

“When it comes to the state of their discipline,” Darrin McMahon suggests, “historians are often curiously obsessed with the future—as interested, it would seem, in what stands ahead as what lies behind.”<sup>1</sup> But at least as Jo Guldi and David Armitage see it, the historian’s interest in the future isn’t really all that odd. As they have recently suggested, “[t]he discipline of history holds particular promise for looking both backwards and forwards.” “After all,” they assure, “historians are masters of change over time.”<sup>2</sup> But even if we concede that historians are professionally warranted to have an interest in the future, McMahon’s point lingers on. For what is more curious than the historian’s disciplinary interest in time is the difficulty she immediately experiences in knowing *how to speak of it*. This is the difficulty of historiography, the problem of historical method. Of course, one might respond knowingly, the historical method has *always* been curious. Neither properly at home in the world of the sciences nor in that of the humanities, the historian’s role has perennially been that of the odd in-between. It is simply that in recent times, perhaps, that we have become ever more aware of historiography’s thoroughgoing quirkiness.<sup>3</sup>

And what quirks have we found? Well, it might be easier to speak of what was finally abandoned: that noble dream of being able to speak of the past like it really was, to speak of it in a way that was independent of subjective description.<sup>4</sup> And so, with the dream gone, we grudgingly concede that when we write of time, neither rationalism nor empiricism might offer a perch from which to look out and make an objective assessment, free from interpretive disagreement. As much as we have strained to listen, texts of the past never speak to us; we can only speak the texts, shaping them from our own particular positions, our own particular times, our own particular figurations and orientations.<sup>5</sup> And should we falter, and we see in the past the history of an idea that seems *itself* to speak in the present, we need a good pinch,

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<sup>1</sup> Darrin McMahon, “The Return of the History of Ideas?” in *RETHINKING MODERN EUROPEAN INTELLECTUAL HISTORY* 15 (Darrin McMahon & Samuel Moyn, eds., 2014). The rethinking is directed at *MODERN EUROPEAN INTELLECTUAL HISTORY: REAPPRAISALS AND NEW PERSPECTIVES* (Dominick LaCapra & Steven L. Kaplan, eds., 1982).

<sup>2</sup> JO GULDI AND DAVID ARMITAGE, *THE HISTORY MANIFESTO* 14 (2014).

<sup>3</sup> See, e.g., MICHEL DE CERTEAU, *THE WRITING OF HISTORY*; John Toews, *Manifesting, Producing, and Mobilizing Historical Consciousness in the ‘Postmodern Condition’*, 48 *HISTORY & THEORY* 257 (2009).

<sup>4</sup> PETER NOVICK, *THAT NOBLE DREAM: THE ‘OBJECTIVITY’ QUESTION AND THE AMERICAN HISTORICAL PROFESSION* (1988). Of course, it wasn’t by any means universally abandoned. See, e.g., James Kloppenberg, *Objectivity and Historicism: A Century of American Historical Writing*, 94 *AMER. HIST. REV.* 1011 (1989).

<sup>5</sup> HAYDEN WHITE, *METAHISTORY: THE HISTORICAL IMAGINATION IN NINETEENTH CENTURY EUROPE* (2014).

since surely we're dreaming. And when we dream, we see ourselves in a past that has made the present, we see ourselves then as the explanation for ourselves now and the engine for what we will become; we see as God sees, masters of time.<sup>6</sup>

But here's the really curious part of this historiographical posture. When we dream these dreams of transcendence, (which many of us continue to do), our professional failure takes place on two seemingly contradictory fronts. First, mature historians ought to refrain from the making of totalizing narratives, sweeping their generalities along through the ages. As Quentin Skinner intoned long ago, the mistake, of course, is that the writing of such "grand" history misses the contexts into which the historian's texts must be placed.<sup>7</sup> Second, and seemingly going in the opposite direction, is Jacques Derrida famous warning: dreaming historians have lost sight of the ineradicable contingency and unending multiplicity of the contexts from which she might choose.<sup>8</sup> That is, the doubled failure amounts at once to (i) having failed to produce a secure context in space and time in which to generate the text's meaning, and (ii) having failed to understand that there could have been nothing natural or necessary about that chosen context or meaning. Thus, what we must do in this curious posture is, in our unavoidable situatedness, construct a context in which to place our text, a context that is as exhaustive as possible in its rooting in space and time, and recognize that for all of our exhaustion, the context we have created is never a singular arena in which to understand that text's meaning.

