legal professions almost everywhere in the world, although those systems vary enormously in the degree of sophistication and institutional independence. In between modern and premodern systems, there is a huge swath of analytical gray area, and we have no space here to attempt any serious line-drawing exercise, although we may do so in a future article. The core qualitative criteria, as stated here, is the elevation of law to an expert field: something that is beyond the ability of most laymen to reliably comprehend without the assistance of a professional. This is largely a function of the legal system’s scope and complexity, but it can also be related to the level of public education and the prevalence and penetration of interregional commerce into local economies.

¹¹⁴ *See* Patrick Keller & Gary Schmitt, Opinion, *Germany and the Spider-Man Doctrine*, WALL ST. J. (Feb. 6, 2014, 4:03 PM) <https://www.wsj.com/articles/germany-and-the-spiderman-doctrine-1391720533> [<https://perma.cc/Z795-DWZJ>].

years,¹¹⁵ but the early modern history of English or Germanic law would also seem to fit this basic description.¹¹⁶ Nonetheless, in the modern era, the two conditions have largely developed in a harmonized fashion: the growth of legal complexity and sophistication seems to largely dovetail with the sociopolitical ascendancy of law. Combined, they have fueled the rise of legal internalism to an arguably unprecedented level of sociopolitical prominence.

Of course, one might ask why, given this Review's immediate focus on the relationship between legal internalism and modern copyright, it needs to discuss the behavioral foundations of internalism at all, much less in such detail. The answer is that, while we could adequately critique Slauter, Dommann, and Wang's accounts of institutional change through the weaker claim of "internalism can sometimes emerge in modern legal systems, and likely did emerge in the systems discussed in these books," we ultimately wish to make the much stronger claim that "internalism will almost always emerge in professionalized modern legal systems." Internalism, as we present it, is not merely some contingent sociolegal phenomenon that may or may not emerge as legal systems grow in substantive sophistication and sociopolitical significance, but is rather likely to emerge in light of the *structure* of those legal systems and given the inherent cognitive biases and incentives of legal professionals.

Now internalism, when it emerges, can very plausibly be beaten back by any number of intellectual, political, or social developments, including, for example, large amounts of external political interference with adjudication. We do expect to see some movement toward internalism within the legal profession — which can later be reversed under certain conditions — in the great majority of modern legal systems, even heavily authoritarian ones. This structural inevitability or near-inevitability is, as discussed below, what ultimately distinguishes our theory of internalism from preexisting accounts of "legal consciousness."

¹¹⁵ On China, see PHILIP C.C. HUANG, *CODE, CUSTOM, AND LEGAL PRACTICE IN CHINA: THE QING AND THE REPUBLIC COMPARED* 1–12 (2002); Chen, *supra* note 85, at 1–5, 31–34 (examining professional ethics and identity in the Chinese legal profession between 1651 and 1911). On the Ottoman legal system and its dual characteristics of legal pluralism and professionalism, see Karen Barkey, *Aspects of Legal Pluralism in the Ottoman Empire*, in *LEGAL PLURALISM AND EMPIRES, 1500–1850*, at 83, 83–87 (Richard J. Ross & Lauren Benton eds., 2013); Haim Gerber, *Law in the Ottoman Empire*, in *THE OXFORD HANDBOOK OF ISLAMIC LAW* 475, 476–80, 484–87 (Anver M. Emon & Rumea Ahmed eds., 2018); Kent F. Schull & M. Safa Saraçoglu, *Introduction*, in *LAW AND LEGALITY IN THE OTTOMAN EMPIRE AND REPUBLIC OF TURKEY* 1–8 (Kent F. Schull, M. Safa Saraçoglu & Robert F. Zens eds., 2016).

¹¹⁶ The best account of the highly fragmented if highly professionalized nature of German law in the early modern era remains FRANZ WIEACKER, *A HISTORY OF PRIVATE LAW IN EUROPE WITH PARTICULAR REFERENCE TO GERMANY* (Tony Weir trans., 1995). On legal pluralism in early modern England, see Dominic Birch, *Legal Pluralism in Early Modern England and Colonial Virginia*, 5 *J. INSTITUTIONAL STUD.* 717, 742–43 (2019).

There are two ways of arguing for inevitability: we can either empirically demonstrate the emergence of internalism in nearly all modern legal systems, or we can argue that there is a strong theoretical likelihood of its emergence. Given that there is no space here to even remotely attempt the former, we have opted for the latter, while leaving open the possibility of pursuing the former in some later work. That said, even the most rigorous empirical demonstration of sociolegal uniformity will, in the end, require some sort of underlying theoretical account that can explain the uniformity, which is exactly what we have preemptively supplied here.

While the account thus far has attempted to explain why — and how — the argument raises an obvious additional question of relevance to historical accounts of copyright. This inquiry in turn hinges on how the rise of legal internalism shapes the form and content of legal change, and more specifically of change in copyright law.

B. Legal Internalism and Legal Change

Having identified the behavioral foundations of legal internalism and its relationship to (and divergence from) other internal theories of law, we now move to understanding how legal internalism plays a crucial role in the trajectory of legal and institutional change. This section thus makes the case for legal internalism as an important variable in the evolution of legal institutions, and it does so by focusing specifically on how internalism interacts with sociopolitical forces external to the legal system and the actors within it. Our claim here is not that legal internalism can be a purely self-contained force for legal change, driven by law's internal logic. Far from it. It is instead that legal internalism leads actors within the legal system to direct and process external forces so as to bring about changes in the content and structure of law — something that narratives about legal institutions should be careful not to overlook or underemphasize.

As a preliminary matter, given that we have presented legal internalism largely as a behavioral phenomenon among legal professionals, it can affect the law only insofar as legal professionals can affect the law. In nearly all modern legal systems, of course, legal professionals, especially judges, do exert significant influence over the shape, content, and functionality of legal institutions.¹¹⁷ There are, indeed, strong theoretic-

¹¹⁷ There have traditionally been doubts about whether the legal profession enjoys any real political or institutional agency in modern autocracies, but as a rich literature on authoritarian legality has recently argued, such doubts overlook the significant investment in law that even the most rigidly authoritarian state tends to make and the role that the legal profession plays in such investment. See, e.g., Maciej Kisilowski, *The Middlemen: The Legal Profession, the Rule of Law, and Authoritarian Regimes*, 40 *LAW & SOC. INQUIRY* 700, 707–08 (2015); Tamir Moustafa & Tom

cal reasons to believe that legal professions will be institutionally influential wherever they exist: an important reason why any legal system would have a legal profession at all is that, at some point, laws become too complex and too expansive for laypeople to easily understand and make use of them.¹¹⁸ In other words, the core condition for the emergence of a legal profession inherently generates a large knowledge and expertise gap between lawyers and nonlawyers, which then ensures that legal professionals will possess at least some significant amount of institutional agency and influence.

To risk stating the obvious, seeing the law as epistemologically self-contained does not imply that the law is, or should be, unresponsive to external sociopolitical or economic shocks. After all, any legal system that contains a mechanism of legislation and rulemaking explicitly provides a legitimate channel through which such external factors can impact legal institutions. The crucial thing for the legal internalist is therefore *how* the law responds to external factors: only through legally authorized channels, and only as an internally coherent system. The institutional impact of the former is relatively straightforward. Absent formal legislation, rulemaking, or new judicial precedents, internalism implores the law to be unresponsive to sociopolitical change.¹¹⁹ In other words, beyond a limited number of authorized channels for change, an epistemologically self-contained legal system is seen to be institutionally biased against change, and therefore inclined toward stability and conservatism.

In comparison, the institutional impact of internal coherence is much more complicated. As many scholars have argued, over time, legal professionals will often attempt to render new legal rules logically consistent with relevant preexisting rules.¹²⁰ The specific logic they apply in this

Ginsburg, *Introduction: The Functions of Courts in Authoritarian Politics*, in *RULE BY LAW: THE POLITICS OF COURTS IN AUTHORITARIAN REGIMES* 1, 1–11 (Tom Ginsburg & Tamir Moustafa eds., 2008).

¹¹⁸ In most societies, the development of the legal profession closely tracks the growing complexity of law and the expansion of its socioeconomic footprint. See, e.g., Milton M. Klein, *From Community to Status: The Development of the Legal Profession in Colonial New York*, 60 *N.Y. HIST.* 133, 138–39 (1979); Randall Peerenboom, *Economic Development and the Development of the Legal Profession in China*, in *CHINESE JUSTICE: CIVIL DISPUTE RESOLUTION IN CONTEMPORARY CHINA* 114, 114, 120 (Margaret Y.K. Woo & Mary E. Gallagher eds., 2011).

