Title

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Abstract: This article addresses the power of law to make historical change. We begin by charting a rich debate on law's autonomy held over the course of the twentieth century, overviewing contributions by Classical Legal Thought, Law and Society, Marxism, the New Left, Critical Legal History, and what we term the "Millennial Consensus." We then sketch an alternative view that we feel is implicit in much legal history, where the law is seen as an "architecture"—a set of tools with which we build our society. On this view, law's autonomy lies in the way that it facilitates specific forms of societal ordering at the expense of others. We emphasize that it also has an existential dimension in that we can never foresee all the future uses particular legal institutions may be put to.

Keywords: legal historiography, contingency, architecture, autonomy, legal history, political economy, legal theory, existentialism

I.   Introduction

While people make the law, often the inverse is the case. As with language, each of us is born into a given legal system; also as with language, each of us must continuously use that inherited system in our interactions and collaborations with one another. That system of legal devices and institutions enables us to collaborate with one another, but it does so through specific forms, facilitating specific varieties of interaction, often at the expense of others. In this way, law, to a remarkable degree, *creates* the world around us, and shapes (as it is shaped by) the way we think, act, and live. Legal history is replete with examples of how the law, in this way, acts as the architecture of our society.

What we are trying to do in this article is to resurrect and map a largely forgotten debate that played a large role in legal historiographical discussion over the twentieth century: the debate between law's autonomy and its historical contingency. Advocates of autonomy (in this sense) see the law as a generative force in itself, either evolving independently or resisting social change originating from outside the law; advocates of contingency, on the other hand, see law as primarily reactive, reflecting and responding to the world around it.[1] Mainstream contemporary legal history has, with some notable exceptions, elided this debate—settling on a view of the law as "relatively autonomous."[2] While admitting that the law does not, in itself, make historical change, this view concedes that the law must have a "degree of relative autonomy derived from the nature of legal institutions or the ideology of the law and legality, or both" (Phillips 2010, 293). Even here, however, the law is primarily described as a reactive force: in the words of one recent paper on legal-economic history, "[D]id the law respond to socioeconomic pressures or did it resist them?" (Turner 2018, 137). This paper will surface a third option, already implicit, we will argue, in some contemporary and classic legal history, where the law is seen less as a constraining force than as an "architecture"—that is, a set of tools with which we build our social spaces, and that (as we will elaborate) inevitably carries unintended and/or unforeseen consequences for which we must take responsibility.[3] These tools

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[1] Autonomy and contingency are porous terms and call for some clarification. Largely following the historiographical debates set out below, autonomy here refers to law's constitutive power, either to further its own independent development or to enable broader social changes. Therefore, when we refer to the debate over the "autonomy of the law and its contingency," we are referring to the debate over law's power to make or enable historical change, either in itself or in society more generally. If the law is autonomous, it is not dependent or contingent on extralegal factors to make change. If the law is contingent, in the sense we use the term, it does not make or enable historical change itself, but is *dependent* on (or a reflection of) broader historical, social, or economic factors, and these factors must be teased out to grasp how law is shaped by them. This use of the term "contingency" is somewhat distinct from but clearly related to a common understanding of the term, according to which events are not produced or derived logically or necessarily from other conditions (for example, market forces, human agency, cultural climate, social conditions). Contingency, in that sense, means an event *x* does not follow *necessarily* from a condition *C*. Another use of the term, closely related to the last one, comes from the critical tradition and Left traditions, which use "contingency" to punctuate an attempt to demystify and destabilize institutional arrangements with the banner: "things could be different," or "things could be otherwise," gesturing toward the possibility of alternative futures. One recent exploration of this topic comes from Justin Desautels-Stein and Samuel Moyn (2021b, 518), who, following Roberto Unger, argue that "[t]he point of revealing contingency in the past, for its best analysis, is to explore social institutions and legal rules that can expand practical freedom in the midst of the powerful forces that undoubtedly shape so much of natural processes and social life—for we already know that societies mainly differ from one another in the extent to which their institutional designs structurally produce individual and collective freedom rather than determination." We will address this notion of contingency at some length when dealing with Critical Legal Studies. Also, in Part III, we will use this latter connotation of contingency to gesture toward going to the past to untap unrealized possibilities for alternative futures.

[2] Desautels-Stein and Moyn (Desautels-Stein and Moyn 2021a; 2021b) have reopened this debate under a new light which interrogates whether legal history is *just* a tool for the demystification of law revealing its contingent nature, or whether legal historians *should* or *are* doing something more. For Desautels-Stein and Moyn, some tools which were critical are now second nature for most legal historians with a critical bite. This calls for new questions: where can we go from here if contingency seems to be the danceroom where everyone is dancing and sharing their moves? Is it a good time to bring back intellectual and political economy drivers of the law?

[3] This aspect of the law as architecture approach is rooted, in part, in one strand of existentialist philosophy, a Kierkegaardian philosophical tradition according to which our decisions will never be entirely based on solid grounds, and we will have to make our choices *believing* (taking the leap of faith) they are the best available (Kierkegaard [1843]

make our daily lives. We rely on them every day, nearly every time we engage with others. Changes to them, however iterative and slight, have turned history and can lead to places we wouldn't imagine.

Some would likely accuse such an approach of reifying the legal order, of arguing that it has direct subjective power over individuals, and that accepting this approach thereby blinds us to the fact that the law is a human creation that we can always change to make a more "developed" or more "just" world. But the accounts we're drawing from and extrapolating on here do not deny human agency over law, but complicate it. Certainly, a deep and critical knowledge of law's long-term historical contingency and indeterminacy is vital, but even the most critical approach to law must take account of the fact that all of us *use* the legal devices available to us in our lives every day. Every purchase, every contract, every marriage, every order of business however slight relies on a massive edifice of legal devices and institutions. They don't just limit us, in the sense of a criminal or regulatory prohibition; they *make* certain interactions *possible*, while also blocking or discouraging other forms of social coordination. In a very real sense, we are bound and defined by them. Even if we take a critical view of the historical and ideological frameworks upon which our laws are built, the importance of law as architecture cannot be ignored. To understand how lasting variations to our legal system change our social world, we consider it necessary to adopt an architectural perspective—one that emphasizes the building and using of legal devices and institutions enabling specific forms of cooperation and conflict (as well as, of course, exploitation). This perspective emphasizes how those building blocks and the resulting legal edifice enable a particular legal and social order, assigning roles to specific actors and institutions, shaping our social relations, rearranging entitlements, and bargaining power within it.[4] Such an approach also alerts us to the ways in which legal devices have been put to new uses, often ones not foreseen by their creators, and that have had led to massive historical shifts through time. Metaphorically speaking, we can fix the plumbing of a house, but sometimes when we do, the water may leak in an unexpected direction. The house, admittedly, is less a solid and consistent edifice than a patchwork assembly of fixes here and there to maintain the overall structure. We can change the law (and we continuously do), but often this is done without knowing where our changes might lead.

In Part II, we return to a time when the law's autonomy was a hot topic in legal-academic discourse. In particular, we survey the contest over the law's autonomy as it was carried out in Anglo-American legal historiographical debates over the twentieth century. We begin with the argument for

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2003). The notion of legal architecture is also informed, from an ethical standpoint, by a Weberian politics of vocation, which demands feeling the responsibility for our intended and unintended consequences with heart and soul and uttering, "Here I stand; I can do no other" (Weber [1919] 1946).

[4] Although Desautels-Stein's and Moyn's aim is to embed legal history in a larger project of social theory, what we propose here is not entirely different from their claim that it is not enough to reveal the contingency of the law in the existing socioeconomic and political arrangements. An explanation of the patterns and the systemic connections is needed if we want to understand the factors shaping our current legal arrangements. In their words, "explanation is supposed to provide a sense of why outcomes accrued as they did, precisely when they might have been different. To be sure, the revelation of contingency, as existentialist traditions in philosophy always taught, reminds us of our freedom, but it does not absolve us of explaining why we used it to choose one social order rather than another—especially when it has typically meant throwing our freedom away . . . But even a valuable case study of contingent outcomes still has to explain why it matters here and now" (Desautels-Stein and Moyn 2021a, 308).

autonomy advocated by Classical Legal Thought at the dawn of the twentieth century. We then discuss two opposing scholarly approaches that both advocated strongly for law's contingency—the Law and Society movement and Marxist analysis. After that, we turn to two equally influential arguments for what is today referred to as law's "relative autonomy," one made by the New Left historians and another by some thinkers within Critical Legal Studies ("CLS"). This section will close with a discussion of the relatively placid position on this issue arrived at by many historians at the turn of the twentieth century, which we term "the Millennial Consensus."