The curious posture of what we can designate "poststructuralist historicism," to put the point differently, is a posture in which historical method itself has made it increasingly difficult to conceptualize, let alone answer, questions about what stands ahead in the future of legal history. For to speak of what stands ahead, we need a sense of where we stand now. And where *do* we stand? Are ours "ancient" times? Is this a "golden" age? Was there ever a "modernity"? Poststructuralist historicism, by and large, counsels against asking such questions. The ancient, the golden, the gilded, the age of revolution, the age of empire, the modern, even the postmodern—it is unlikely that these labels might refer with any predictability or stability to a particular space or time. These labels, we are warned, must be revealed as the gross generalizations that they inevitably are, possibly useful as heuristics, but ultimately, and unavoidably, fictive.<sup>9</sup>

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<sup>6</sup> For discussion, see DIPESH CHAKRABARTY, *PROVINCIALIZING Europe* 237-255 (2000).

<sup>7</sup> QUENTIN SKINNER, *VISIONS OF POLITICS I* 79 (2002).

<sup>8</sup> JACQUE DERRIDA, *LIMITED INC* 9 (1988).

<sup>9</sup> For representative critiques, see KATHLEEN DAVIS, *PERIODIZATION AND SOVEREIGNTY* (2008); Helge Jordheim, *Against Periodization: Koselleck's Theory of Multiple Temporalities*, 51 *HISTORY & THEORY* 151 (2012).

I believe that for some legal historians, the interest in exploring what stands ahead is also an interest in exploring where we stand now—an interest in pushing back against poststructuralist historicism and discovering new vocabularies that might articulate the vastness of our historical terrain. And so, while a powerful use of poststructuralist historicism may be to disrupt and destabilize, some want to do more.<sup>10</sup> And for this set, poststructuralist historicism probably emerges as an obstacle to be overcome.<sup>11</sup> For me, I too am interested in seeking out broader patterns and deeper structures in the vast fabric of legal history. But I see poststructuralist historicism and its tendency for disruption, for all of its problems, as on the whole a pretty good thing. And so, in my effort to conceive a *structuralist* historiography that might better equip us for grander adventures in legal history, I think of poststructuralism more as an expert Sherpa than an enemy to be outwitted. Structuralist legal history has learned much from poststructuralism; but the learning needn't push the historian always to "complexify and contextualize all so-called simpler variables in order to understand real social situations."<sup>12</sup>

In the discussion that follows, I outline a series of steps for how this might work. The argument, in short, is this.

First, the poststructuralist suspicion about grand narratives we have progressively developed since at least the "linguistic turn," is a good suspicion. This suspicion has generated an approach to both social and intellectual history where the historian is ever on call to provide the most localized and most complex context in which to place law. But at the same time I fear that we have become too suspicious, and that an ambient poststructuralist historicism has come to foreclose certain modes of legal historiography better suited to the search for broad patterns in legal history.

Second, I believe that one such mode is "legal structuralism," or structuralist legal history. And while, to say again, I believe that there is much moving in favor of poststructuralism, structuralist legal history was unjustifiably condemned for its lack of social context.

Third, it is true that legal structuralism does not counsel a search for political, economic, cultural, or any other extralegal context in which to place law. So, in this sense,

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<sup>10</sup> And while it might seem that we have been robbed of a properly usable past, the past, as Robert Gordon has suggested, still has its uses. Poststructuralist historicism "inverts or scrambles familiar narratives of stasis, recovery, or progress...[and] unsettles familiar strategies that we use to tame the past in order to normalize the present." Robert Gordon, *The Arrival of Critical Historicism*, 49 STAN. L. REV. 1023, 1024 (1997).

<sup>11</sup> See, e.g., PRESENCE (Ranjan Ghosh and Ethan Kleinberg, eds., 2013).

<sup>12</sup> For discussion, see Justin Desautels-Stein, *Structuralist Legal Histories*, 78 L. & CONTEMP. PROBS. 37 (2015). The quotation is from IMMANUEL WALLERSTEIN, *WORLD-SYSTEMS ANALYSIS* 19 (2007).

structuralist legal history is indeed quite alien to the methods of social and intellectual historians. The structuralist historian instead seeks out a *legal* context in which to place law. Admittedly, this sounds weird. Isn't law, itself, already a legal context? The answer, I believe, is no—it's not. I also believe that the mistake in thinking of law as having its own inherent legal context is a crucial and absolutely fundamental kind of mistake, since its effect is to generally mask the presence of the legal context in which law is practiced.

Fourth, and from this structuralist perspective, a legal context is understood in the language of *legal thought*, which in turn is understood as a structure of legal argument. It is at this point in the argument that I introduce a maneuver for thinking about the future for legal history. For as I finally suggest, a useful tool for imagining both present and future is that of *contemporary* legal thought. Legal structuralism, as I have said, encourages the placing of historical texts in context. That context, however, is the unfamiliar domain of legal context. The legal context is legal thought, and legal thought encompasses an assortment of techniques for the use of making legal arguments. In structuralist legal history, however, we wouldn't speak of *present legal thought* or *future legal thought*, but would rather speak of legal thought as a discrete language-system. So, for example, in the work of Duncan Kennedy we see historical discussions of "classical legal thought," "social legal thought," and "contemporary legal thought."<sup>13</sup> These are structures of legal argument, not periods of legal history, identified and operated in time.