¹¹⁹ This modus operandi is reflected in some key elements of the “new formalism” that has recently emerged in the American legal academy insofar as it promotes a reliance on “the formal law” and argues that legal instruments should be interpreted in accordance with legal rules. See, e.g., Baude & Sachs, *supra* note 82, at 1083; Thomas C. Grey, *The New Formalism* 1–2, 16 (Stanford L. Sch., Pub. L. & Legal Theory Working Paper Series, Working Paper No. 4, 1999) <https://ssrn.com/abstract=200732> [<https://perma.cc/95ML-9BXZ>].

¹²⁰ See Baude & Sachs, *supra* note 82, at 1083; Neil MacCormick, *Coherence in Legal Justification*, in *THEORY OF LEGAL SCIENCE* 235, 235 (Aleksander Peczenik, Lars Lindahl & Bert van Roermund eds., 1984); see also Bruce Ackerman, *De-schooling Constitutional Law*, 123

process differs from account to account, varying both in the kind of logic being applied and the rigor of its application. Yet the accounts share a common observation that *some* push toward coherency is usually made in the aftermath of new legislation, rulemaking, precedent, or perhaps a “constitutional moment.”¹²¹ During this push, both the new rules and preexisting ones can be interpreted or reinterpreted, until the law is once again internally coherent in the eyes of legal professionals. The difficulty of this task depends on how the new rules were introduced: If their creators took internal coherence into account during the drafting process, then it can be very easy to merge them into the preexisting legal system. If not, as is sometimes the case during highly politicized legislative conflicts, then the professional recovery of coherence can involve the imposition of significant interpretative compromises on the new rules, relevant preexisting rules, or both.

This process can, depending on the specific circumstances, be either a conservative force that constrains the magnitude of legal change or a radical one that amplifies it. The former is significantly more common than the latter, but the latter is more than a mere theoretical possibility. Some highly influential accounts have argued, for example, that it is a prominent feature of American constitutional history.¹²² In the great majority of cases, legal professionals will likely pursue coherence by interpreting the new rule — within the boundaries of textual plausibility — in a way that minimizes its impact on preexisting rules. As an illustration, mainstream accounts of American statutory interpretation canons argue that they “foster statutory interpretations that do not alter relationships any more than is necessary to achieve the statutory objectives.”¹²³ A similar institutional bias toward preserving preexisting rules whenever possible is prevalent in most modern jurisdictions, especially continental legal systems that emphasize the stability of their codified laws.¹²⁴ When the textual scope of the new rule is relatively limited and the political will behind it relatively moderate, then squaring new rules

YALE L.J. 3104, 3121 (2014) (discussing the process of “intergenerational synthesis” that constitutional change demands); Kenneth J. Kress, *Legal Reasoning and Coherence Theories: Dworkin's Rights Thesis, Retroactivity, and the Linear Order of Decisions*, 72 CALIF. L. REV. 369, 370–72 (1984).

¹²¹ E.g., Ackerman, *supra* note 120, at 3121.

¹²² See, e.g., 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 117 (1993) (describing the Emancipation Proclamation's initial inconsistency with the Constitution and the subsequent embodiment of its constitutional meaning in the Thirteenth Amendment through the amendment process).

¹²³ David L. Shapiro, *Continuity and Change in Statutory Interpretation*, 67 N.Y.U. L. REV. 921, 921 (1992).

¹²⁴ See, e.g., Jean Louis Bergel, *Principal Features and Methods of Codification*, 48 LA. L. REV. 1073, 1097 (1988) (discussing the importance of substantive stability to codification projects, especially those in the civil law tradition).

with preexisting rules offers the path of least resistance to regaining internal coherence. It also maximizes the legal system's structural and substantive stability and minimizes the impact on the state's prior commitments. Additionally, the common law's well-worn legal fiction of the "declaratory theory" of lawmaking, wherein judges are seen to merely declare preexisting law rather than make new law,¹²⁵ ensures that legal change takes place incrementally, again maintaining a form of systemic coherence.

There are several benefits to harmonizing new law with preexisting law: insofar as the ability to make credible commitments is normatively desirable, then an interpretative process that limits the ability of new law to alter prior commitments is also normatively desirable.¹²⁶ This is not to say, of course, that new law cannot change those commitments, but rather that it must do so in an express and direct fashion, explicitly overruling any commitment made in preexisting laws and regulations that it wishes to discard or modify.¹²⁷ By forcing lawmakers to act explicitly whenever possible, the institutional bias toward stability provides the additional benefit of minimizing the information costs one must incur to understand the consequences of legal change. Given these significant upsides, it is thoroughly unsurprising that the conventional way of pursuing internal legal coherency is to minimize the institutional impact of new rules.

That said, it is not the only way. In some relatively rare cases where the political consensus behind the new rules is extraordinarily powerful, their issuance might actually put significant pressure on legal professionals to reinterpret preexisting rules to maximize their compatibility with, for lack of a better phrase, the "illuminating spirit" of the new rules. Such examples are particularly salient at the level of constitutional change.¹²⁸ In such cases, the tail can sometimes wag the dog —

¹²⁵ See Allan Beaver, *The Declaratory Theory of Law*, 33 OXFORD J. LEGAL STUD. 421, 421 (2013).

¹²⁶ On the economic benefits of making credible commitments, see, for example, STEPHEN HABER, ARMANDO RAZO & NOEL MAURER, *THE POLITICS OF PROPERTY RIGHTS: POLITICAL INSTABILITY, CREDIBLE COMMITMENTS, AND ECONOMIC GROWTH IN MEXICO, 1876–1929* (2003); DOUGLASS C. NORTH & ROBERT PAUL THOMAS, *THE RISE OF THE WESTERN WORLD: A NEW ECONOMIC HISTORY* (1973); Timothy Frye, *Credible Commitment and Property Rights: Evidence from Russia*, 98 AM. POL. SCI. REV. 453 (2004).

¹²⁷ See Shapiro, *supra* note 123, at 940 (describing the "clear statement" rules).

¹²⁸ For example, some highly influential accounts of American constitutional history argue that, following major constitutional paradigm shifts such as the Civil War or the New Deal, the enormous political weight behind the new constitutional rules forced a substantial backward-looking revision of many preexisting constitutional rules and conventions. I ACKERMAN, *supra* note 122, at 81–130. More controversially, some legal scholars in China argue that the recent 2018 amendments to the Chinese Constitution, which formally recognized the Communist Party's "leadership" over the Chinese state and abolished term limits for the presidency, were so significant that they forced a fundamental rethinking of how China's constitution should be interpreted. See Feng Lin, *The 2018 Constitutional Amendments: Significance and Impact on the Theories of Party-State Relationship*

if we consider, based on their relative textual volume, newly issued rules to be the tail, and preexisting ones to be the dog — if the tail carries enough political weight.

These dynamics suggest, therefore, that internalism tends to create a paradigm-shift model of legal change,¹²⁹ rather than a linear one: long periods of institutional conservatism, during which the institutional impact of new legislation or rulemaking is minimized, are followed by bursts of radical reinterpretation. To some extent, the former actually induces the latter. The legal profession's conventional conservatism means that, if political lawmakers wish to generate major changes, they must, essentially, muster overwhelming political force. Relative to the pace of external sociopolitical change, the pace of legal change is usually slower, but punctuated by periodic paradigm shifts that force the legal system to “catch up” to external circumstances or, in rare cases, even pull ahead of them.

There is, in the end, no fundamental incompatibility between this kind of internalism-driven theory of legal change and an externalist one that emphasizes the role of political, economic, social, or technological change. As noted above, the former merely seeks to channel the latter through a set of institutional and interpretive procedures. Indeed, this has long been documented to be the manner in which change comes about through the judicial process in the common law, where legal concepts splinter their meaning into analytical and normative content, thereby retaining stability in the former while pushing through (sometimes radical) change in the latter, based on external influences.¹³⁰ Appreciating the process and conduit of change — legal internalism — is however just as important as understanding the substantive content of such change.

C. *Legal Internalism, Legal Consciousness, and Historical Narratives*

Several prominent jurisprudential theories of law quite consciously adopt a framing that they describe as internal or participant-based. What differentiates our account of legal internalism from these accounts

in China, CHINA PERSP, no. 1, 2019, at 11. Skeptics would say that China never had a functional constitution to begin with, and therefore that such academic discussions are legally meaningless, since they merely reflect the state of power politics in Beijing and carry no legal weight of their own. See Taisu Zhang & Tom Ginsburg, *China's Turn Toward Law*, 59 VA. J. INT'L L. 307, 347–48 (2019). Many others would disagree, however, choosing instead to take the Chinese legal system seriously on its own terms. See *id.*

¹²⁹ We employ the term “paradigm shift” in the traditional Kuhnian sense first seen in THOMAS KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (4th ed. 2012): that is, a system of change that alternates periods of normal continuity within a paradigm, followed by periods of rapid revolutionary change.