We are not here trying to map all legal history (or even all legal historiography) over this period, nor even to summarize every aspect of these scholarly movements, but to pull out a particular debate within the field. These schools and the authors and pieces used to represent them are chosen as representative examples. In fact, we map these schools and their representatives not as a homogeneous and fully coherent system of beliefs, but as specific articulations of temperaments or styles of thought with regard to this particular topic.[5] We are aware of the risk of every mapping exercise: underemphasizing part of the territory, oversimplifying the map for the sake of its usefulness, or worst, inaccurately describing the landscape. These risks lead us to suggest that more than mapping these schools of thought, we are mapping a particular approach to the autonomy of law expressed by representatives within them.

Borges narrates that in a fictitious empire, the art of cartography was honed gradually until it reached perfection: a map resembled point for point, parcel for parcel, the mapped territory. "[T]he map of one Province alone took up the whole of a City, and the map of the empire, the whole of a Province" (Borges 1998, 325). However, "those Unconscionable Maps did not satisfy and the Colleges of Cartographers set up a Map of the Empire which had the size of the Empire itself and coincided with it point by point" (327). At the end, succeeding generations understood the gargantuan map was useless, and they "abandoned it to the Inclemencies of the Sun and of the Winters" (ibid.). Unlike Borges' cartographers, we do not aim to map Classical Legal Thought, Law and Society, Marxist historiography, New Left History, CLS, or what we call the Millennial Consensus point for point. Such a project would extend well beyond the scope of what we have in

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[5] Changing the frame from schools of thought to temperaments, styles, or patterns of thought emphasizes the inner debates, tensions, and contradictions within schools of thought and the inherent difficulty of pinning them down. Still, temperament evokes a shared lens and sometimes even a shared tendency to think, understand, and feel legal problems in a certain way. The temperamental or characterological dimension, as opposed to "schools of thought," in the way problems are framed and how rationalization of discourse occurs, has seldom appeared in legal scholarship. The notion of temperament has a family resemblance to consciousness and to role, working as a heuristic informing perspective-taking: from where to look, why, and for what purpose. Also, temperament can clarify some attitudinal or perspectival clashes in legal schools of thought, just as, according to William James, it helped clarify similar clashes in philosophy. "The history of philosophy is to a great extent that of a certain clash of human temperaments . . . Temperament is no conventionally recognized reason, so [the professional philosopher] urges impersonal reasons only for his conclusions" (James [1907] 2000, 8). In legal scholarship, temperament has made episodic appearances. Duncan Kennedy, for instance, suggests that in schools of thought there are temperaments turning some people hostile, for instance, to the idea of state power in the contemporary liberal mode and others sympathetic to it (Kennedy and Blalock 2022). The temperamental point was also raised by Libby Adler in an exchange concerning LPE and critical legal scholarship: "It always struck me that the kind of characterological dimension of being drawn to CLS is the taking pleasure in the liberation from that mystification and the kind of rebellion against the mystified order, kind of unshackling yourself from the false necessity" (LPE Project 2022). It is in this semantic field that we use the notion of temperament.

mind here and of our own capabilities and would likely be abandoned like the map in Borges' story. We have created instead a map of a certain debate within and between some strands of these schools of thought or temperaments, because we want to orient our discussion with regard to how legal historiography helps us understand law's autonomy, because we want to draw from these approaches key elements and concepts we feel are worth revisiting, and because we feel this mapping exercise might help to make explicit the approach we here feel is implicit in much legal scholarship, which we term "law as architecture."

In Part III, then, we will outline this approach to the key question underlying this debate. Our account in this section draws heavily from both classics in legal history and contemporary works—largely those associated with the LPE movement (Britton-Purdy et al. 2020). To that extent, what we present is primarily an extrapolation of an approach we feel is implicit in much of this work and an application of it to the question of law's autonomy.[6] Law's autonomy, in this model, is not limited to its immediate responsiveness to the demands of society, but stems fundamentally from its role as a set of tools or devices people use that direct their energies into certain patterns of cooperation. The focus here is not on the law simply as a constraining force responding to socioeconomic developments, but on the law as an enabling (and a disenabling) architecture, as a set of tools and blueprints. Legal actors (a category that includes all of us) use the tools available to them, tools that were often developed with little or no real awareness of their full potential uses and which have often had unexpected effects. Autonomy can be attributed to law itself in this model because of the tendency it has to enable new modes of social organization (and exploitation) unforeseen by its creators. It often, in a sense, runs away from us, and with us. A large part of the law's autonomy, in other words, stems from the fact that the tools it offers have inherent tendencies, herding society in one direction or another, often in spite of any original intentions that may have laid behind them. We conclude by summarizing our main assertions and pointing the way for possible future work in this area.

II.   Debates Over Autonomy vs Contingency in Legal History

A.   *Law as an Island: The Case for Autonomy in Classical Legal Thought*

Classical Legal Thought or "Legal Formalism" left a lasting shadow on legal thought throughout the twentieth century, if only because so much scholarship was developed directly in opposition to it. Among other things, the movement was a stark advocate for law's autonomy, which can be captured, more or less, as follows: law is an autonomous discipline, developing organically and independently of extra-juridical factors. Law grows, therefore, not because it is responsive to external factors (society, the economy, or other disciplines), but because it obeys its own internal and generative logic. According to this view, law is a science in the sense that it is a coherent, integral, deductible, and generalizable body of materials from which the judge can extract a neutral doctrine applicable to future cases. Formalism isolates the law from policy judgments in judicial decision-

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[6] We build from this work the main examples of which are discussed throughout this paper. Needless to say, these authors have not themselves explicitly adopted the approach we outline here, and any errors in our interpretation or application of those works belong with us.

making and other interpretative and argumentative modes that use justice, social policy, or any external justification to support legal decisions (Farber 2015).

Formalism (or, as Pound dubbed it, "mechanical jurisprudence") understood law as a geometrical island—as an autonomous, self-contained system secluded from the influx of society.[7] For formalists, abstraction and deductive inference are the preferred modes of legal reasoning. Like Euclidean geometry logically applies theorems to solve specific problems, formalism applies general legal principles or rules to solve individual cases.[8] For instance, the will of the parties was the abstract principle that governed contract law cases. The law is therefore regarded as a scientific endeavor capable of precise outcomes and correct solutions, provided that abstraction and deduction are applied logically. The law functions less adaptively based on the context of its application, and more as the operation of an internal logic that is responsive only to its own principles, rules, and inference techniques to specific cases.

Although legal formalism existed in the French and German legal traditions, where, through the codification movement of the early nineteenth century, it was turned into a legal ideal, this understanding of law was epitomized and popularized in 1871 in the United States by the then-dean of Harvard Law School, Christopher Columbus Langdell, who crystallized its conceptualization:[9]

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[7] As Frederick Schauer (1988) has argued in his paper on formalism, there is a lack of agreement on what formalism means. For instance, for H.L.A. Hart, formalism means to ignore the necessity of choice in penumbral area of rules (Hart [1961] 2012). For Morton Horwitz, it means to ignore instrumental functions of law (Horwitz 1977). For Karl Llewellyn, it is an "authoritarian, formal, logical" style of legal thought, relying excessively on written language of rules (Llewellyn 1962, 183). Duncan Kennedy, for his part, thinks that formalism is a "view that rule application is mechanical and that mechanical rule application is just" (Kennedy 1973, 355). For Schauer, who tries to develop a less pejorative view of formalism, it is "the willingness to make decisions according to the literal meaning of words or phrases or sentences or paragraphs on a printed page, even if the consequences of that decision seem either to frustrate the purpose behind those words or to diverge significantly from what the decision-maker thinks—the rule aside—should be done" (Schauer 1988, 538). In any case, formalism has the following characteristics: it is a mechanical application of rules that limits or, in extreme cases, neglects the necessity of choice in legal decision-making due to an excessive belief that everything is contained in rules, and that a mechanical application of such rules is either just or mandated by the law.

[8] The notion of law as geometry is based on the idea that legal materials can be synthesized in principles that work like axioms which can be applied, through deduction, to all potential cases. This idea predates Langdell and goes as far back as Leibniz, and the idea that law is a science can be traced back to Francis Bacon. "While Francis Bacon did much in England to develop the idea that law could be treated as a science and was thus susceptible to scientific method," writes Hoeflich, "it was Gottfried Wilhelm Leibniz who must be given fullest credit for the popularization and specific exploration of the geometric paradigm in law" (Hoeflich 1986, 99).