And as a result, the *contemporary* is not another way of talking about current events, or "the present," or about what is happening *now*.<sup>14</sup> Again, contemporary legal thought is a structure of legal argument, a context for understanding the deployment of law, without an inherent chronology. But it is also, nevertheless, a way of getting a handle diachronically on what law and legal thought might become, such as when we hypothesize what might be *other* than contemporary legal thought, a *post-contemporary*. This is how structuralist legal history speaks of the future.

Let me explain, a bit more slowly this time.

### 1. *Functionalist Historicism and its Social Contexts*

In American Legal Thought there is a tendency to understand *Law* as a sometimes faithful servant of *Society*.<sup>15</sup> It is only sometimes faithful in the sense that, when law is

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<sup>13</sup> Duncan Kennedy, "Three Globalizations of Law and Legal Thought, 1850-2000," in *THE NEW LAW AND DEVELOPMENT: A CRITICAL APPRAISAL* (David Trubek and Alvaro Santos, eds., 2006).

<sup>14</sup> See Chakrabarty, *supra* note, at 243.

<sup>15</sup> See, e.g., David Trubek, *Toward a Social Theory of Law: An Essay on the Study of Law and Development*, 82 *YALE L. J.* 1 (1972).

functioning properly, it will have identified a relevant basket of social needs or interests, and hence fashioned itself so as to satisfy those needs and interests. When this happens, law in action and law in the books are happily in sync. But at other times, law seems to have a mind of its own, fascinated with some set of rules that have fallen out of step with the real world, the social world law is meant to serve. From what came to be known as the law and society perspective, or if you like, a “law and...” sensibility, the role of jurists, including legal historians, was to set law in its proper social context. We could understand law’s history, from this point of view, by understanding law’s social purpose. Famously, historians like J. Willard Hurst became emblematic of this kind of law and society historiography, sometimes known as “functionalist historicism.”<sup>16</sup>

Functionalist historicism—a mode in which the historian situates law in a past social context so as to provide that law with its meaning and social function—could in part be understood as an embrace of Robert Darnton’s “social history of ideas” and a response to the mistakes of Arthur Lovejoy’s “History of Ideas.”<sup>17</sup> But functionalist historicism itself came under assault for having made the same mistakes. In a word, the criticism was this. Whereas early purveyors of the history of ideas had made the mistake of reifying their “unit ideas” and “fundamental concepts,” losing sight of the prime material along the way, functionalist historians made the mistake of reifying the materiality of the social world.<sup>18</sup> It was just wrong, as Robert Gordon argued, to think that we could use positivist social science as a means for figuring out law’s social ends and the right social contexts in which those ends might be realized.<sup>19</sup>

Without saying much more here, let’s say that what Gordon was marking out was a poststructuralist critique of functionalist historicism. It was, in other words, the consolidation of a critical view of the “law and...” sensibility about legal historiography. The new historiography that emerged might be termed poststructuralist historicism.<sup>20</sup> But rather than having displaced the “law and...” sensibility, I think it makes sense to see poststructuralist historicism as having deepened, quite radically, that sensibility’s basic assumptions. The functionalists, as I have said, were keen to explain law’s development by way of a context in which law fulfilled some given political or economic function. The poststructuralists

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<sup>16</sup> See, e.g., WILLARD HURST, *THE GROWTH OF AMERICAN LAW: THE LAW MAKERS* (1950). For analysis of functionalist historicism, see Robert Gordon, *Critical Legal Histories*, 36 *STAN. L. REV.* 57 (1984).

<sup>17</sup> But see Daniel Scott Smith, “Context, Time, History,” in *THEORY, METHOD, AND PRACTICE IN SOCIAL AND CULTURAL HISTORY* (Peter Karsten and John Modell, eds., 1992).

<sup>18</sup> A helpful example of this critique is Gary Peller, *The Metaphysics of American Law*, 73 *CAL. L. REV.* 1151 (1985).

<sup>19</sup> Gordon, *supra* note 14, at .

<sup>20</sup> See Chris Tomlins, “Historicism and Materiality in Legal Theory,” in *LAW, THEORY, AND HISTORY: NEW ESSAYS ON A NEGLECTED DIALOGUE* (Maksimilian Del Mar and Michael Lobban, eds. 2016).

countered that these contexts were far too hazy, too slippery, that the causal arrows moved in too many conflicting directions to generate anything like a “true” account of why law did what it did.<sup>21</sup> But at the same time, poststructuralists didn’t give up on the idea of constructing social contexts for law.<sup>22</sup> It was rather that they now wanted to multiply the contexts, maybe forever, exploring the ultimately unknowable textures and traces of law’s dedifferentiated presence.<sup>23</sup> It was still “law and...” But now, it was “law and...everything, always already.”