¹³⁰ See Shyamkrishna Balganesh & Gideon Parchomovsky, *Structure and Value in the Common Law*, 163 U. PA. L. REV. 1241 (2015).

is that legal internalism remains functionally agnostic to the actual motivations behind participants' outward projections of the law as epistemologically self-contained, normative, and logically coherent.¹³¹ In other words, what matters for legal internalism is that the discourse and reasoning of law reflect its core tenets, even if participants do not themselves believe the law to embody those tenets as an actual matter.

Indeed, it is this feature that sets legal internalism apart from the "internal point of view" advanced by Professor H.L.A. Hart in *The Concept of Law*.¹³² A central feature of Hart's theory of when something becomes a legal rule is his argument that the rule of conduct at issue comes to be seen by members of the community as obligatory in nature.¹³³ And to understand this obligatory nature, Hart posits the centrality of the internal point of view, which he describes as viewing the rules "as a member of the group which accepts and uses them as guides to conduct."¹³⁴ As Professor Scott Shapiro persuasively points out, the internal point of view entails insiders not just viewing the rules but also accepting them with a particular "normative attitude" that treats them as obligatory in guiding their conduct.¹³⁵ To Hart, then, the internal point of view represents the internalization of a belief about the obligatory nature of a rule.

¹³¹ While we focus our discussion here on comparing legal internalism to the most prominent accounts that employ the internal-external distinction, it is worth noting that the distinction has come to be employed by other scholars as well in recent times. Our focus in this section is simply on the most dominant of those accounts. See generally Charles Barzun, *Inside-Out: Beyond the Internal/External Distinction in Legal Scholarship*, 101 VA. L. REV. 1203 (2015) (critiquing the internal-external distinction for "operat[ing] mainly as a rhetorical weapon whose function is to insulate particular substantive views from arguments deemed to be threatening to it," *id.* at 1209–10); William Baude & Stephen E. Sachs, *Originalism and the Law of the Past*, 37 LAW & HIST. REV. 809 (2019) (explaining that originalism tends to focus on "'internal accounts' of legal doctrine . . . , rather than on 'external' accounts of law's wider reception and operation," *id.* at 813); Eric A. Posner & Adrian Vermeule, *Inside or Outside the System?*, 80 U. CHI. L. REV. 1743 (2013) (identifying an "inside/outside fallacy," *id.* at 1745, in legal literature, which equivocates between the external view of an analyst of the legal system and the internal view of an actor within the legal system).

¹³² See HART, *supra* note 101, at 89.

¹³³ See *id.*

¹³⁴ *Id.* For the extensive literature that has since emerged on the internal point of view, see generally John C.P. Goldberg & Benjamin C. Zipursky, *Seeing Tort Law from the Internal Point of View: Holmes and Hart on Legal Duties*, 75 FORDHAM L. REV. 1563 (2006); Richard Holton, *Positivism and the Internal Point of View*, 17 LAW & PHIL. 597 (1998); Michael Mandel, *Dworkin, Hart, and the Problem of Theoretical Perspective*, 14 LAW & SOC'Y REV. 57 (1979); Dale A. Nance, *Rules, Standards, and the Internal Point of View*, 75 FORDHAM L. REV. 1287 (2006); Dennis Patterson, *Explicating the Internal Point of View*, 52 SMU L. REV. 67 (1999); Stephen Perry, *Hart on Social Rules and the Foundations of Law: Liberating the Internal Point of View*, 75 FORDHAM L. REV. 1171 (2006); Frederick Schauer, *Fuller's Internal Point of View*, 13 LAW & PHIL. 285 (1994); Scott J. Shapiro, *What Is the Internal Point of View?*, 75 FORDHAM L. REV. 1157 (2006).

¹³⁵ Shapiro, *supra* note 134, at 1159.

Professor Ronald Dworkin offers a variation on this idea. In *Law's Empire*, Dworkin offers a participant's perspective as a predicate to his development of a nonpositivist theory of law.¹³⁶ To Dworkin, law is a fundamentally "interpretive" practice, where its participants hold an interpretive attitude.¹³⁷ This interpretive attitude consists in recognizing the practice to have intrinsic value and attempting to have the practice coalesce with the identified value.¹³⁸ All the same, the interpretive attitude requires adopting the participant's point of view since it is only then that the practice will be seen as intrinsically valuable. He thus notes that his work "takes up the internal, participants' point of view; it tries to grasp the argumentative character of our legal practice by joining that practice and struggling with the issues of soundness and truth participants face."¹³⁹

In Dworkin's account, the "internal" viewpoint is merely a reference to how law operates as an interpretive practice rather than as a substantive component of the law itself, as it is for Hart. The concept does important work for Dworkin. Dworkin is using the participants' internal viewpoint to make a claim about the very nature of law, rather than about participants' beliefs about the law. And this viewpoint allows him to avoid providing additional detail about the participants' motives and reasons for their views, and instead to operate on the assumption that the interpretive community (of judges) is fully committed to a unified conception of value.¹⁴⁰

Legal internalism in our account has no direct connection to the actual (or internalized) beliefs of the participants to whom it applies (legal professionals and elites). It is sufficient for us that participants behave in a way that outwardly suggests their seeing the law or a part thereof along the three core dimensions that we identify. In other words, our account is indifferent to the motives underlying participants' adherence to internalism: the adherence could arise from a genuine subjective belief in the characteristics of law, or indeed from a strategic recognition that, although participants do not believe in these characteristics, it is nevertheless in the rational self-interest of participants to behave as though they do. Legal internalism thus adopts a stance that simply recognizes a behavioral pattern from the outside, without calling into question participants' reasons for it. Indeed, Hart himself described such a stance as "extreme," given how divergent it was from the internal point of view that he was advancing.¹⁴¹

¹³⁶ RONALD DWORIN, *LAW'S EMPIRE* 14–15 (1986).

¹³⁷ *Id.* at 47.

¹³⁸ *See id.*

¹³⁹ *Id.* at 14.

¹⁴⁰ *See id.* at 199–202.

¹⁴¹ HART, *supra* note 101, at 89.

Thus understood, legal internalism remains compatible with the core insight of legal realism: legal reasoning (and thus adjudication) entails the use of a variety of nonlegal factors, which legal actors then “rationalize” using “appropriate legal rules and reasons.”¹⁴² To the extent that one believes that a legal system is overrun by actors operating within the frame of such realism, legal internalism merely remains compatible with this belief since it says nothing about actors’ motivations for the rationalization. Such rationalization might result from a subconscious internalization of law’s normativity,¹⁴³ a strategic effort to mask nonlegal considerations in the language of the law,¹⁴⁴ or instead no more than a good faith effort to translate the nonlegal into the legal.¹⁴⁵ Indeed, legal internalism might even encompass Sartrean bad faith, situations where the actor’s own mind is in conflict, producing an outward insincerity.¹⁴⁶ Under any of these circumstances, legal internalism — as a theory about the outward behavior of legal participants — can hold true without modification. As a result, it is crucial to note that legal internalism does not commit actors to a version of “legal formalism” which presumes the acceptance of the autonomy and inner intelligibility of the law. The behavior of a legal formalist would reveal the tenets of legal internalism no more — and no less — than would that of a legal realist.

There is, however, an internal account of law that legal internalism comes close to and builds on, while adding to its analytical content and rejecting some of its normative implications. This is the idea of legal consciousness. The idea of legal consciousness originates in what came to be known as the law and society movement, where it represents the notion of “legal hegemony,” or the ability of legal institutions to sustain their power and influence despite the law in action not conforming to the letter of the law.¹⁴⁷ As originally conceived, legal consciousness

¹⁴² Brian Leiter, *Rethinking Legal Realism: Toward a Naturalized Jurisprudence*, 76 TEX. L. REV. 267, 268 (1997).

¹⁴³ See, e.g., Ernest J. Weinrib, *Legal Formalism: On the Immanent Rationality of Law*, 97 YALE L.J. 949, 953 (1988) (“Formalist doctrine is characterized by the working out of the implications of law from a standpoint internal to law.”).

¹⁴⁴ See, e.g., MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW*, 1780–1860, at 253–54 (1977).

¹⁴⁵ See, e.g., Richard A. Posner, *Judges’ Writing Styles (and Do They Matter?)*, 62 U. CHI. L. REV. 1421, 1429 (1995).

¹⁴⁶ See JEAN-PAUL SARTRE, *BEING AND NOTHINGNESS* 87–89 (Hazel E. Barnes trans., 1984) (1943); see also DAVID DETMER, *SARTRE EXPLAINED: FROM BAD FAITH TO AUTHENTICITY* 75 (2008). For an account of this form of motivation in the law, see David E. Pozen, *Constitutional Bad Faith*, 129 HARV. L. REV. 885, 895 (2016).