[9] Daniel Farber (2015, 741) argues that legal formalism has had two distinct periods: one from the post-Civil War and ending in the New Deal era (1870-1930), and the second from the final quarter of the twentieth century and onwards. He argues that "after the Civil War . . . there was a move toward more rigorous reliance on texts and deductions from general legal principles." The second era was ignited by members affiliated to the Reagan administration in what later came to be the Federalist Society, where classical formalism revived and got translated into originalism (Farber 2015, 741). In contrast, Bruce Kimball challenges the Holmesian reading of Langdell, which has fixed a necessary association between Langdell and legal formalism or, more specifically, Classical Legal Thought. As Kimball argues:

> Langdell's characteristic mode of reasoning in the field of contracts and, more broadly, in jurisprudence, is actually three-dimensional, exhibiting a comprehensive yet contradictory integration of induction from authority, deduction from principle, and analysis of justice and policy. The contradiction lies in Langdell's combining all three while claiming to emphasize logical consistency and to disregard justice and policy.

"Law, considered as a science, consists of certain principles or doctrines. To have such a mastery of these as to be able to apply them with constant facility and certainty to the ever-tangled skein of human affairs, is what constitutes a true lawyer" (Langdell 1871, vi). Formalists seek certainty and predictability from the law. Abstraction of general principles from legal materials and deductive application of such principles are the tools that grant them a space to assess a social reality and regulate it without dealing directly with reality's messiness, complexity, and unpredictable traits. The operation of the law is simple: general principles are postulated (*civil law*) or abstracted from cases (*common law*) to become the axioms of the system. These axioms are like the major premises in a massive legal syllogism through which deduction can solve any case that comes before judicial decisionmakers.

Formalism has four main characteristics. It is *comprehensive* because it provides a doctrine, principle, or institutional mechanism to resolve *all* cases. It is *complete* in the sense that it has no gaps and assumes there is one correct solution for *every* case. It is grounded on *formality*, because it is a closed system that operates according to an internal logic and rules out any intrusion of "non-legal" or external criteria like morality or policy; and it is *derivative*, as every rule in the system can be derived deductively from more general rules.[10]

Law develops slowly for the formalist, but not because it changes with society. It grows gradually through judicial decisions that illustrate the process of abstraction and deductive inference. "How can we identify law's development?" is a big question from the formalist perspective. The answer is rather indeterminate: "The growth is to be traced in the main through a series of cases" (Langdell 1871, vi). This growth has its own development, and it is only discernible through the mastery of spotting principles that appear in cases and the doctrine embodied in them.
So, how does legal formalism translate into legal history? Legal history's materials reside in the judicial decisions where a glimpse of law's geometrical logic can be identified; these are the raw sources from which neutral, objective principles are abstracted. Doing historiography as a formalist requires going directly to the cases of the past and to the doctrinal work that has already distilled the principles that capture what the law is from this raw, messy, and factual material.[11] The result is a compendium of answers to the question of *what the law is*, based on how it is represented in judicial decisions and doctrinal work as an inexorable manifestation of a system that follows its own operational and logical rules. The formalist method "was seen as scientific, apolitical, principled, objective, logical, and rational" (Singer 1988, 499), and the formalist historiography mirrored these values by believing in the law as a geometrical island separated from the vast continental territory of social reality and political struggles.

Langdell's mode of reasoning therefore fits not Holmes's critique, but the 'paradox of form and substance' that has been considered one of Holmes's greatest insights about judicial reasoning." (Kimball 2009, 5–6)

[10] This conceptualization replicates and updates the description of formalism developed by Thomas Grey (1983).
[11] The formalists tend to view doctrine as the main source of historiography, and they conceive of it as the process to define the norms (general principles and rules) for solving disputes, to orient social behavior, and to regulate the jurisdictional powers and institutions enforcing the law.

The reaction against formalism started in France with François Geny (1919), in Germany with the later works of Rudolph von Jhering (1877–83), and in the United States with Oliver Wendell Holmes Jr. (Holmes 1897; Kennedy 2004, 1032–1035). In *The Path of the Law*, his famous address at the Boston University School of Law in 1897, Holmes identified two pitfalls lying in the path of the law: morality and logic. "Behind the logical form," Holmes reminded us, "lies a judgment as to the relative worth and importance of competing legislative grounds, often an inarticulate and unconscious judgment . . . you can give any conclusion a logical form. You can imply a condition in a contract" (Holmes 1897, 998). With this statement formalism started to collapse, at least in American legal scholarship, and its pure vision of the autonomy of the law began to be seen with suspicion. Law is not immune to the social world; in fact, the law is a site of struggle within the social world. Holmes continued his diatribe against formalism: "[T]here is a concealed, half-conscious battle on the question of legislative policy, and if anyone thinks that it can be settled deductively, or once for all, I only can say I think he is theoretically wrong, and that I am certain that his conclusion will not be accepted in practice *semper ubique et ab omnibus*" (ibid., 999). This is one of the birthplaces of American Legal Realism and, more importantly, it is a statement that debunked this vision of the autonomy of the law. From a geometrical island, law began to be cast as an instrumental tool adapted to social needs and permeated by discourses and realities outside the law. It could no longer be separated from policy questions and social consequences. As Felix Cohen put it, "[W]hen the vivid fictions and metaphors of traditional jurisprudence are thought of as reasons for decisions, rather than poetical or mnemonic devices for formulating decisions reached on other grounds, then the author, as well as the reader, of the opinion or argument, is apt to forget the social forces which mold the law and the social ideals by which the law is to be judged" (Cohen 1935, 812). Pragmatism lurked in the law and in legal history. Geometry was replaced by other analogical disciplines like engineering.[12]

B.   Two Cases for Contingency

The turn from formalism pioneered by the Realists opened the scope of legal scholarship drastically and paved the way for new understandings of law, not as an autonomous, self-developing body of knowledge, but one contingent on the social circumstances in which it was developed and applied. Emphasis on law's contingency grew over the course of the twentieth century, particularly in two separate and parallel intellectual traditions: (1) Law and Society scholarship and (2) Marxist legal history. This section will briefly outline these, focusing particularly on their understanding of law's contingency in response to societal or economic developments.

1.   <u>Law as a Mirror of Society—Law and Society Scholarship</u>

The case for contingency was promoted by a wide array of legal scholars, social scientists, and historians who followed the Holmesian oracle: "[T]he life of the law has not been logic," as the

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[12] The analogy between law and engineering is particularly salient in Roscoe Pound's work. He insisted that "[w]e all have a multiplicity of desires and demands which we seek to satisfy. There are very many of us but there is only one earth. The desires of each continually conflict with or overlap those of his neighbors. So, there is, as one might say, a great task of social engineering" (Pound [1942] 1997, 64).

formalists conceptualized it, "but experience" (Holmes [1881] 1923, 1). This means the law does not follow logical principles and formal rules that guarantee necessary outcomes, but rather it is related to human needs, interests, and their development in society. Following our topographic metaphors, the law is more like a peninsula connected to the mainland (society) and therefore contingent to its dynamic (Welke 2000). Now, if law is something different and yet related to society, for historiographical purposes the main question is, what is the nature of such a relationship? Is law the mirror of society? Is it a tool to meet individuals' and society's needs? Or is it a process of symbiotic adaptation in which law adapts to society and society is modulated by law?[13]

The Legal Realist temperament was primarily forward-looking, focusing largely on policy consequences. They were pragmatists in their forward-looking perspective and generally (though not exclusively), they were less interested in legal history. Following Holmes' metaphor: the Legal Realists were more driven by the idea of taming the dragon than counting its teeth (Holmes 1897, 469).[14]

The backward-looking perspective was accentuated, however, in certain aspects of the extremely broad and influential Law and Society movement—one of the descendants of Legal Realism. Historical work within that movement grew largely from Willard Hurst's 1942 program for legal history research.[15] It aimed to both incorporate the advances of Legal Realism and to go beyond them by looking "not merely (at) the effect of economic, political and cultural activities upon legal action . . . but likewise the effect of legal upon non-legal conduct" (Hurst 1942, 328). Hurst's approach presupposed two analytically distinct domains: the legal, understood as a state and professional practice oriented to respond to society's needs, and the social, which encompassed the market, the family, and cultural interactions, and a logical modality that inquires into the way the two

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[13] The paradigm shift towards contingency and a new and enigmatic relation between law and society started with Holmes' experience-centered jurisprudence. However, it was Pound's sociological jurisprudence, along with his pragmatism, instrumentalism, scientism, and his methodological distinction between law-in-books and law-in-action that claimed to provide a new toolkit to address the needs of an urbanized, industrialized, and pluralistic society, raising the question about how law affects and is affected by society (Pound 1911). This inquiry transformed the work of lawyers by turning them into "result-minded, cause-minded, and process-minded" professionals (Llewellyn 1960). Pound's mindset and particularly his methodological "books-action" distinction was then adopted and modulated by the Legal Realists (Llewellyn 1931), who delved into the gap between the law and its operationalization, exploring the contingent and enigmatic link between law and its social consequences while recognizing the ideological nature of judicial decision-making and the indeterminacy of rules (Singer 1988). Lastly, this movement developed a critical strand, later salient in Critical Legal Studies, and a constructive strand propelled by inquiring into the "real" reasons informing the law and the "real" social issues that the law must address, consolidating a functional, more programmatic, and scientific strand in the Law and Society movement (Trubek 1990).