## 2. *Intellectual History and its Discursive Contexts*

From another quarter comes a different approach to the problem of law’s context, the approach of intellectual history.<sup>24</sup> But whereas those operating in Hurst’s tradition were wrangling with the question of how to choose social contexts for law’s history, intellectual historians were arguing instead about the “linguistic turn.”<sup>25</sup> With roots in the so-called Cambridge School, many intellectual historians believed in the necessity of understanding law in the context of a political discourse.<sup>26</sup> As Quentin Skinner explained, “[t]he aim is to see such texts as contributions to particular discourses, and thereby to recognize the ways in which they followed or challenged or subverted the conventional terms of those discourses themselves. More generally, the aim is to return the specific texts we study to the precise cultural contexts in which they were originally formed.”<sup>27</sup> Perhaps Morton Horwitz’ two volumes dedicated to the *Transformation of American Law* most famously represents this mode of intellectual legal history.

Today it is likely true that some form of Cambridge-style contextualism continues to rule the field of intellectual history, though Skinner’s interest in returning texts to a political context in order to derive the intentions of the speakers has been periodically questioned.<sup>28</sup> Quite recently, the questioning has intensified. In something like the way Robert Gordon tackled Hurst and functionalist historicism, Peter Gordon has tackled Skinner and Cambridge-style contextualism. Gordon argues that contextualism for intellectual historians typically involves a commitment to several interlocking ideas. These ideas include the notion that the intellectual historian ought to search out the discursive circumstances in which a text was

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<sup>21</sup> Derrida, *supra* note, at

<sup>22</sup> Gordon, *supra* note, at

<sup>23</sup> For discussion, see Pierre Schlag, *The Dedifferentiation Problem*, 42 CONT. PHIL. REV. 35 (2009).

<sup>24</sup> See generally, NEW DIRECTIONS IN AMERICAN INTELLECTUAL HISTORY (John Digham and Paul Conkin, eds., 1979); DONALD KELLEY, FRONTIERS; MARTIN JAY, FORCE FIELDS

<sup>25</sup> See THE LINGUISTIC TURN: RECENT ESSAYS IN PHILOSOPHICAL METHOD (Richard Rorty, ed., 1967)

<sup>26</sup> See, e.g., J.G.A. POCOCK, POLITICAL THOUGHT AND HISTORY 76-77 (2009); QUENTIN SKINNER, THE FOUNDATIONS OF MODERN POLITICAL THOUGHT, VOL TWO 127-134 (1978).

<sup>27</sup> Skinner, *supra* note 6, at 125.

<sup>28</sup> MEANING AND CONTEXT: QUENTIN SKINNER AND HIS CRITICS (James Tully, ed., 1989).

originally formulated; that this original formulation will be found in a singularly appropriate time and place; that this original time and place be temporally constrained as tightly as possible; and that, when taken together these premises yield the view that, “for any given idea, there is *one and only one* historical context that both enables and exhausts its meaning.”<sup>29</sup> Again leaning on a raft of poststructuralist criticisms, Gordon the younger pulls apart this mode of contextualism, arguing for the unavoidable slippage between contexts, between the past and the present, between the so-called legitimate and illegitimate. Indeed, Gordon’s attack on the possibility of constructing an empirically accountable, *objective* context in which to situate past events has much in common with the deconstructive missives of deconstructionist theorists like Stanley Fish.<sup>30</sup> Gordon observes,

The ideal of factual reconstruction relies upon the objectivist ideal of disengaged observer: the historian, according to this model, is supposed to remain purely external to the world she aims to know... But once one abandons the notion of a single context, one is confronted with various questions of interpretation and perspective that immediately implicate the historian in the field of meanings she wishes to examine.<sup>31</sup>

But whereas twenty years ago Gordon the elder understood poststructuralism as setting the table for an intensely contextualist approach to legal history, Gordon the younger understands poststructuralism as making quite a lot of trouble for any contextualist readings of the past. To be sure, Peter Gordon concedes that intellectual historians should remain committed to the search for context. But they need to understand that these commitments are fraught, to the very end.

### 3. *Structuralist History and its Legal Contexts*

As the social histories of the functionalists and the intellectual histories coming out of Cambridge and elsewhere continued to develop in the general atmosphere of poststructuralist historicism, the future of legal history looked fairly certain. As Terry Fisher argued in a millennial roundup, legal historiography had become deeply contextualist.<sup>32</sup> The real questions were now about getting as many contexts as possible into the conversation; an

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<sup>29</sup> Peter Gordon, “Contextualism and Criticism in the History of Ideas,” in *RETHINKING MODERN EUROPEAN INTELLECTUAL HISTORY* 44 (Darrin McMahon and Samuel Moyn, eds., 2014).