¹⁴⁷ For an exhaustive overview of the idea and its evolution within scholarship, see Susan S. Silbey, *After Legal Consciousness*, 1 ANN. REV. L. & SOC. SCI. 323 (2005). See also Simon Halliday, *After Hegemony? The Varieties of Legal Consciousness Research*, 28 SOC. & LEGAL STUD. 859, 859 (2019) (examining the evolution of scholarship tied to the idea of legal consciousness).

sought to explain “how the different experiences of law become synthesized into a set of circulating, often taken-for-granted understandings and habits.”¹⁴⁸ In this conception, legal consciousness reflects the intrinsic proclivity of legal ideas and concepts to endure and exert influence, despite all else. Or as one scholar has put it, legal consciousness means to stand for the “critical sociological project of explaining the durability and ideological power of law.”¹⁴⁹

Owing to its distinct political orientation — and commitment to the notion of a legal hegemony — the idea of legal consciousness remained self-consciously amorphous for a long time and admitted a variety of different methodological efforts. Scholars paid less attention to the precise dynamics through which the law was believed to wield its power and influence and focused instead on how these power structures affected different groups and interests. The focus on hegemony thus overtook the emphasis on law, and in due course legal consciousness came to be seen as “infinitely useful to hegemony.”¹⁵⁰

Within the world of legal thinking, the Critical Legal Studies (CLS) movement most directly adopted the idea of legal consciousness.¹⁵¹ Professor Duncan Kennedy embraced the idea and deployed it prominently to explain the structure of legal thinking at different historical moments. He characterized his vision of legal consciousness as follows:

The notion behind the concept of legal consciousness is that people can have in common something more influential than a checklist of facts, techniques, and opinions. They can share premises about the salient aspects of the legal order that are so basic that actors rarely if ever bring them consciously to mind. Yet everyone, including actors who think they disagree profoundly about the substantive issues that matter, would dismiss without a second thought (perhaps as “not a legal argument” or as “simply missing the point”) an approach appearing to deny them.

These underlying premises concern the historical background of the legal process, the institutions involved in it, and the nature of the intellectual constructs which lawyers, judges, and commentators manipulate as they attempt to convince their audiences.¹⁵²

¹⁴⁸ Silbey, *supra* note 147, at 324.

¹⁴⁹ *Id.* at 358.

¹⁵⁰ *Id.* at 360.

¹⁵¹ See Mark Tushnet, *Critical Legal Studies: A Political History*, 100 YALE L.J. 1515, 1528 (1991).

¹⁵² Duncan Kennedy, *Toward an Historical Understanding of Legal Consciousness: The Case of Classical Legal Thought in America, 1850–1940*, 3 RSCH. L. & SOCIO. 3, 6 (1980). For an account of Kennedy’s version of legal consciousness within the overall literature, see Silbey, *supra* note 147, at 344–46.

While Kennedy embraced the idea of legal consciousness in his work, he resisted specifying its salient features in the abstract, accepting it almost as an epistemological artifact of the legal order, akin to a vocabulary or a language.¹⁵³

The concept of legal internalism we employ is closest to legal consciousness and in a crucial sense builds on it. Legal internalism goes beyond legal consciousness in some respects and yet in other respects it resists some of the contingent assumptions that legal consciousness entails. First, while both legal internalism and legal consciousness are grounded in the ways in which participants perceive legal ideas, which in turn accords them deep influence, unlike legal consciousness, legal internalism identifies three very specific (albeit interrelated) ideational pathways for this influence. Legal internalism is not just an amorphous reference to the influence of legal ideas through a shared vocabulary; instead it recognizes that the very discourse of law among legal professionals and elites comes to overtly and outwardly embody three crucial assumptions about law — namely, that the law is normative, epistemologically self-contained, and internally logically coherent. In other words, legal internalism is far more specific. Second, while Kennedy's account of legal consciousness is largely uncommitted to any claim about the likelihood and frequency of legal consciousness, legal internalism is presented here as an inherent intellectual feature of professionalized legal systems, and therefore contains a strong element of sociolegal inevitability. Legal internalism is explicitly structural, and therefore non-contingent. Finally, legal internalism need not represent an undesirable power dynamic in the legal domain. While it may be — and, indeed, frequently is — deployed toward undesirable ends, it is equally capable of yielding material benefits and efficiencies for a legal system.¹⁵⁴

¹⁵³ See Duncan Kennedy, *Three Globalizations of Law and Legal Thought: 1850–2000*, in *THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL* 19, 22–23 (David M. Trubek & Alvaro Santos eds., 2006). For a critique, see John Henry Schlegel, *Three Globalizations: An Essay in Inquiry*, 78 *LAW & CONTEMP. PROBS.* 19 (2015).

¹⁵⁴ Given that our primary goal here is to supply a behavioral theory of legal internalism, rather than a jurisprudential one, we do not take a particularly strong position on the normative desirability of legal internalism. If forced to choose sides, we would be somewhat inclined to view internalism as a net positive for society, but this is, needless to say, a weak inclination.

In our view, even the institutionally conservative — or weak — form of legal internalism can potentially be normatively justified by its considerable socioeconomic benefits: as noted above, it significantly enhances the ability of states to make credible commitments to private socioeconomic actors, thereby facilitating efficient private reliance on government policy. See *supra* p. 1109. Moreover, the institutional stability that internalism usually provides sharply lowers the information costs imposed by law on private activity, which is, in general, a systemic net gain for society at large. See *supra* p. 1109. Such gains are especially valuable in modern, more individualized societies that possess large amounts of commercial and physical mobility, which renders high information costs unusually detrimental to economic welfare. See, e.g., Henry E. Smith, *Property as the Law of Things*, 125 *HARV. L. REV.* 1691, 1706–07 (2012); Henry E. Smith, *Exclusion Versus Governance: Two Strategies for Delineating Property Rights*, 31 *J. LEGAL STUD.* 453, 455 (2002).

Another way of thinking about legal internalism is to conceptualize it as a very specific form of legal consciousness that is devoid of assumptions about hegemony. Indeed, it is this heightened specificity that allows legal internalism — and not legal consciousness — to itself be a variable of legal change and evolution in a historical narrative. While legal consciousness may be used as a lens to analyze legal transformations, it is almost never deployed as an instrumentality of change in itself, given that the very idea of law (and a legal system) is taken to embody a legal consciousness, amorphously understood.

We have seen how legal internalism influences and channels the speed, direction, and form of legal change in a legal system. Accepting

Beyond these relatively well-established economic dimensions, there is, as most lawyers would attest, enormous normative value in keeping legal obligations and rights relatively stable for the sake of protecting individual dignity from the short-term political whims and incentives of those in power — there is, in other words, great value in “non-arbitrary governance.” *See, e.g.*, Stephen Riley, *Human Dignity and the Rule of Law*, 11 *UTRECHT L. REV.* 91, 91 (2015).

The harms of legal internalism, on the other hand, come in two primary forms: First, it is rooted in false intellectual premises. Second, it tends to entrench power and wealthy hierarchies in society by stabilizing the legal system. As noted above, it is not logically possible for any given legal system to be completely epistemologically self-contained: it must always rely on at least some external conventions of linguistic and intellectual interpretation. *See supra* p. 1100. Thus, at some very basic level, legal professionals who believe in legal internalism are operating on the basis of false assumptions. Many scholars would go considerably further than this, and argue that most acts of legal interpretation rely upon significant external assumptions that are left unexamined and therefore unchallenged. *See, e.g.*, Leiter, *supra* note 142, at 267–68 (collecting quotations from scholars expressing this point of view). More troublingly, such assumptions tend, in the views of those scholars, to favor the entrenchment of preexisting sociopolitical hierarchies over equitable change, and therefore lead to escalating levels of inequality. *See, e.g.*, J. Skelly Wright, *The Judicial Right and the Rhetoric of Restraint: A Defense of Judicial Activism in an Age of Conservative Judges*, 14 *HASTINGS CONST. L.Q.* 487, 496, 520 (1987).

There are serious difficulties with both critiques. First, the fact that the pure form of legal internalism — one that believes that the law is entirely and absolutely epistemologically self-contained — cannot be completely correct does not mean that legal professionals truly believe in this pure form. Instead, it seems fairly possible that the kind of internalism that they embrace is a less analytically rigorous and more pragmatically oriented one: for the purposes of their everyday professional activities, the only sources they intellectually consider in legal interpretations are other laws — the linguistic conventions or social norms that they may or may not subconsciously bring into the act of interpretation are simply not part of their conscious intellectual effort. Moreover, the fundamental purpose of the legal profession is not to pursue truth, but to make sure that the legal system functions efficiently — that social welfare is maximized to the extent possible, and costs minimized. Even if members of the profession operated under false intellectual premises, they may well be able to run the legal system as effectively as if they did not.

The entrenching-hierarchies critique, on the other hand, may well be true, but only in the contexts in which legal internalism is an institutionally conservative force: as noted above, this is probably more often true than not, but legal internalism can periodically “make up” for this conservatism by inducing periods of radical reinterpretation and change. *See supra* section II.B, pp. 1106–10. In the overall balance of things, whether internalism truly serves the political interests of entrenched elites is, at least, an open question that has yet to be systematically examined.