[14] To be fair, Legal Realism is a rich and plural tradition. Teasing out their episodic engagements with history as a methodological tool exceeds the scope of this paper, which is focused on a particular debate within more explicitly historical work over this period.

[15] As Friedman puts it:

> The outstanding practitioner was J. Willard Hurst, who spent almost his entire career at the University of Wisconsin. Hurst and his followers—the so-called Wisconsin school—moved sharply away from case-centered, formalistic, doctrinal history. Hurst placed his attention squarely on the relationship between law and society—in particular, between law and the economy. Starting in the 1950s his work almost literally defined the field. (Friedman 2005, 547)

domains are related. The difficult question, then, was how are law and society related, or what does the ampersand stand for in the label "Law & Society?"

Hurst's distinction between "effect upon legal action" (society has an effect on the law) and "effect of legal action" (law has an effect on society) provided a new path for legal historians, and, in large part, set the terms of the debate outlined in this paper. In particular, Hurst and his followers were interested in tracing the legal responses to economic and social changes. This program discarded the view of law's autonomy, and instead opted for the image of a "mirror" to illustrate how legal responses mirrored economic and social changes.

As Lawrence Friedman put it, the Law and Society movement adopted an instrumental legal theory: the drive promoting legal change derives from social needs and demands. The law responds to these needs and, by doing so, also transforms them (Friedman 1986). Law's contingency in society was largely instrumental and under-specified in this project. It was instrumental because this approach perceived the law as a policy tool aimed at specific social needs, economic goals, or group interests. It sometimes overlooked other paths not taken to grasp the relationship between law and society. For instance, think about the effect law had in society not in terms of how law satisfies social interests and needs or is modulated by them, but how it produces and articulates markets, social consciousness, regimes of verification (what counts as true or false in certain domains), modes of domination and exclusion, or temperaments and *habitus* (modes of acting, perceiving, feeling, and communicating). And it was unspecified because the origins, motivations, and goals of the effects *upon* and *of* legal action could mean at least three different things. It could mean that law was a mirror of society reproducing (and sustaining) its power relations. It could also mean that law was a functional response to social processes and needs, in the same way that an engineer fixes misalignments to grease the machine. Or it could mean that law and society mutually adapt as interrelated systems responding circularly to specific inputs and outputs. But this form of adaptation, which means to discard or change something to thrive in a new context, precluded radical changes or structural transformations and favored incremental reforms, just as one's body temperature adapts gradually to the environment's weather.

The critiques against this functional view of law and society took a wide array of shapes: the defense of the status quo, treating the law as a dependent variable in social changes, downplaying the ideological role of the law, and excessive confidence in empirical social sciences (Grossberg 1991). But perhaps the main source of discontent was the fact that it was unclear if law and society were different variables and, if so, whether the law could amount to something more than a mere mirror, functional, or adaptive response.

One way to disentangle the relationship between law and society is to start with the terms and then elucidate the modality of the relationship, or the other way around. If we start with the contested concepts of "law" and "society," then questions of boundaries are important: what counts as law? Does every legal material have an effect upon society? Is society evolving progressively, cyclically, or is it in constant need of re-engineering? Is society evolving with its own internal logic and law has to catch its tempo, or is society full of needs that demand to be addressed by the law? Is this approach to legal historiography adopting a formalist, state-centric, and doctrinal understanding of the law? And if we inquire about the conjunction law "and" society, the questions are more perplexing: Is law a *mirror* of society and therefore if the latter changes, will the former *necessarily* reflect such changes? Is law *causing* social changes, or is it only society's needs *causing* functionalist legal responses? How

strong is this causation nexus? Is it possible to study it? Or is law rather adapting to society? And if law adapts to society, should we adopt a longer temporal framework in our research? Independently of the possible answers to these questions, the breakthrough of this approach to legal history is its understanding that the meaning of the law cannot be grasped without looking at social, economic, cultural, and political context (Fisk 2018).

Law and Society also championed empirical and sociological tools to describe a wide array of phenomena: how social variations accounted for changes in the legal domain; how legal responses to social needs and interests had an effect on ordinary people or on specific contexts; and how the empirical and sociological study of how legal needs were addressed by legal rules and decisions that, once implemented, reproduced new social needs and conflicting interests, demanding, therefore, new legal arrangements.

Law "and" society might work in two directions—just like you can go from the mainland to the peninsula, you can travel your way back. But the main point here is that law is not autonomous or independent, totally or partially; it is highly dependent on society either because it mirrors it, it works as a tool to achieve a well-ordered society, designing the normative framework for capitalistic society to thrive, or because law adapts to society—and (possibly) society to law. If the relation is of adaptation, instead of mirroring or instrumental functionalism, then law is not a fixed state and professional practice, but a domain that mutates and doesn't just adapt to the norms to make them responsive to social needs but will adapt the whole practice and conception of the law. Regardless of the nature of the relation, it is important to be reminded that walking in the boundary of the mainland and the peninsula, it is not easy to realize when you are on land and when you are entering the pseudo-island because they are indiscernible.

The limitations we see in Law and Society scholarship are rooted in the idea that law is a system that depends on an "Other" (society or economy) to develop and be meaningful (González-Jácome 2017). The dependency of law narrows the understanding of legal effects in society. Searching for correlations or causal links between social phenomena and legal responses, a typical task of Law and Society research, reduces the field of vision to immediate and direct changes, here and now, sometimes ignoring how the whole system operates and what its architecture and logic might reveal about how social relations are governed. In other words, the role of law in social change will be missed if, as Robert Gordon puts it, the legal historian "looks only for the immediate social effect of marginal changes in discrete enactments and ignores the whole invisible background network of rules that are silently incorporated into people's lives" (Gordon 1984, 108).[16] These background rules operate, overtly or tacitly, in social relations, habits, and processes where the law shapes and

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[16] One way to understand background rules is through the metaphor of painting. Immediate social effects tend to shift our gaze to the foreground. Sometimes, however, what makes possible such effects lies in the background. If we look at Jan Van Eyck's painting *Arnolfini Portrait* or Katsushika Hokusai's woodblock print *The Great Wave off Kanagawa,* we might be misled that what is important is there in front of us (Arnolfini or the big wave, respectively), but if we train our eyes, we might see, as in these works of art, that the action, the gravitational force, what makes them possible, or simply the key feature, was not in the foreground. (Van Eyck himself appears in a little mirror in the background of the painting, and Mount Fuji is barely visible yet anchors our perspective to the relevant.) Rules play with our perspective and shift our attention, too. We thank philosopher María del Rosario Acosta for pointing out to us these examples.

produces modes of being in the world. Despite overemphasizing the foreground, this mode of legal historiography, however, has been massively productive and influential to this date.

2.   Law as Superstructure: Law's Autonomy in Marxism

Parallel to Law and Society scholarship, Anglo-American legal historians and scholars over the twentieth century began devoting more attention to Marx and Marxism in their approaches to legal history.[17] Marx and Engels never compiled a theory of law specifically, yet their general theory of history has had a massive presence in legal scholarship, even if often as a bogeyman rather than a specific model to be either critiqued or followed (Gordon 1988). While diametrically opposed to Law and Society scholarship in many ways, the classical Marxist approach likewise emphasizes the contingency of law relative to extralegal developments over its autonomy. This derives from Marx's notorious division of historical developments into a (determinative) "base," including social and economic phenomena, and a (determined) "superstructure," including, among other things, law and the state. Referencing this distinction, many describe Marxist historiography as an approach that casts law as entirely contingent on extralegal developments in the "base," but, on our reading, this is not entirely true. Rather, as we read the seminal texts, the result is considerably more layered and sophisticated. While Marx does hold that pre-legal economic relations are the primary actors in historical development, he still reserves considerable space for law's autonomy, both in how it supports economic relations and in how it resists changes in the mode of production, leading, at times, to social crisis (Tomlins 2018).