<sup>30</sup> STANLEY FISH, *DOING WHAT COMES NATURALLY* 43-44 (1989) (“There is no epistemological difference between direct and mediated communications because, in a fundamental sense, all communications are mediated. That is, communications of every kind are characterized by exactly the same conditions—the necessity of interpretive work, the unavoidability of perspective, and the construction by acts of interpretation of that which supposedly grounds interpretation, intentions, characters, and pieces of the world.”)

<sup>31</sup> Gordon, *supra* note 27, at 44.

<sup>32</sup> William Fisher III, *Texts and Contexts: The Application to American Legal History of the Methodologies of Intellectual History*, 49 *STAN. L. REV.* 1065 (1997).

extremely complex conversation, to be sure. But on Fisher's map was something of an alien intruder, and Fisher seemed uncertain of what to do with it. That intruder was structuralist legal history.<sup>33</sup> Perhaps as a courtesy to his colleague Duncan Kennedy, Fisher mentioned structuralism as historiography, but the analysis reads more as eulogy than research agenda.<sup>34</sup> Structuralism, by this time in 1997, was pretty much dead.

After all, structuralist legal history was by that time already bearing an especially unwelcome albatross. Legal structuralism, according to its opponents, sought to identify totalizing and universally transcendent structures that might explain *Law*, without paying any attention at all to social context.<sup>35</sup> And, to be fair, the structuralists didn't seem interested in explaining law's history with reference to the lumber industry, the sex industry, or any industry that might come to mind.<sup>36</sup> Structuralist history seemed obsessed instead with doctrine,<sup>37</sup> and to that end smacked of an embarrassing kind of history that wasn't really history at all: "law office history."<sup>38</sup> The phrase is enough to make you shudder.

Although it is true that legal structuralism was accused of much that is beyond the scope of this essay, it was the accusation that structuralism failed to put its histories in context that I want now to re-assess.<sup>39</sup> For my view is that structuralist legal history is interested in context as much as poststructuralist historicism, in any of its guises. But the sorts of context sought out by the structuralists is quite different than that constructed by functionalists and intellectual historians. What's more, it's not just a different kind of context, it is also that legal structuralists use context for a different purpose. Annabel Brett, for example, has

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<sup>33</sup> See, e.g., DUNCAN KENNEDY, *THE RISE AND FALL OF CLASSICAL LEGAL THOUGHT* (2006).

<sup>34</sup> Fisher, *supra* note 30, at 1073-1076.

<sup>35</sup> See, e.g., Thomas Heller, *Structuralism and Critique*, 36 *STAN. L. REV.* 127 (1984); David Trubek, *Where the Action Is: Critical Legal Studies and Empiricism*, 36 *STAN. L. REV.* 575 (1984).

<sup>36</sup> See, e.g., Duncan Kennedy, *The Structure of Blackstone's Commentaries*, 28 *BUFF. L. REV.* 209 (1979).

<sup>37</sup> See, e.g., Joan Williams, *Critical Legal Studies: The Death of Transcendence and the Rise of the New Langdells*, 62 *N.Y.U. L. REV.* 429 (1987).

<sup>38</sup> For discussion of law office history, see Laura Kalman, *Border Patrol: Reflections on the Turn to History in Legal Scholarship*, 66 *FORDHAM L. REV.* 87 (1997).

<sup>39</sup> This short essay is primarily concerned with defending the notion that structuralist legal history can be understood as a brand of contextualism. However, as I argue here, structuralist contextualism is of a very different sort than that defined, for instance, by Peter Gordon, who sees it as "the epistemological and normative (and implicitly metaphysical) premise that ideas are properly understood only if they are studied within the context of their initial articulation." Gordon, *supra* note 27, at 36. In contrast, the structuralist cares little for the context in which the articulation may have been originally articulated. The interest is rather in the grammatical context that a speaker of law might use at any given time. Nevertheless, this search for context is still vulnerable to the manner of poststructuralist critique raised by Gordon and others. This issue, while absolutely critical, is however outside the scope of the present essay, which again is limited to the explication of structuralist context, and not its defense. I have defended the use of structuralist context in Justin Desautels-Stein, *Back in Style*, 25 *L. & CRITIQUE* 141 (2014), and intend to provide a much fuller version in the forthcoming *THE PROBLEM WITH PRAGMATISM: A STRUCTURALIST HISTORY OF CONTEMPORARY LEGAL THOUGHT IN THE UNITED STATES*.



explained that intellectual historians locate historical contexts in order to understand the origins of a discourse, what caused the discourse to transform, what factors were responsible for why its proponents thought the way they did.<sup>40</sup> But structuralist legal history itself has no interest in the elaboration of historical contexts that purport to explain discursive origins, explaining why a given set of actors believed what we think they may have believed. And furthermore, structuralist legal history itself has no interest in placing law in a political, economic, or cultural context. Indeed, structuralist legal history refrains from searching out any distinctively extralegal context.