How to weigh these benefits and harms against each other is, in the end, an exceedingly complicated question that we cannot address here. The goal here is only to flag the fairly compelling arguments on both sides of the equation.

these dynamics as an epistemic reality of how legal evolution works then requires determining how the role of legal internalism *in* legal change may be fruitfully incorporated into a historical narrative of a legal institution. As external variables and influences make their way into the sociopolitical discourse surrounding the law, their real influence *qua* law is only ever realized when they enter the legal domain, wherein internalism (or the internalist mindset) plays a framing function. It is this framing function of legal internalism — operating through its three central tenets — that historical narratives need to take seriously.

At the outset, it needs to be understood that the framing function of legal internalism is more than just a nominal one, something that a simplistic reading of Kennedy's account could imply. Instead, the framing exerts important substantive influence on the content and shape of the external variables themselves. And it does so not through a formal modification to the substantive content, but instead by altering the salience and acceptability of the different variables through the process of framing. In an important sense, this process corresponds to a phenomenon described by Professor Robert Gordon in his classic work *Critical Legal Histories* as the idea of "law as constitutive of consciousness."¹⁵⁵

Influenced by Kennedy's work on the evolution of legal consciousness, Gordon suggested that viewing the law as unidirectionally influenced by social, political, economic, and technological change was unduly myopic.¹⁵⁶ He argued instead that there was in reality an additional dimension to the interaction, wherein the law — through its conceptual categories and framing — creates the boundary conditions for change and in the process exerts an influence of its own on the content and direction of such change.¹⁵⁷ As Gordon put it, "the 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."¹⁵⁸ Gordon's call to recognize the dialectical nature of the relationship between law and society has in the years since spawned a variety of scholarly interventions that have taken the idea seriously.¹⁵⁹

¹⁵⁵ Gordon, *supra* note 18, at 109 (capitalization omitted).

¹⁵⁶ *See id.* at 63–65, 70–71.

¹⁵⁷ *Id.* at 109–12.

¹⁵⁸ *Id.* at 111.

¹⁵⁹ These are summarized and discussed in a series of essays written for a 2012 symposium. *See* Blumenthal, *supra* note 18; Laura F. Edwards, Review Essay, *The History in "Critical Legal Histories": Robert W. Gordon. 1984. Critical Legal Histories*. Stanford Law Review 36:57–125, 37 LAW & SOC. INQUIRY 187 (2012); Hendrik Hartog, Review Essay, *Introduction to Symposium on "Critical Legal Histories": Robert W. Gordon. 1984. Critical Legal Histories*. Stanford Law Review 36:57–125, 37 LAW & SOC. INQUIRY 147 (2012); Christopher Tomlins, *What Is Left of the Law and Society Paradigm After Critique? Revisiting Gordon's "Critical Legal Histories,"* 37 LAW & SOC. INQUIRY 155 (2012).

All the same, the activity that Gordon's article has generated among legal historians over the past thirty-five years further reinforces the unique intellectual value of understanding legal internalism as a behavioral, rather than a jurisprudential or merely sociological phenomenon. As recent commentators have noted, while Gordon's argument that law is constitutive of consciousness "has come to serve as a working assumption" among legal historians, the specific shape of that assumption has differed quite substantially from Gordon's original design.¹⁶⁰ Whereas Gordon seemingly placed considerable emphasis on the role of the legal profession and its relative autonomy (reflected in "mandarin" legal materials),¹⁶¹ later historians have pushed back against the "essentialism" that the article hints at, which some would argue "entails the absolute autonomy of law."¹⁶² Instead, they emphasize the fundamentally contingent ways in which law and society mutually constitute and have embraced "indeterminacy and plurality" as the defining characteristics of legal change.¹⁶³

Kennedy's concept of legal consciousness would largely agree with a description of legal change as contingent and indeterminate, at least within legal institutions themselves.¹⁶⁴ The theory of internalism we develop here is fundamentally different. By constructing a substantively noncontingent behavioral account of legal expertise and professionalism, we affirmatively seek to defend the "tinge of essentialism" that recent scholarship has accused Gordon of.¹⁶⁵ While we certainly acknowledge the importance of contingency and indeterminism in historical change, a theory of historical change that allows no room for structural features and innate behavioral tendencies goes much too far.

The idea of law being "constitutive" of society captures the role of legal internalism in effecting change, even when driven by external (non-legal) influences. When an institution assumes both legal and nonlegal (for example, sociocultural) significance, it is easy to simply presume that the latter influences the former. All the same, the entrenchment of internalism within a legal system complicates that story, for it now produces a stream of influence from the legal to the nonlegal. The question is how best to tell that "story" without committing to the idea of law's autonomy.

¹⁶⁰ Blumenthal, *supra* note 18, at 167.

¹⁶¹ *Id.*

¹⁶² *Id.* at 174.

¹⁶³ *Id.* at 177; *see also id.* at 176–77. Indeed, in more recent work, Gordon appears to incorporate these perspectives into his understanding. *See* David Sugarman, *Robert W. Gordon in Conversation with David Sugarman*, LAW & HIST. REV., <https://lawandhistoryreview.org/article/robert-w-gordon-in-conversation-with-david-sugarman> [<https://perma.cc/6YNM-HHKP>].

¹⁶⁴ *See* Kennedy, *supra* note 152, at 6–7.

¹⁶⁵ Blumenthal, *supra* note 18, at 174.

Translated into a lesson for historical narratives of legal institutions, this current flowing from legal to nonlegal systems means that such narratives miss a lot when they simply view the law as the target of external influences. To be complete and fully capture the nature of the evolutionary pattern involved, such narratives need to dwell on precise pathways of change and the unstated influence legal internalism plays therein. As an illustration, consider the role that the framing of a right as “property” has played in various historical narratives. Scholars have long noted the extent to which this framing was motivated by considerations of commerce, efficiency, value, commodification, and control¹⁶⁶ — all fairly legitimate arguments that rely on extralegal variables as the origins of influence. Yet historical narratives examining this deployment of the property narrative often gloss over the critical role that the rules of equity and equitable jurisdiction played in influencing the framing when property as an idea was invoked in that setting. With a strong norm developing that equity would intervene — and thus compete with the common law — only when a right was “proprietary,” courts began to describe entitlements in property terms so as to invoke and sustain equitable jurisdiction, and with it the extraordinary remedies that became available to courts.¹⁶⁷ External considerations certainly played a role in entrenching the idea of property in these stories; yet the imagery and framing (as “property”) were themselves products of the legal internalism that courts and litigants worked with.

We return to applying these insights to historical narratives about copyright in the next Part.

III. LEGAL INTERNALISM AND COPYRIGHT

Having examined what legal internalism entails as a behavioral theory of how legal professionals and participants in a legal system treat the system, and described its relevance as an explanatory tool in historical narratives about the evolution and growth of legal institutions, this Part turns back to copyright. As an institution that derives — and has always derived — its relevance from the coercive power of law, copyright exhibits the hallmarks of legal internalism to a significant degree. Indeed, as we argue, copyright law cannot be understood without appreciating the impact of legal internalism on its shape, working, and

¹⁶⁶ See, e.g., MARGARET JANE RADIN, *CONTESTED COMMODITIES* 2–4 (1996); WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW* 11 (2003); Mark A. Lemley, *Property, Intellectual Property, and Free Riding*, 83 *TEX. L. REV.* 1031, 1031 (2005).

¹⁶⁷ See, e.g., Joseph R. Long, *Equitable Jurisdiction to Protect Personal Rights*, 33 *YALE L.J.* 115, 115 (1923) (“[A] court of equity . . . has no jurisdiction to protect personal rights where no property rights are involved.”); Roscoe Pound, *Equitable Relief Against Defamation and Injuries to Personality*, 29 *HARV. L. REV.* 640, 643–44, 646–47 (1916) (discussing how courts came to manipulate the idea of property as a result of the need for a property right to invoke equitable jurisdiction).

normative structure. And while this certainly does not imply disregarding *other* sociopolitical and economic influences on the institution, historical narratives of copyright need to find a way to integrate legal internalism into their attempt to look to new sources and influences to describe the evolution of copyright.

This Part is divided into two sections. Section A first makes the case for copyright as a site of legal internalism, arguing that the system and its participants exhibit *all* of the central features of our account, including several of the behavioral attributes. Section B then returns to the three books being reviewed to show — drawing on an example from each — how they each might integrate legal internalism into their narratives. Our objective in this Part is not to offer an alternative historical narrative of copyright; to the contrary, it is to show how interjecting internalism into copyright enriches the story in such a way that copyright historiography does not have to choose between interdisciplinary and orthodox approaches in binary terms.