While built on dialectics and sophisticated in its framework, it's important to remember that Marx's historiographical model is, at its core, materialist: he begins with "social reproduction"—that is, the relations by which individuals create the means of their continued survival and the reproduction of the species. The totality of these relations of production are "the economic structure of society," which Marx sees as "the real foundation, on which arises the legal and political superstructure and to which correspond definite forms of social consciousness" (Marx [1859] 1991, 172). In other words, humans must reproduce the means of their material life, and they will naturally collaborate to do this in some social manner. This is the real foundation of historical development; the rest of human society and consciousness is built on top of those social formations. As he says quite plainly: "[T]he mode of production of material life conditions the general character of the social, political, and intellectual life" (ibid.). In other words, the entire state apparatus, legal system, and even spiritual and philosophical beliefs arise from the material conditions of life—it is these core social-economic

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[17] Marxist scholarship is one area where questions over law's autonomy and contingency did not fade towards the end of the twentieth century, and that has produced an absolutely immense literature on this question. Any attempt to summarize this would extend well beyond the scope of this paper. We have therefore focused this section solely on the core classic works in this area that received attention in Anglo-American historiographical debates in this period, in order to capture the significant contribution of this movement to this particular debate, at this particular moment. As a result, we do not deal here with the contributions of many other divergent and fulsome accounts of law's autonomy within Marxist scholarship, such as, for example, the influential writings of Louis Althusser (2014) and Antonio Gramsci, as well as contemporary approaches, such as Ntina Tzouvala's (2020) sophisticated structuralist account of the history of international law. For an appraisal of Marxist theories of law and historiography in Anglo-American legal academic work since the 1970s, and one that deals explicitly and at length with the autonomy of law, see Holdren and Tucker (2020).

relations upon which our society is established and reproduced. As Engels emphasized, the foundation of this perspective is that "the consciousness of men is determined by their existence and not the other way round" (Marx and Engels 1859, n.p.).

Law obviously comes second in this view to the social-economic means of production; however, we feel that it is not correct to say that Marx therefore views the law as *merely* a contingent reflection of the economic base. Rather, Marx grants that the law has autonomy in at least two ways. First, legal forms in his model mediate economic processes. While legal relations are built on top of the economic foundation, once established, economic relations are carried out by means of and within the existing legal order. In other words, production begins to occur "within the framework of" property relationships, understood not only socially but also legally. (In this sense, "property relations" are not merely part of the social-economic order, but are also legal concepts, which are relied on routinely in acts of production.) As Marx and Engels put it in the *German Ideology*, "[s]ince the state is the form in which individuals of a ruling class assert their common interests, and in which the whole civil society of an epoch is epitomised, it follows that all common institutions are set up with the help of the state and are given a political form" (Marx and Engels [1932] 1998, 99). Second, a society's legal framework can also show autonomy in the manner in which it resists change and protects the status quo. Crucially, for Marx, the economic substrate is not static: rather, it can develop and evolve over time, particularly as human technology advances, which can lead to changes in a society's most advanced modes of production. At such a time, "material productive forces of society come into conflict with the existing relations of production" (Marx [1859] 1977, n.p.). That is, "forms of development of the productive forces" (existing property relationships), instead of facilitating production as they used to, now act as "fetters," restricting production from adopting new, more advanced models (ibid.). The classic example of this for Marx, of course, was the shift from feudalism to capitalist production, which could only be enabled by forceful displacement of the structures of the feudal state.[18] We can see this from the way Marx describes social conflict and revolutions:

> At a certain stage of development, the material productive forces of society come into conflict with the existing relations of production or—this merely expresses the same thing in legal terms—with the property relations within the framework of which they have operated hitherto. From forms of development of the productive forces these relations turn into their fetters. Then begins an era of social revolution. The changes in the economic foundation lead sooner or later to the transformation of the whole immense superstructure. (Marx [1859] 1991, 43)

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[18] As Marx describes it:

> The industrial capitalists, these new potentates, had on their part not only to displace the guild masters of handicrafts, but also the feudal lords, who were in possession of the sources of wealth. In this respect, the rise of the industrial capitalists appears as the fruit of a victorious struggle both against feudal power and its disgusting prerogatives, and against the guilds, and the fetters by which the latter restricted the free development of production and the free exploitation of many by man. (Marx 1990, 875)

Social conflict, for Marx, is the process by which old legal frameworks are compelled to adapt to new modes of production and exchange, or, as he puts it, "intercourse" (Marx and Engels [1932] 1998, 101). In this view, "all collisions in history have their origin . . . in the contradiction between the productive forces and the form of intercourse" (ibid., 83).

Crucially, when considering such change, we must remain ever mindful of the distinction between the socioeconomic foundation for such shifts, and the ideological superstructure where conflict over these shifts takes place. The base can be understood with scientific precision, while the superstructure takes the form of ideology.

> In studying such transformations it is always necessary to distinguish between the material transformation of the economic conditions of production, which can be determined with the precision of natural science, and the legal, political, religious, artistic or philosophic—in short, ideological forms in which men become conscious of this conflict and fight it out. (Marx 1859, n.p.)

Particularly important for Anglo-American theory is the contribution of Isaac Balbus, who (building on the work of Evgeny Pashukanis) set out to articulate a Marxian account of law as a "relatively autonomous" phenomenon that would avoid the trap of falling into either "instrumentalist" accounts, by which law responds directly to pressure from social actors, or "formalist" accounts, by which law develops internally (Balbus 1977). For him, the logic of law under capitalism was homologous to the logic of the capitalist mode of production: "If, in a capitalist mode of production, products take on the form of individual *commodities*, people take on the form of individual *citizens*; the exchange of commodities is paralleled by the exchange of citizens" (Balbus 1977, 575). These two forms, one economic and one legal, come alongside, match, and reinforce one another: the formal equality of legal persons corresponds to and helps to reinforce commodity production and exchange. Therefore, the law can be independent of specific social interests, while nevertheless reinforcing them: for example, the right of formal equality can enable and reinforce *de facto* inequality and the maintenance of an existing class structure. In this sense, Balbus argues that law is relatively autonomous from specific social actors, even those representing particular class interests.

However, and importantly, while defending law's autonomy from various social actors or interests, Balbus does *not* see law as autonomous from the broader system of production. Indeed, quite the opposite. For Balbus, the existing form of law is directly tied to, indeed it is an expression of, the fundamental logic of capitalism: "[T]he relative autonomy of the legal form from the will of social actors entails at the same time an essential *identity* or homology between the legal form and the very 'cell' of capitalist society, the commodity form" (ibid., 573). Thus, for Balbus, law is relatively autonomous from social actors, but not at all from the capitalist system, of which it is ultimately a reflection. It may help reinforce the capitalist order, but law here is ultimately secondary to it.

In sum, law in this model has a, more or less, twofold autonomy: it both codifies and facilitates existing modes of production (acting, in Balbus' account, as a reflection of capitalist logics), and it

can then create fetters that hamper the creation of new modes of production, precipitating social conflict.[19] Instead of a determining base and a wholly determined superstructure, Marx's model includes considerable interaction between the two levels, particularly when you take into account Balbus' account of the legal form mirroring and advancing commodity production. Civil society and the state apparatus, while determined by the most advanced current mode of production, play directly into its operation and can limit or facilitate its expansion over time: "Rather than a determining base and a determined superstructure . . . we encounter dynamic interaction between distinct components (the economic, the legal, and political) of the same structure" (Tomlins 2018, 523).

Looked at as a whole, however, even this twofold autonomy is still relatively limited. As Marx said, where conflict exists between the legal order and the mode of production, law will always ultimately be on the losing side: "The changes in the economic foundation lead sooner or later to the transformation of the whole immense superstructure" (Marx 1859, n.p.). In other words, the social-economic base is both determinative at the outset, and will ultimately always determine a legal order's continued survival or evolution. Law has power, without question, but it is "new superior relations of production," which must first "mature[] within the framework of the old society" that are responsible for substantial, long-term historical shifts (Marx 1859, n.p.). Alterations to legal form are, for the most part, ancillary, contributing to the reproduction of a given social form, but not enabling its long-term change (Balbus 1977, 580).[20] In other words, law can facilitate or hamper societal progress, but does not in itself enable higher-order social change. Far from what some critics of Marx might say, law does have considerable autonomy in this model; however, its scope is still rather limited when looked at over the broader perspective.