Which brings us to the question of just what it is that structuralist legal history attempts to do, and why, if the purpose isn't to explain why law has emerged and transformed at some given point in time and space. As for its task, structuralist legal history is indeed a mode of contextualist historiography, but the targeted context is a *legal* context. Now, at first blush the idea of "putting law in legal context" might seem to implicate one of two possibilities, but neither is what I have in mind. The first wrong turn is towards so-called doctrinal history. This is a history in search of the evolution of legal rules, paying attention to how those rules have changed over time. A second unintended possibility for "legal context" would look for something like a traditional "philosophy of history," wherein the historian seeks out basic questions about the nature of law, and how that nature has been conceived differently at various moments in time.

What I do have in mind is this. For the structuralist, the identification of a legal *context* entails the identification of a particular mode of legal *thought*. Legal thought refers to the *language* of legal argument—the moves, techniques, and styles jurists use in the process of putting legal rules into action, giving the rules momentum, and when done successfully, giving the rules a gloss of necessity. To put the point another way, when the structuralist historian constructs a mode of legal thought, she is constructing a legal grammar, a layer in the legal structure that is operationally distinct from law's "rules." The realm of doctrine, of course, is also relevant to legal thought. But rather than focus solely on the content of rules, the structuralist historian's attention to legal thought directs us to the ways in which jurists put the rules into *legal arguments*.

#### 4. *Legal Context and Legal Thought*

So let me say that one more time. Poststructuralist historicism has come to influence the way we think about crafting contexts for legal history, in both its functionalist and intellectual registers. Structuralist legal history was sidelined in the last decades of the twentieth century, in part because it was thought to have so thoroughly failed to understand

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<sup>40</sup> Annabel Brett, "What is Intellectual History Now?" in *WHAT IS HISTORY NOW?* (David Cannadine, ed., 2002).

the importance of social context. But as I am now suggesting, structuralist legal history *is* contextualist history. But the context into which the structuralist places law is a legal context. And, I admit, this does have a strange ring to it. But what helps here is to remember what the Gordons have reminded, that law never comes pre-loaded with any particular context at all. Having established that the rules of servitudes in the 1930s, for example, came to change over the next couple decades doesn't establish any context in which to understand those changes. If couched as a history, such an account really is the kind of doctrinal history we all try to avoid.<sup>41</sup>

And so, the structuralist needs to construct that legal context in which to understand (say) the rules of servitudes in property law. And legal context, on this view, is legal thought. And legal thought, on this view, is legal grammar. And legal grammar, on this view, entails a language-system's formal rules for shaping surface-level rules in the lexicon into persuasive, and hopefully, *necessitated* legal conclusions. All of this is legal context, and there is certainly nothing apparent about that context when one peruses a field of doctrine, like servitudes, or nuisance, or some such thing. Just like in any other historiographic mode, the historian needs to construct the context—it is never just there, awaiting the historian's arrival.

Here's a brief example of how structuralist legal history constructs legal context as legal thought, and of how doctrine and what I am calling legal context are very different things. In 1989, Martti Koskenniemi published what was probably the last of the legal structuralist works of that period, *From Apology to Utopia: The Structure of International Legal Argument*.<sup>42</sup> It's a long book concerned with international law, with the apparent purpose of showing how an extended amount of doctrinal material was caught up in basic tensions and contradictions. The account goes back several centuries, beginning in the 1500s and ending in the postwar twentieth century. For some readers, the history was thoroughly presentist, with its apparent suggestion that the thinkers of the sixteenth century and up to the present had all been thinking about the same problems and in the same misguided ways.<sup>43</sup>

But this really isn't what the book is about at all. Instead, it attempted to put international law in the context of legal thought, and to that end, three structures of legal thought. Koskenniemi's effort to construct legal thought focused on the language-system of liberal political theory, and then broke this liberal language into two separate structures. In each case, the structure explained how legal thinkers operating in a given language-system

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<sup>41</sup> See, e.g., JESSE DUKEMINIER, et. al., PROPERTY 668 (2006) (“In this chapter we put great emphasis on how and why the law of servitudes developed as it did, because we believe it is far easier to understand this rather disorderly law from the perspective of history than as a logical system.”)

<sup>42</sup> MARTTI KOSKENNIEMI, FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT (2006).