A. Copyright Law Internalism

Ever since its origins, the term “copyright” has meant something very specific. With minor variations across jurisdictions, it has always referred to a *legally generated* form of exclusivity associated with expressive subjective matter. The legally generated aspect of copyright has set it apart from its very outset, such that despite invocations of property metaphors (“literary property,” “ownership”), the positive law has always played a critical role in maintaining the existence and viability of the system. In England this was the Statute of Anne of 1710,¹⁶⁸ in the United States it was the Copyright Act of 1790,¹⁶⁹ in Germany it was the imperial copyright statute of 1870,¹⁷⁰ and in China it was the introduction of new copyright legislation over several decades in the first half of the twentieth century, which provided the formal institutional background against which the customary regimes Wang discusses operated.¹⁷¹ In each of these systems, the law — both formally and informally — played a crucial role in constructing the very existence of copyright.

While no one denies this reality, its significance is routinely underappreciated. Relevant here is the fact that the legal origins of copyright represented something of a clean break from the mechanisms of control

¹⁶⁸ 1710 8 Ann. c. 19 (Eng.).

¹⁶⁹ Ch. 15, 1 Stat. 124 (1790).

¹⁷⁰ Gesetz, betreffend das Urheberrecht an Schriftwerken, Abbildungen, musikalischen Kompositionen und dramatischen Werken [Statute Concerning Authors' Rights to Works of Literature, Illustrations, Musical Compositions, and Dramatic Works], June 11, 1870, BGBL DES NORDDEUTSCHEN BUNDES at 339 (Ger.); see also RICHARD ROGERS BOWKER, COPYRIGHT: ITS HISTORY AND ITS LAW 402 (1912).

¹⁷¹ See Muwen Song, *Zhongguo de banquan baohu*, 2 ZHUZUOQUAN 1 (1991) (China).

and exclusivity that preceded it. Consequently, the legal system functioned as a crucial gatekeeper both for what copyright was and the manner in which it would operate. Legal professionals — lawyers, judges, and bureaucrats — thus undoubtedly played a critical role in shepherding the gatekeeper function of the law. While they no doubt were influenced by the external interests of litigants, clients, and constituents, their role as gatekeepers of what “copyright” meant and extended to accorded them significant control over the narrative. As the “high mandarins of the [copyright] system,”¹⁷² legal professionals held views on copyright that were crucial, formative, and extended to other segments of society. Perhaps most crucially, they were legal internalists.

What the legal profession produced very early on was therefore a vision of copyright where the rules of (copyright) law determined what copyright was. It also further generated the worldview that as a body of law, copyright was normative, epistemologically self-contained, and internally coherent. Indeed, these features continue to dominate the modern copyright landscape where legal professionals and legally informed elites view the area in overtly internalist terms. Each of these features has in turn played a crucial role in directing the trajectory of copyright’s evolution.

To begin with the most obvious, from its very inception copyright has been conceived of — by participants in a legal system — as being a normatively laden institution. What this has meant is that copyright rules are conceptualized as directed at behavioral modification on their own, since they carry the possibility of bringing the state’s coercive power to bear on individuals. Lawyers and judges speaking of copyright’s framework of exclusive rights describe it as if it automatically imposes obligations on others to refrain from copying protected expression, acknowledging that these obligations are entirely the product of the law, that is, not of a natural law origin. As an illustration, consider the following observation by Justice Holmes on the nature of copyright:

[I]n copyright property has reached a more abstract expression. The right to exclude is not directed to an object in possession or owned, but is *in vacuo*, so to speak. It restrains the spontaneity of men where but for it there would be nothing of any kind to hinder their doing as they saw fit. It is a prohibition of conduct remote from the persons or tangibles of the party having the right. It may be infringed a thousand miles from the owner and without his ever becoming aware of the wrong. It is a right which could not be recognized or endured for more than a limited time, and therefore, I may remark in passing, it is one which hardly can be conceived except as a product of statute, as the authorities now agree.¹⁷³

Copyright was a “prohibition of conduct,” yet decidedly nonnaturalistic in contradistinction to tangible property. In short, copyright is

¹⁷² Gordon, *supra* note 18, at 120.

¹⁷³ *White-Smith Music Publ’g Co. v. Apollo Co.*, 209 U.S. 1, 19 (1908) (Holmes, J., concurring).

conceived of within legal circles as fundamentally parasitic on the presumptive normativity of law, rather than on a distinctive moral foundation.

Conversations about copyright — among professionals within the legal system — also approach the institution as exclusively authoritative on questions that alternative sources of guidance might concurrently cover. This perspective is about more than just the delineation of the relevant field. It is instead a genuine worldview that attempts to determine the boundaries of what counts as relevant to copyright and what does not. The most poignant example of this perceived epistemological self-containment in the copyright discourse comes from the early days of Anglo-American copyright and the debate over the plausible subsistence of a parallel common law-based, that is, a customarily (or naturalistically) rooted, system of exclusive rights that would concurrently cover original expression even when statutory protection ended: “common law copyright.” After protracted litigation, courts on both sides of the Atlantic arrived at the conclusion that common law copyright was no longer an independently legitimate legal category for published works, after the enactment of statutory copyright.¹⁷⁴ Statutory copyright was to be the exclusive source of authority within the field, at least for published works. And ever since, the copyright discourse has proceeded on the assumption that the contours of copyright are to be determined entirely by the terms of the statute.

Copyright’s perceived epistemological self-containment has grown only more trenchant in recent times, especially in the United States where it has assumed an overtly institutional dimension. Since copyright is statutory in origin, sources of copyright rules, concepts, and principles that are extrastatutory are treated with deep suspicion, in the belief that they could undermine the statute’s formal claim to exclusive authority. To the extent that these additional sources are tolerated, they are permitted to subsist based on the view that the legislature has implicitly or explicitly acquiesced to them.¹⁷⁵

Lastly, internal logical coherence has long been seen as a characteristic of copyright, thus conceived of in legal terms. During the classical era, this coherence manifested itself in the belief that copyright rules could be derived and formulated deductively through reference to other

¹⁷⁴ See, e.g., *Jefferys v. Boosey* (1854) 10 Eng. Rep. 681 (HL) (rejecting the existence of common law copyright); *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591 (1834) (confirming that copyright law in the United States was exclusively statutory); *Donaldson v. Becket* (1774) 1 Eng. Rep. 837 (HL) (rejecting the existence of perpetual copyright in published works without sufficient explanation); *Millar v. Taylor* (1769) 98 Eng. Rep. 201 (KB) (confirming the existence of a perpetual common law copyright). For a good overview of the controversy surrounding common law copyright, see Gómez-Arostegui, *supra* note 1, at 3–5.

¹⁷⁵ See, e.g., Leval, *supra* note 60, at 1061–62.

rules and cases interpreting them.¹⁷⁶ Epistemological self-containment thus produced a strong impulse toward logical coherence. Ironically, even today when courts and lawyers consciously abjure direct reference to logic, they nevertheless go to extraordinary lengths to “interpret” statutory and nonstatutory rules and principles in a way that ensures a grand consistency within the domain of self-containment.¹⁷⁷

In short, then, legal internalism remains a dominant feature of copyright, however understood and defined. The law — in copyright — is seen by participants not just as another source of detail and information about copyright; it is instead constitutive of what copyright is in an important sense.

B. Legal Internalism in Historical Copyright Narratives

If the law is accepted as itself being constitutive of social consciousness, legal internalism as an innate feature of the high mandarin discourse within the law represents a more specific pathway for this constitutive process. In other words, legal internalism informs and directs the categories and imagery of the social discourse surrounding a legally embedded institution. It is worth reiterating that the significance of legal internalism does not imply that any of the other variables are less important in the constitutive process; it just implies that their interaction with legal internalism must remain a central part of the narrative. This is true of copyright, where the imagery and conceptual ideas of the legal framework and its treatment by legal participants have exerted an unstated influence on the direction and nature of legal change.

The narrative in each of the books reviewed here would have benefited from a direct engagement with legal internalism, which would have added a layer of complexity to the causal story that each purports to tell. In what follows, we highlight how each of the narratives might have combined legal internalism with its chosen variables in the narrative, using a prominent episode from each book.

1. *The Political Economy of News as Protectable Subject Matter.* — In his emphasis on the political economy of news publishing and its intersection with copyright, Slaughter pays acute attention to newspapers’ self-identification as a separate category of work that remained on the peripheries of copyright’s traditional conception of “literary works” (pp. 281–85). Undoubtedly, this separate self-identification was driven in large measure by the very different business models and organizational structures of this industry, some of which the book identifies (pp. 192–93). All the same, the overt emphasis on the political economy of such

¹⁷⁶ See Balganes, *supra* note 59, at 1125–35.

¹⁷⁷ *Id.* at 1166–74.

self-identification causes Slauter to overlook the ways in which the “separate” and “different” debate manifested itself in actual copyright law and jurisprudence.