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[19] For a more contemporary iteration of this approach, see Ellen Meiksins Wood (2002). She identified the distinction between pre-capitalist societies and capitalism with the transformation of social property relations between producers and appropriators. The question of the origin of capitalism is framed under the market dependence of producers as a way of surviving and the specific mode of production that emphasizes competition, profit-maximization, and improvement to further develop the productive forces. If the key factor for the emergence of capitalism was, as she put it, "the development of certain social property relations that generated market imperatives [(competition, profit maximization, production development, improvement)] and capitalist 'laws of motion'" (Wood 2002, 75), these laws were enabled and codified by the legal infrastructure. In other words, market forces were assisted by the coercive intervention of the law and the new forms and conceptions of property that were embedded in legal norms to support the new modes of production. But the point in this contemporary reading of the history of capitalism was not to paraphrase Marx's point, but rather to use historical tools; not just to know that the market society was the cause and not the effect of industrialization, but, more importantly, to identify the conditions and systemic roots of capitalism to "know just why they work the way they do" and, therefore, replace it with a different forms of social and property relations (141).

[20] While we don't have the space to fully address it here, we would argue that this same limited form of autonomy applies to much contemporary work in the Marxist vein. For example, Ntina Tzouvala's account of the logic that both underlies and is constitutive of modern international law ultimately sees it as a mediated reflection of the contradictions inherent in the global capitalist system (Tzouvala 2020, 35).

C.   Two Cases for Relative Autonomy

Over the last quarter of the twentieth century, these two traditions were both critiqued and expanded upon by two other parallel movements in legal historiography: (1) the New Left social historians in the United Kingdom, organized around E. P. Thompson, and (2) the Critical Legal Studies movement in the United States.

While separated by an ocean and some aspects of their methodology, there was also much aligning these two schools with one another. Although in a different way, both built on Marx, and both looked deeply at outside influences on legal developments, often with an eye to those groups either oppressed by law or excluded from legal protections. Also, in contrast to Marx and much of Law and Society scholarship, both considered law not only as a set of institutions, but also as an ideology, focusing heavily on the norms, background rules, and doctrines underpinning legal developments and reasoning. Perhaps most importantly for the purposes of this article, both considered the law "relatively autonomous"—that is, while primarily contingent on external influences, they both asserted that "law has always had some degree of autonomy, has been to some extent impervious to change from outside influences and indeed able to influence other histories" (Phillips 2010, 293).

1.   <u>Law as an Arena for Conflict: Relative Autonomy in New Left Legal History</u>

For someone who never set out to be a legal historian *per se*, few have had such a pervasive influence on the writing of legal history over the twentieth century as E. P. Thompson, who, along with several of his students, both expanded upon and complicated the traditional Marxist approach to legal history—ultimately rejecting entirely the Marxist division between base and superstructure, at least in regard to the role of law.

The Preface to his celebrated *Making of the English Working Class* makes several assertions that both challenge classical Marxist historiography and set an agenda for Marxist historical scholarship going forward (premises that have also influenced an entire generation of legal historians, Marxist and otherwise.) In particular, legal historians have drawn on two central aspects of the approach outlined there. First, they have drawn heavily on Thompson's bottom-up approach to historical causation. Unlike much previous history, in Thompson's account, people themselves are seen as agents in their own history, rather than simply the objects of broader historical forces (such as advancements in society's mode of production). In Thompson's words, "The working class didn't rise like the sun at an appointed time. It was present at its own making" (Thompson 1964, 9). For authors in this tradition, no historical account is complete without including the actions of everyday individuals operating within legal frameworks. Second, historians have drawn on Thompson's historicization of the idea of class relationships. Class, for Thompson, is both *historical*, in that it is something that happens in history, "unifying a number of disparate and seemingly unconnected events," and it is a *relationship*, because it happens when some people, due to common experience, begin to "feel and articulate a common identity" of interests, over and against others "whose interests are different

from (and usually opposed to) theirs" (Thompson, 1964, 9).[21] This approach spans the gap between material circumstances and ideological conflict, blending the two in historical analysis.

One remarkable example of this approach was carried out by Douglas Hay in his celebrated article, "Property, Authority and the Criminal Law" (Hay 2011). The immediate focus of his analysis was an apparent historical paradox in English criminal law of the eighteenth century. The English of the period, as he says, "cherished the death sentence," and the number of offenses punishable by death expanded immensely over the century, as did the number of prosecutions. Yet, despite these proliferations, the number of actual executions remained steady or may even have decreased over the same period. Why did the use of the death penalty increase (often in the face of opposition from individuals interested in humanizing and rationalizing the criminal law) without relying on actual executions? The consensus answer at the time Hay wrote his essay was that the death penalty promoted deterrence, which was required because England did not have a police force or public prosecutions at that time. But, as Hay observes, this simply begs the question: How is it that a legal regime that is routinely not enforced can be effective as deterrence?

Hay's answer is that the law's real power lies not in its role as a mere enforcement mechanism or as a means of terror, but in its power as *ideology*. He divides eighteenth-century criminal law's role as ideology into three aspects (majesty, justice, and clemency), and then describes the experience of an individual caught in that system, detailing the many stages at which it placed the lower classes at the whim of higher-class individuals: from the bringing of private prosecutions (largely by the landed classes), prosecutorial discretion of wealthy counsel, petitions for mercy often made to wealthy employers, and the strict adherence of justices to legal formalities, which frequently absolved individuals of conviction. All of this, described thickly from below, communicates an image of "the Law" as an impartial and fair system of rights, all the while entrenching existing (and extremely oppressive) class hierarchies. Indeed, as Hay observes, the inconsistency of the law itself may have furthered its strength as ideology, for it communicated the largely false idea that the law was impartial and fair, and not structured to further the interests of a specific class. In this way, its weakness as enforcement promoted its effectiveness as a governing force.

Of course, when law's power as ideology failed, the system could (and did) resort to terror in the form of mass public executions. Nevertheless, its discretionary aspects gave law powers that fear alone could not accomplish:

> The criminal law was critically important in maintaining bonds of obedience and deference, in legitimizing the status quo, in constantly recreating the structure of authority which arose from property and in turn protected its interests.

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[21] Thompson notably opposes his approach over and against three historical "orthodoxies" that he casts as either undermining working-class agency (such as casting them as victims of laissez-faire or as the result of evolving productive forces) or adopting a "Pilgrim's Progress" approach, "ransacking" the historical record for "forerunners" of today's society and justifying historical developments from contemporary values and perspectives, where "the blind alleys, the lost causes, and the losers themselves are forgotten" (Thompson 1964, 12).

> But terror alone could never have accomplished those ends. It was the raw material of authority, but class interest and the structure of the law itself shaped it into a much more effective instrument of power. (Hay 2011, 25)

This approach clearly relies on Marxist analysis to an extent; it views the law of a period as expressing and enforcing a given set of class relations. Nevertheless, it differs crucially from Marx in terms of the law's autonomy and power. On this view, the law has ideological power well beyond its entrenchment of a specific property-rights regime and/or state apparatus; indeed, at times this ideological power can go well beyond mere enforcement of the rules of civil society:

> A ruling class organizes its power in the state. The sanction of the state is force, but it is force that is legitimized, however imperfectly, and therefore the state deals also in ideologies. (Ibid., 62–63)

In other words, to be truly powerful, the law must not only codify a specific class regime but must legitimize it—that is, the law must express class dynamics as rightful and fair, as expressed in a system that is, at its root, *just*. In doing so, the law's true power as ideology is made manifest, and this power extends well beyond its mere enforcement as a regime of rules and regulations. Similar to the Marxist legal historiography, the New Left underscored the power of law as a codifying tool to fix human relations and secure means of production; but unlike Marxists, the New Left went one step further, exploring through history law's power as an ideological tool capable of inverting values and casting as neutral and fair a class relation or treatment to a specific group in society.

Thompson, in *Whigs and Hunters* (a study that accompanied the same set that included Hay's essay), extrapolated further on this approach and its contrasts with the traditional Marxist historiography. There, he openly accepts much of the Marxist approach to law's contingency, at least as a critique of formalism, saying, "The greatest of all fictions is that the law itself evolves, from case to case, by its own impartial logic, true only to its own integrity, unswayed by expedient considerations" (Thompson 2016, 195). Yet, he asserts that his historical research made plain that the workings of law go much deeper than mere "superstructure;" they were "deeply imbricated within the very basis of productive relations" (ibid., 204).