<sup>43</sup> For discussion, see the Symposium celebrating the book's 25<sup>th</sup> anniversary, LEIDEN J. INT'L L. (2016).

were constrained by that system in how they could fashion legal arguments about particular conclusions. Koskenniemi outlined a “classic” liberal structure of legal argument, as well as a “modern” structure, and then contrasted both of these liberal structures with the pre-liberal structure of argument in Aristotelian thought. Thus, rather than see Koskenniemi as having provided a doctrinal history of international law plodding up to the present, the book is actually a structuralist history of international legal thought. That is, the book provides a legal context (legal thought) for understanding the doctrines of international law. Again, law and legal context are distinct, and knowing something of the former doesn’t mean you know anything of the latter. To think that you could is to think that in surveying a list of vocabulary terms in some foreign language would necessarily entail an understanding of that language’s syntactical rules. It doesn’t.

### 5. *Contemporary Legal Thought*

I can now return to the questions about historians and their preoccupations with the future that triggered this explication of the structuralist method. As I mentioned at the outset, a difficulty in the effort to think about the future of legal history is the methodological trouble with finding a firm footing in the present. Poststructuralist historicism puts the historian on shifting sands, calling into question any attempt to reify what will always be a “metaphysics of presence.” In this light, typical efforts to locate the present by way of periodization are suspect.<sup>44</sup> Of course, we ought to be suspicious of periodization, particularly if we sense that the labels are being used in ways that are over- or under-inclusive, which is—virtually—always. But as I just explained above, structuralist histories like *From Apology to Utopia* do use such labels, like classical and modern, though it is helpful to remember that these are not the names of historical periods; they are rather the names of argumentative structures, structures that operate independently of any presupposed chronology. It may be unfashionable, for example, to thoroughly argue today in the language of classic liberal legal thought. But you can certainly do it. Classic liberalism, in this sense, presents not a period but a style.

The structuralist tendency to name structures of legal thought is not, in other words, diachronic. It is instead a synchronic account of a given language in operation at a particular time. Which brings me to the chronologically proximate structure of legal argument known as *contemporary* legal thought. But before I can say much about what contemporary legal thought might be, I should clarify what I think it is not. Contemporary legal thought is not the same thing as “contemporary law.” In my view, there is very likely such a thing, and it strikes me as synonymous with “current doctrine,” or, “the rules for right now.”

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<sup>44</sup> See, e.g., PETER FITZPATRICK, *THE MYTHOLOGY OF MODERN LAW* (1992). Cf. *THE MODERNIST IMAGINATION: INTELLECTUAL HISTORY AND CRITICAL THEORY* (Warren Breckman, et. al., eds., 2009).

“Contemporary law,” in this sense, is probably the target of the Bar Exam. But an analysis of “contemporary law” will always be subject to poststructuralist critique: contemporary for who, where, when, why? We have no *context* for understanding what might be particularly “contemporary” about it, other than the temporal sense of experiencing it *now* (which is already *then*). For if everything that happens right now and which is also legal is therefore, by definition, “contemporary law,” well, we’re going nowhere fast. What do we do, for example, when we look out at the *now*, and come back with wildly conflicting reports about what we see? These differences, as Hayden White so often emphasized, have much to do with the ways in which our intellectual orientations already prefigure what it is we are disposed to see. It is for similar reasons that art historians are skeptical about unpacking “contemporary art” as the art of now. Rather, some art historians are after a proper context in which to give the label contemporary some discrete meaning, a meaning that might be contrasted with modern art, for example.

So rather than ask questions about “the law of now,” I ask of contemporary *legal thought*. From the structuralist perspective, this means that we ask whether there is a legal context in which we might understand such “contemporary doctrines,” and how we might go about knowing that context. Duncan Kennedy, for example, has recently provided just such a structuralist legal history of contemporary legal thought.<sup>45</sup> After discussing what he calls “classical legal thought” and “social legal thought,” Kennedy defined contemporary legal thought as a structure of legal argument coming into dominance in the late 1960s and 1970s. But whereas Kennedy saw classical legal thought and social legal thought as integrated by their respective grammars, he saw the consequent site of contemporary legal thought as more of a train wreck. Rather than supported by a distinctive set of syntactical forms, Kennedy believed contemporary legal thought to be an open-ended language, sourced in the scattered debris left over from the demolished remains of classical and social legal thought.<sup>46</sup>

I see contemporary legal thought differently. Like Martti Koskenniemi, I exclusively target liberal legalism as a language-system. Like Reinhart Koselleck, I think of this language-system as a necessary “saddle” in the process of mounting the historical inquiry.<sup>47</sup> Like Duncan Kennedy, my understanding of liberal legalism breaks out into a division between classical legal thought and (what I call) modern legal thought. But whereas Kennedy understood contemporary legal thought as a bunch of bits and pieces, I have argued for a third, more integrated, more discrete structure of legal argument in liberal legalism. I call that third

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<sup>45</sup> Kennedy, *supra* note.