We circle back to the book’s discussion of *Clayton v. Stone* (pp. 121–39), criticized previously for its simplicity.¹⁷⁸ Slauter wants to see in the *Clayton* opinion a direct effort by the judge to treat the subject matter at issue in periodicals — price currents in the case — as unworthy of protection as a literary work (pp. 129–31), and he latches on to observations in the opinion about “encourag[ing] learning” to arrive at his conclusion (p. 131). While the subject matter–based reading of *Clayton* is not erroneous, it does not fully capture the ambiguity inherent in the case, which is reflected in a stark reality noted earlier: *Clayton* was hardly ever cited or quoted for the idea that news periodicals were ineligible for copyright.¹⁷⁹ To the extent that one adopted such a reading, most considered the decision erroneous. Instead, *Clayton* was understood — within the legal profession, among judges and lawyers — as representing the court’s ambivalence about the interaction between copyright’s requirement of formalities and a category’s eligibility for protection.

We have noted previously how later courts came to cite *Clayton*, and how half a century later the prominent treatise writer Eaton Drone attempted to make sense of the opinion.¹⁸⁰ Yet even closer in time to the case, the lawyerly understanding of the opinion was that it was confused. Slauter alludes to this but glosses over it. He notes how the influential treatise writer George Ticknor Curtis openly criticized the decision as being wrong (pp. 134–35). Yet Curtis — much like Drone would do later¹⁸¹ — did attempt to make sense of *Clayton* and in a footnote adds: “I cannot but think that the true reason was that the publication, being in a newspaper, had not been duly entered according to the act of congress.”¹⁸² To Curtis (and Drone), what explained Judge Thompson’s opinion was his belief that newspapers were ineligible for protection because — as a category — they were incapable of daily registration, given how that process worked. True, this is something of a subject matter limitation, but it is intricately tied to a view about the crucial role of formalities for copyright protections.

In this legal internalist reading, the ideas of protectable subject matter and formalities intersected to generate the holding in the case. Given his exclusive focus on political economy in the narrative, Slauter is content taking just one side of this duality into account, and he altogether brushes off the notion of formalities by simply noting that the plaintiffs

¹⁷⁸ See *supra* pp. 1075–77.

¹⁷⁹ See cases cited *supra* note 39.

¹⁸⁰ See *supra* p. 1077.

¹⁸¹ See DRONE, *supra* note 36, at 169 n.1.

¹⁸² GEORGE TICKNOR CURTIS, A TREATISE ON THE LAW OF COPYRIGHT 108 n.2 (1847).

had complied with them in the case (p. 129). In some ways, that is beside the point in the internalist reading: the judge was looking at formality-compliance *in principle* to arrive at the subject matter limit. The critical complicating factor here is the role of copyright formalities, which in the internalist reading of the opinion is constitutive of what works become eligible for copyright as a categorical matter.

The key here is not whether the high mandarin¹⁸³ understanding of *Clayton* or Slaughter's understanding is correct. We will perhaps never know, since both are equally plausible. The point is instead that the internalist understanding of the case — tying subject matter to formalities — came to represent the dominant account of *Clayton* in the legal literature and jurisprudence. A narrative about the evolution of *copyright* that does not account for how participants came to internalize an idea (in this case a decision) directly influencing the direction of such evolution must remain incomplete. By integrating the imagery of law — that is, formalities — with the treatment of newspapers as a separate category, internalism thus adds a layer of nuance that would otherwise be altogether ignored.

2. *Law, Norms, and New Technology.* — Dommann's stated goal in her book is to view the history of copyright as "a legal history of media as well as a media history of legal norms" (p. 7). The interaction among norms, formal law, and new technology has been a fertile ground for scholarly intervention over the years.¹⁸⁴ And yet the precise dynamics of the interaction between these informal norms — which embody some limited normativity among adherents — and formal legal rules remain something of a mystery and heavily context-dependent. So it is in copyright too, where the mechanism through which informal rules attempt to clarify or modify the formal law has had limited success.

All the same, the book's narrative about one of the most important efforts to develop a set of guidelines for copyright, initiated upon the emergence of a new technology, photocopying, pays scant attention to the manner in which that development interacted with formal copyright doctrine (pp. 90–104). The "Gentlemen's Agreement" of 1935 was an informal agreement between members of the publishing industry and members of the scholarly world that sought to create a set of guidelines that would allow libraries (and similar institutions) to make single photographic copies of protected works without incurring liability for

¹⁸³ See Gordon, *supra* note 18, at 120.

¹⁸⁴ See generally Michael J. Madison, Brett M. Frischmann & Katherine J. Strandburg, *Constructing Commons in the Cultural Environment*, 95 CORNELL L. REV. 657 (2010) (proposing a "theoretical framework to systematize case study-based research exploring the construction of the cultural commons" and how intellectual property law interacts with "commons arrangements," *id.* at 659–60).

infringement, if certain conditions were satisfied.¹⁸⁵ Its principal protagonist, librarian and historian Robert C. Binkley, features prominently in Dommann's narrative, where she describes his motivations as well as his involvement in shepherding the negotiations to fruition (pp. 86–97, 100–02).

As Dommann notes, Binkley's original aim was to persuade publishers to support a new provision in the copyright statute that would have exempted libraries from infringement for making individual photocopies (p. 100). When these negotiations broke down, the nonbinding "agreement" was all that remained (p. 100). While the agreement worked well in the early days of photocopying, the advent of high-speed photocopying in the 1960s called many of its assumptions into question.¹⁸⁶ Various efforts were again made to introduce changes legislatively, and again the parties directly involved failed to arrive at any clear consensus.¹⁸⁷ Eventually, Congress enacted a completely watered-down set of exemptions for libraries, which by all accounts has to this day proven to be of little value.¹⁸⁸

While all of this narrative is descriptively accurate as a political economy story, it says very little about *why* norms such as the Gentlemen's Agreement have gained very little traction in copyright law, especially when it comes to regulating permissible copying. Answering this question requires an internalist understanding of copyright. To begin, it must not be forgotten that the baseline against which the agreement developed was the fair use doctrine, which enabled courts to exempt copying from infringement on a case-by-case basis. Being heavily contextual and driven by general — rather than domain-specific — principles, the fair use doctrine was certainly seen as a second-best alternative to a tailored statutory provision,¹⁸⁹ along the lines of what Binkley initially imagined. Yet when that option fell through, the guidelines would have naturally assumed a place distinctly inferior to the fair use doctrine, which, even though open-ended and context-specific, nevertheless represented *formal* law. The only circumstance under which this hierarchy could have changed was if the guidelines recognized an alternative doctrinal pathway to their formalization as law. By conceding

¹⁸⁵ See Peter B. Hirtle, *Research, Libraries, and Fair Use: The Gentlemen's Agreement of 1935*, 53 J. COPYRIGHT SOC'Y U.S.A. 545, 546 (2006).

¹⁸⁶ See U.S. COPYRIGHT OFF., SECTION 108 OF TITLE 17: A DISCUSSION DOCUMENT OF THE REGISTER OF COPYRIGHTS 5 (2017), <https://www.copyright.gov/policy/section108/discussion-document.pdf> [<https://perma.cc/S5VZ-VF72>].

¹⁸⁷ See *id.* at 6.

¹⁸⁸ See 17 U.S.C. § 108; see also U.S. COPYRIGHT OFF., *supra* note 186, at 13 (noting the "outdated character" of the exceptions).

¹⁸⁹ This is an argument that continues to be made to this day. See U.S. COPYRIGHT OFF., *supra* note 186, at 15 ("Reliance on fair use alone will leave libraries and archives without a robust, certain safe harbor for their essential, everyday activities.").

the novelty of the guidelines, the drafters were taking the idea of custom off the table. This in turn left a judicially crafted exception as the only viable option, for which the fair use doctrine remained the most obvious vehicle.¹⁹⁰

From an internalist point of view, a large part of the problem surrounding the acceptance (and success) of the Gentlemen's Agreement was its interaction with the fair use doctrine, something that Dommann's narrative does not fully address. In attempting to push for a negotiated solution, Binkley and his supporters adopted an unduly narrow interpretation of fair use, a posture taken by one of Binkley's allies to demonstrate deference to and cooperation with publishers.¹⁹¹ They adopted the view that fair use was limited to quoting from protected work rather than making entire copies.¹⁹² Yet that very narrow interpretation foreclosed for the guidelines the most obvious pathway to its formal acceptance as law. Unwittingly, then, the proponents of the Gentlemen's Agreement undermined what was perhaps the key doctrinal conduit to its success.

In the legal internalist understanding, copyright is hard-pressed to ever acknowledge a role for freestanding norms and practices when conceived of as an epistemologically self-contained system that demands exclusivity in normative authority over the domain of its operation. For such norms to find credence within the system, they require formalization as *law*. This is the paradox that participants within copyright saw with the Gentlemen's Agreement, which resulted in its redundancy once fair use was taken off the table as a source of doctrinal support. The full story of the Gentlemen's Agreement within copyright and similar guidelines for new technologies captures this reality,¹⁹³ which a focus on new technologies and their political economy is bound to overlook.