Like Marx, Thompson felt that class relations were mediated by law, but, unlike Marx, he asserted, "[T]his is not the same thing as saying that law was no more than those relations translated into other terms which masked or mystified the reality" (203). Law, rather, influenced the totality of society, and was itself a multifaceted concept: It could be understood as a set of institutions (including courts, legal professionals, and so on), as a set of rules, as an ideology, and, lastly, "in terms of its own logic, rules and procedures—that is, simply as law" (203). This fourth aspect refers to the idea that the very act of mediating disputes through legal means carries with it a certain procedural ideal (call it "the Rule of Law"), which holds that the law "shall apply logical criteria with reference to standards of universality and equality" (ibid.). Law, in this sense, carries its own ideal—an ideal of fairness and impartiality. Indeed, law *must* have such an ideal, for it would be ineffective as an institution and an ideology without it. It is "the essential precondition for the effectiveness of law" (205). It is in this rather limited and narrow sense that Thompson famously asserted the Rule of Law to be "an unqualified human good" (208). And, while it need not (indeed, he says, it likely never has) completely live up to that ideal, it would be ineffective as an ideology if it did not meet it *sometimes*. In order to be effective, the law must, on occasion, actually *be* just.

In adhering to and exhibiting this logic, the law provides a great and public arena for conflict over society's values. While it often, indeed most of the time, may mediate class relations in the interests of the powerful, it mediates these relations "through legal forms," including its own ideals of justice and fairness (207). The law, then, is imbricated in every level of society, mediating and translating conflicts in legal forms.

> I found that law did not keep politely to a "level," but was at every bloody level; it was imbricated within the mode of production and productive relations themselves (as property-rights, definitions of agrarian practice) and it was simultaneously present in the philosophy of Locke; it intruded brusquely within alien categories, reappearing bewigged and gowned in the guise of ideology; it danced a cotillion with religion, moralizing over the theater of Tyburn; it was an arm of politics and politics was one of its arms; it was an academic discipline, subjected to the rigor of its own autonomous logic; it contributed to the definition of the self-identity both of rulers and of ruled; above all, it afforded an arena for class struggle, within which alternative notions of law were fought out. (Thompson 1978, 96)

While starting from a vaguely Marxist perspective, these historians clearly expanded on the traditional Marxist view of law's power and autonomy. The base-superstructure divide is rejected, the autonomy of law as ideology is emphasized, and, perhaps most influentially for subsequent legal historians, the law is cast primarily as a forum for social conflicts, in which those conflicts are translated into legal forms and concepts. The law, on this account, becomes both a force and a resource for analyzing society's deepest and most disputed conflicts and ideological shifts.

2.   Law as Consciousness: Relative Autonomy in Critical Legal History

Few intellectual movements had as much influence on legal history over the last decades of the twentieth century as Critical Legal Studies (CLS or the Crits); likewise, there is perhaps no area of legal inquiry that had a greater influence on CLS than legal history. The two, to a great extent, grew alongside one another.[22] Alongside Law and Society (another so-called illegitimate heir of the Legal Realists), CLS emerged in Madison, Wisconsin, where a bunch of left-leaning law professors from across the US gathered at a 1977 conference to rethink the relationship between law and society, to reject a lurking scientism in the legal academy, and to politicize academic legal discourse and

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[22] There are slightly divergent opinions about this. Some would argue that the crits were engaging in legal history but not thinking about the relationship between law and history. For instance, Desautels-Stein and Moyn argue:

> [W]hat critical legal studies was not about, and has never been about, was the relation between law and history. Law and politics, law and society, law and economics, law and identity—yes. Law and history, not really. This fact is all the more startling when we consider that the major works in critical legal studies were all legal histories . . . Why? What was it, then, that left the early critical legal studies movement, for all of its claims about the past, surprisingly distant from the *field* of legal history? A minor reason is that the two central founders of critical legal studies at Harvard Law School—Duncan Kennedy and Roberto Mangabeira Unger—had no formal training in history. (Desautels-Stein and Moyn, 2021b, 299)

pedagogical method.[23] Over the succeeding decades, these scholars would fundamentally rethink many aspects of legal history (and legal scholarship more generally), in each case emphasizing law's role not as merely a functional expression of society's demands, but as a realm of discourse with its own categories, operational logic, and professional consciousness.

Although CLS was never a monolithic group fully endorsing the same ideologies or approaches, some common traits or, more specifically, a critical temperament can be identified. For the limited purposes of this article—and without implying that this characterization of CLS explains the variants, tensions, and internal factions of this intellectual tradition (not to mention scholars who adopt this temperament without labeling themselves as Crits)—CLS made at least two particularly important contributions to the debate about law's autonomy in legal history: (1) the development of the *indeterminacy thesis* and (2) the emphasis on law's legitimating role as legal consciousness and as a discourse, not only a body of rules.[24] These contributions provided a new lens to understand how power operates through history: The power of the legal order is not just the force it exerts on people, but its capacity to persuade them that "the world described in legal categories, images, and narratives is the best, the only possible, or the [only] attainable world where reasonable persons would want to live" (Gordon 1984, 109). In this way, CLS marks both a continuation of and a break with American Legal Realism, as well as a parallel (and in some ways overlapping) development to the New Left. Both saw law as responding to societal demands, but also as expressing a degree of relative autonomy.[25]

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[23] For a detailed and rear-window narrative on CLS told by Duncan Kennedy, see Corinne Blalock's interview with Duncan Kennedy, in which Kennedy said:

> I think of CLS as having been but no longer a movement, as having been and still very much being an active school of thought . . . The goal of CLS as a movement, at least as I saw it, was to create something that was an identifiable political tendency to the left of American liberalism that was institutionalized and that could sustain itself over time . . . At least as I saw it there were three immediately plausible projects and the already mentioned long-term project of institutionalizing the school of thought as a thing valuable in itself as part of the project of enlightenment and with hope that it would be useful in a future needing our type of radical-change theorizing. The three projects were the politicization of legal academia through scandalous utterances, developing our new critical legal theory that culminated in the critique of rights, and paradoxically to many the firm support of liberal legalist reform. (Kennedy and Blalock 2022, 389–391)

[24] In this, as specified further below, we primarily follow the work of Robert Gordon and Duncan Kennedy and others within their milieu of the CLS movement (Kennedy 2006a; Kennedy 2006b; Halley 2011). Seeing the law as a discourse and not just as a body of rules expanded the analytical unit of legal historians and opened new windows to see other forms of law's operation. According to Duncan Kennedy, "the manuscript had a more ambitious agenda. It aimed to be the first structuralist narrative of the path of emergence of the 'legal objects,' private rights and powers, that are the building blocks with which modern law is made. It was supposed to be what Foucault called, following Nietzsche, a 'genealogy,' in this case, of American Law understood as a discourse rather than as a body of rules" (Kennedy 2006a, viii).

[25] The main differences between them, as we understand it, are twofold. First, CLS's emphasis was generally less on law as a forum for conflict than on law as a mode of reasoning, discourse, or consciousness, into which societal conflicts are translated. Second, its advocacy of the indeterminacy thesis didn't have a direct parallel in the work of the New Left. We elaborate on both aspects below.

Under the indeterminacy thesis, there are areas of vagueness, plasticity, and flexibility in legal rules that put their specific meaning up for grabs in any given application.[26] This idea was already present in some strands of Legal Realism—like that of Karl Llewellyn, who argued that "there are two opposing canons [of construction] on almost every point" (Llewellyn 1949, 401). However, the Crits pulled the thread of consistency further, dismantling the seeming coherence of legal discourse to reveal indeterminacy at every level of legal analysis, including not only legal doctrine but also policy arguments and theoretical moves used to back up legal claims.[27] Indeed, the Crits critiqued the Realists' reliance on policy in the same way that the latter had critiqued the formalists' reliance on principle: as a fundamentally flawed project of rationalization. For the formalists, legal determinations were to be made with reference to reason and precedent; for the Realists, the law's indeterminacy should be resolved by recourse to considerations of "policy;" for the Crits, neither could resolve law's fundamental uncertainty.[28]

An implication of this critique of policy is our second central thread of the CLS project: their opposition to the Law and Society approach to the law as a mirror or reflection of society, functionally responding to social needs.[29] While some CLS scholars held that the law was contingent on societal developments in some senses, they also asserted that the law's operational logic helped to shape legal elites' consciousness, categories, and practices. "Legal thought," argued Duncan Kennedy, "is distinguishable from other bodies of thought, say economic and political and social and religious thought, and also 'relatively autonomous' from the interests, material and ideal, that impel social actors to take positions about what the law in particular cases is or ought to be" (Kennedy 2006a, x). The changes over time in the legal apparatus (forms of reasoning, legal arguments, policies, and principles) can shed light on our current practices and lead to alternative institutional futures. Inversely, legal history operated in the other direction: following the roads not

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[26] One could argue that the indeterminacy thesis was not limited to the plasticity of rules, but expandable to the plasticity of people. Any attempt to fix the meaning of signs and discourse faced the problem of what can be called the mercurial nature of signs (for example, rules and people): the tighter you grasp them, the more their liquid nature becomes salient.