<sup>46</sup> For Kennedy’s most recent analysis, see Duncan Kennedy, *The Hermeneutic of Suspicion in Contemporary American Legal Thought*, 25 L. & CRITIQUE (2014).

<sup>47</sup> REINHART KOSELLECK, *THE PRACTICE OF CONCEPTUAL HISTORY: TIMING HISTORY, SPACING CONCEPTS* (2002).

structure Pragmatic Liberalism.<sup>48</sup> I think of Pragmatic Liberalism as the grammatical blending of legal pragmatism with liberal legalism, such that legal pragmatism both sustains and empowers the continued use of the classic and modern structures of liberal legalism. The structure of contemporary legal thought, in other words, is Pragmatic Liberalism.

#### 6. *Post-Contemporary Legal History, aka, The Future*

But of what relevance is Pragmatic Liberalism to the future of legal history? In one sense, it isn't strictly relevant at all. There is absolutely nothing in my structuralist account of Pragmatic Liberalism which necessitates any causal explanations about what the future will be. Knowing something of Pragmatic Liberalism needn't be instructive at all for the person wanting to know what comes next. But as I have suggested, diachronic agnosticism is itself an essential aspect of the structuralist method. The idea is to articulate a structure of legal argument, which itself is a mode of thought, which in turn is a legal context in which to understand legal doctrine. It is, as Michel Foucault suggested, not a horizontal sweep through time, but rather a vertical slice of time, an archeology.<sup>49</sup>

And yet, I did have a reason for coming to Pragmatic Liberalism. As I suggested at the outset, it is difficult to say something about the future of anything unless we have some sense of a starting point. But in our poststructuralist posture the business of establishing a starting point is mind-boggling if we take the task as having to say something about the "law of now."<sup>50</sup> Which law, where, according to whom?<sup>51</sup> Taking shelter in our poststructuralist historicism, our answer may be, "Well, when I look at the law of now, I concede that it is constrained by my own point of view, and so I will do the best I can to tell the story in the most refined and complex contexts that I am able."<sup>52</sup>

But this is not the view from the vantage of structuralist legal history. Structuralist legal histories are "poststructuralist" in that they concede that the presence of a "now" truly does boggle the mind if it is meant as a starting point. There isn't a now, to put it bluntly. Or at least, there is no now over which we'll ever be able to find much agreement. And so,

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<sup>48</sup> Justin Desautels-Stein, *Pragmatic Liberalism: The Outlook of the Dead*, 55 B.C. L. REV. 1041 (2014). See also, JUSTIN DESAUTELS-STEIN, *THE PROBLEM WITH PRAGMATISM: A STRUCTURALIST HISTORY OF CONTEMPORARY LEGAL THOUGHT IN THE UNITED STATES* (forthcoming 2017).

<sup>49</sup> MICHEL FOUCAULT, *THE ARCHAEOLOGY OF KNOWLEDGE & THE DISCOURSE ON LANGUAGE* 193-194 (1972).

<sup>50</sup> See Hedieger, *Being in Time*

<sup>51</sup> See Marshall Berman, *ALL THAT IS SOLID MELTS INTO AIR* 331 (1982).

<sup>52</sup> I think Gordon Wood expresses a version of this sentiment in Gordon Wood, *In Defense of Academic History Writing*, 48 (3) PERSPECTIVES ON HISTORY (2010) ("Despite the sometimes gross presentism of much current history writing and despite some historians' efforts to use history as an ideological weapon in contemporary politics, most historians writing today still yearn to be as objective and as true to the past as historians of the late 19th century did, and most present-day academic historians still judge each other's works in accord with the standards developed by the generation that created the historical profession over a century ago.")

letting go of the “law of now,” the structuralist looks for a structure of legal argument and then asks, *across space and time*, when and where has this structure been operated. In my view, Pragmatic Liberalism offers a way to think about contemporary legal thought in the United States, as it has been operated by jurists over the past several decades. Does this mean that Pragmatic Liberalism is happening “right now,” or that it is the best way of diagnosing our present condition? I have no idea. Does this mean that Pragmatic Liberalism is a mode of legal argument, seemingly indigenous to the United States, of which there is little trace before the middle of the twentieth century? I think that it does.

And now. With this structure of contemporary legal thought in hand, I might begin to speak of the future, since I now have a distinctive starting point, or “saddle,” or “anchor,” or “topos,” or *langue*,” or whatever. I might begin to speak of the future in terms that are strictly “post-contemporary,” or more appropriately, I might begin to speak of a future structure of legal argument; a structure *other* than that of liberal legalism, other than that of Pragmatic Liberalism. I might begin to speak of the future of legal history. But not *now*.