3. *Social Norms in the Shadow of the Formal Law.* — Wang's book may seem to be better insulated against the internalism critique than are the previous two due to its explicitly social focus, but this is only partially true. The book's inquiry into customary practices and sociopolitical incentives does not directly implicate legal internalism in the same way that the other books do. But a full account of customary practice and elite legal behavior in early twentieth-century China must account for the political ascendancy of legal reform in that era and the ensuing rise of legal professionalism, if only as background conditions. The rise

¹⁹⁰ Indeed, some scholars have seen the agreement as a means of "interpret[ing]" the fair use doctrine. See KENNETH D. CREWS, *COPYRIGHT, FAIR USE, AND THE CHALLENGE FOR UNIVERSITIES* 30–31 (1993). Yet this was not the original design of the Agreement, which did not rest on fair use as a vehicle. See Hirtle, *supra* note 185, at 585–87.

¹⁹¹ See Hirtle, *supra* note 185, at 585–87.

¹⁹² See *id.*

¹⁹³ See Jennifer Rothman, *The Questionable Use of Custom in Intellectual Property*, 93 VA. L. REV. 1899, 1916–24 (2007).

of legal internalism as a byproduct of those developments has the potential to significantly complicate — and also enrich — Wang’s social narrative. Wang persuasively argues that the history of copyright cannot be told without its social dimension, but the flip side of that argument is that the social history of copyright cannot be comprehensively told without fuller engagement with its legal dimension.

Law and legal reform came to assume outsized importance in early twentieth-century Chinese politics as part of the general obsession with Western-style “modernization” that gripped the elite’s imagination after a series of military humiliations at the hands of European powers, and later at the hands of Japan.¹⁹⁴ The history of this modernization politics was not quite as simple as China encountering superior Western institutions and wishing to copy them — there were complex domestic conditions that laid much of the intellectual groundwork for radical political change well before the Opium War.¹⁹⁵ But by the early 1900s, large-scale legal reform in the image of European and Japanese laws had undeniably become one of the primary agenda items in elite politics.¹⁹⁶ The Qing Court’s attempts to issue copyright legislation in 1903 and 1911 were but two components of this general drive toward legal “modernization,”¹⁹⁷ and they should be understood in that context.

With the influx of Western legal institutions came an influx of Western ideas about law and its proper functioning. To a large extent, these were German and Japanese in origin, both of which emphasized the importance of legal formalism and internalism.¹⁹⁸ Although this Review has primarily spoken of legal internalism as a cognitive inclination that legal professionals are likely to possess, the Chinese embrace of legal formalism went far beyond that: formal legislation based on Western models; formal legal interpretation; and the independent, professional operation of the legal system — these ideas carried, in early twentieth-century China, a kind of political urgency unique to societies that perceived themselves in deep crisis and considered changing the form of their laws one of the central solutions.¹⁹⁹ As historians have long observed, the concept of “rule of law” (*fazhi*) — which generally meant unbiased governance based on rules that, once enacted, would be enforced without contamination by external sociopolitical

¹⁹⁴ See ZHANG DEMEI, TANSUO YU JUEZE, QINGMO FALÜ YIZHI YANJIU [Searches and Decisions: A Study of Legal Transplants in the Late Qing] 3–28 (2003) (China); Zhang, *Development of Comparative Law*, *supra* note 49, at 238.

¹⁹⁵ See Zhang, *Development of Comparative Law*, *supra* note 49, at 230–35.

¹⁹⁶ See *id.* at 232–35.

¹⁹⁷ Song, *supra* note 171, at 1–3.

¹⁹⁸ Wang Limin, *Lun Qingmo Deguo Fa dui Zhongguo Jindai Fazhi Xingcheng de Yingxiang* [On the Influence of German Law on the Emergence of Legal Institutions in Late Qing China], 2 SHANGHAI SHEHUI KEXUE YUAN XUESHU JIKAN 5, 5–10 (1996) (China).

¹⁹⁹ See Zhang, *Development of Comparative Law*, *supra* note 49, at 233–35.

forces — came to assume enormous significance among the Chinese intellectual and political elite during this era and to exert a distinctly internalist influence on how they understood the proper functioning of law.²⁰⁰

It would, of course, take many decades before actual legal practice began to functionally approximate “rule of law” ideals,²⁰¹ but the intellectual embrace of some version of legal formalism almost certainly had some short-term impact on elite behavior: the sociopolitical prestige of new, Western-style legislation, including that of copyright, likely surpassed the stature of preexisting imperial laws and regulations, endowed as they were with an aura of modernization. The enforcement of these laws was undeniably shoddy due to very weak state capacity, but institutional prestige, and therefore influence, can exist in the absence of effective enforcement. Just as importantly, the belief that society should be organized by formal laws and rules, rather than by informal relations, became very popular among political, intellectual, and economic elites alike — including some of the elite authors that Wang focuses much of her narrative on.²⁰² It seems likely that this belief would have influenced the way that they coordinated and regulated their own domains of socioeconomic activity.

All these considerations point in the direction of reconsidering whether customary copyright practices operated parallel to, and perhaps substantively independent of, the formal law, or if customary copyright practices operated under the formal law’s shadow — conceptually and intellectually, if not necessarily institutionally. This concern can be addressed only by substantively comparing the customary and formal regimes, or by comparing customary practice after the intellectual advent of legal modernization with customary practice before. Given that, by and large, Wang’s book does neither of these things, we are, in the absence of other sophisticated accounts of customary copyright practices, left hanging among any number of possible interactions between formal and informal regulatory regimes. Given the weakness of the Chinese state and formal legal system throughout this period, the social history of Chinese copyright need not be an internalist or formalist one in any institutional sense, but it nonetheless could have benefited from more serious engagement with internalism as an intellectual and political force.

²⁰⁰ LI XUEZHI, *MINGUO CHUNIAN DE FAZHI SICHAO YU FAZHI JIANSHE* [“Rule of Law” Intellectual Trends and Legal Reform in the Early Republican Era] 1–16 (2004) (China).

²⁰¹ On the difficult history of “legal modernity” in Republican China, see XIAOQUN XU, *TRIAL OF MODERNITY: JUDICIAL REFORM IN EARLY TWENTIETH-CENTURY CHINA* 329–35 (2008).

²⁰² Both Yan Fu and Liang Qichao were prominent proponents of “*fazhi*.” See Lin Chuankun, *Yan Fu Fazhi Sixiang Chu Tan* [An Initial Exploration of Yan Fu’s Ideas on the Rule of Law], 5 *FAZHAN YANJIU* 105 (2007) (China); Liu Xin, *Liang Qichao Fazhi Sixiang Yanjiu* [A Study of Liang Qichao’s Ideas on the Rule of Law], 5 *FAXUE JIA* 25 (1997) (China).

CONCLUSION

Historical writing on copyright has emerged as a prominent subfield within the world of copyright scholarship. It has fruitfully come to embrace the ideals of interdisciplinarity, and with them the recognition that a vast array of nontraditional sources can shed useful light on the evolution of the copyright system. In attempting to break with what is seen as the “orthodox” approach to copyright history, however, this new turn in the field has made a concerted effort to distance itself from being just another *history of the law*. While there is some real benefit to breaking the constraints of the orthodox approach, this artificial distancing of copyright from the law misses something significant.

The recent contributions by Slauter, Wang, and Dommann represent significant additions to this interdisciplinary trend in the history of copyright. Yet as we have argued, their underemphasis on substantive law and neglect of legal internalism mean that they miss various nuances, and some influences appear more significant (or insignificant) than they should. Copyright is — and has always been — a creation of the law, despite rhetoric and claims to the contrary. This reality has imbued the functioning of copyright with what we have herein described as “legal internalism,” which represents a particular behavioral orientation seen in individuals stewarding the legal regime in an area. Consequently, any effort to tell the story of copyright without acknowledging — whether implicitly or expressly — the role of legal internalism in directing its shape and trajectory is bound to be incomplete. And, as we have attempted to show, legal internalism need not be seen as a version of the orthodox approach with its myopic focus on purely legal sources. To the contrary, copyright’s legal internalism is capable of melding with the myriad external (nonlegal) sources that the interdisciplinary turn in the field has embraced. This internalist approach thereby allows for a richer, more nuanced, yet *legally grounded* historical narrative of copyright.

Each of the three books reviewed makes a serious contribution, not just to copyright history but also to the methodology of historical narratives in the law. Slauter tells the story of copyright from the perspective of an industry constantly on the peripheries of the system, Dommann attempts to see copyright through the lens of media and technological theory, and Wang situates copyright against the backdrop of its cultural replication through custom. Historical narratives such as these have potentially significant ramifications beyond the historical study of copyright. Indeed, they have much to contribute to the theory, justification, and reform of modern copyright. All the same, to realize this potential, they would do well to squarely engage with the law and the nuances of legality.