[27] Duncan Kennedy not only uses arguments and counterarguments, but also theories and counter-theories, ideologies and counter-ideologies, and other "argument-bites" which structure the entire semiotics of the law (Kennedy 1991a).

[28] In Duncan Kennedy's words: "My purpose was to get way beyond legal realism. The idea was that the realists had been so committed to policy science and policy analysis as the way in which they would preserve the law/politics distinction that they were never able to take their own critique seriously . . . We crits were basically doing to policy analysis what the realists had done to formal doctrine" (Hackney 2012, 27).

[29] Seminal in the development of this approach was the work of Morton Horwitz. His book, *The Transformation of American Law, 1870-1960: The Crisis of Legal Orthodoxy,* explicitly replaced a functionalist story of American law developing in response to (largely) positive societal developments with a more pessimistic story of a capitalist class adapting and making use of the law for its own purposes. There was a notable shift in his intellectual history between that book and the first volume, *The Transformation of American Law, 1780-1860.* The second volume was less focused on "if-then" statements revealing the causes of historical phenomena, and more on the best explanation that a complex and a multi-causal account can provide in a legal historical narrative. As Horwitz himself explains it, "By the time I was writing *Transformation II,* the question of whether you could make causal attributions when there were multicausal influences was a central issue, which also produces post-modernism" (Hackney 2012, 58). Horwitz highlighted the political and moral choices animating legal changes. For him, one of the tasks of the legal historian was to destabilize—or expose—the process of reification, where "particular and moral struggles quickly come to be portrayed as universal truth good for all time" (Horwitz 1992, 271). In short, on Horwitz's account, legal doctrine could be (and, in the development of American common law, frequently was) a tool for the reification of a specific worldview, such as a particular brand of market capitalism, and legal history therefore was a tool for exposing such reification.

taken. Critical legal approaches to history viewed changes in society as actualized possibilities—not as necessary instantiations or responses. These approaches focused on non-actualized possibilities and, therefore, asked why some roads were not taken, and which background rules distributed the bargaining chips to actors in a specific struggle, creating winners and losers. This expanded the map of legal historiography in a crucial sense: Instead of studying how an ant traveled a linear road from *A* to *B*, critical legal history focused on how the spider weaved trajectories and made decisions, occupying new territory to crush the bugs along the way, while leaving some threads undone—possible alternatives to be found for those willing to pull the thread.

Much like Marxist legal history, CLS recognized that legal practice has a certain degree of resistance to extralegal change: "[L]egal norms and practices aren't completely plastic and don't alter every time another set of interests gets its paws on them because they do have some resilience, some long or medium-term continuity of inner structure" (Gordon 1984, 88). Law has certain "long-run structural characteristics that make legal practices outlast short-term swings in political pressure" (ibid., 89). However, the core of the CLS critique went much further than this, asserting that the law also had a degree of autonomy as a form of discourse or consciousness, embedded into "the very marrow of society"—one that can be wielded to explain, justify, and rationalize a certain legal-political order. As Robert Gordon put it:

> Many Critical writers would, I think, claim not only that law figures as a factor in the power relationships of individuals and social classes but also that it is omnipresent in the very marrow of society that lawmaking and law-interpreting institutions have been among the primary sources of the pictures of order and disorder, virtue and vice, reasonableness and craziness, Realism and visionary naïveté and of some of the most commonplace aspects of social reality that ordinary people carry around with them and use in ordering their lives. To put this another way, the power exerted by a legal regime consists less in the force that it can bring to bear against violators of its rules than in its capacity to persuade people that the world described in its images and categories is the only attainable world in which a sane person would want to live. "Either this world," legal actions are always implicitly asserting, "some slightly amended version of this world, or the Deluge." (Ibid., 109)

In other words, critical legal historians claimed that legal thinking is imbricated in the most basic of our everyday interactions and conceptions, and that its power lies in casting the existing order as if it is necessary. By casting social relationships in legal terms, the law can help "to reproduce" a certain "consciousness by confirming it" (111). Our wants and desires are shaped by the "forms" of thought available to us and by the legal discourse and doctrine which partake of shaping social relations.

If law works as a rationalization machine, transforming the contingent into the necessary, critical moves were directed to reverse this, showing the contingent in what appears as necessary. For this reason, critical legal historians often focus on moments where particular legal determinations present a divergent set of possibilities, and then trace how the chosen path is rationalized and justified *ex post* through legal reason (Frug 1980; Klare 1978). Legal developments are presented not as developments of legal reasoning *per se*, but as choices that we make, and for which we must be accountable. If there was ever an ultimate goal of critical historiography, it is this: to show us "how law does not necessarily have a hold over the present or our ability to imagine alternative futures"

(Desautels-Stein and Moyn 2021b, 302). The keywords here are "necessarily" and the imagination of "alternative futures." To put it slightly differently, critical legal historiography shows us that things could have been otherwise because no necessary consequences follow from rearranging legal forms. Discontinuity and rupture are given pride of place in this historiography.

All of this lends itself to genealogical analysis, which is pervasive in critical legal history. This method, inspired largely by Nietzsche and Foucault, looks to the historical origins of various concepts and approaches within a body of knowledge in order to show that a given system of thought was not the result of pure rational development, but of contingent historical moments or decisions, nurtured by extralegal concerns and social conditions (Nietzsche [1887] 2013; Foucault 2008). Genealogy allowed some critical legal historians to follow (or unfollow) the path of the law by pointing to those moments in history where what appears as necessary and obvious was really not so; what appears as universal or consensual hides a parochial agenda or deep disagreements (Cohen 2020; Halley 2011; Kennedy 2010; Alberstein 2002). And what seemed a monolithic, independent, and coherent practice contained the undercurrent of a political battleground, the result of social, epistemological, and political struggle. Genealogical narratives fish out those moments in history where values that we deem natural and necessary were inverted, created, or arbitrarily decided to legitimize a particular view of social reality and its values as "the" view (*sub specie aeternitatis*). To see how our legal categories and institutions are historically contingent, the legal historian might open a space for alternative institutions and experimentalism unfettered by the argument of what legal norms and practices we can or can't establish.

An example is provided by Karl Klare's classic work on the origins of the Wagner Act (Klare 1978). Klare tells the story of the Wagner Act, a seminal piece of US labor legislation that came with myriad possibilities for interpretation and application, and traces how, subsequently, Supreme Court decisions adopting specific contractual constructions and doctrinal choices co-opted and narrowed those possibilities. He does not suggest that the Court was explicitly intending to protect class interest, but rather that the Court was adopting a "style of legal analysis characteristic of modern American legal consciousness that came to stand, whatever the intentions of its authors, as an ineluctable barrier to worker self-activity" (ibid., 270). The law not only responded to society's needs but also, by articulating a new legal consciousness, legitimized a given institutional structure. In other words, the law did not merely respond to society, but shaped a vision for political domination and legitimation.

The critical legal temperament also adopted a deep rejection of scientism, a rejection that can be understood as an attempt to make room for subjectivity and political inclinations within the legal field. Whereas Law and Society replaced Langdellian logic with the social sciences and was thus still driven by some lingering objectivism, Duncan Kennedy, for instance, used "the death of reason" as a narrative providing a new template to rethink the law without a drive for objectivity. In philosophical discourses, the death of reason was associated with the end of metanarratives of philosophical thought; in the law, the death of reason meant a new approach to the history of legal thought, one studying how legal elites act, construe, argue, and teach the law in order "to keep the

law in the domain of the structured, rational, and necessary"[30] (Hackney 2012, 26). The point of this historical inquiry was to spot projects of reconstruction where legal elites secure and restore, by any means available, the necessary, coherent, and rational traits of the law, and also projects of deconstruction where sparks of subjectivity, incoherence, or irrationality are cast by intellectual rivals as destroying the whole enterprise of the law as a neutral, apolitical, and rational project (Hackney 2012, 25). This destruction of the law targeted and meant to undermine the distinction between law and politics. In a nutshell, "the American legal elite repeatedly engaged in a process of reform and critique, and then reconstruction. Each time the pretensions of rationality of legal science were reduced, making it more contingent, and more political, but still retaining a sharp law/politics distinction" (ibid.). In sum, while legal discourse tended to represent legal developments as necessary, in truth they are always the result not of logic or social policy, but of contingent political conflicts.

All of this leaves us with an unresolved question: If neither societal demands, policy considerations, nor the law's own logic dictate the outcome of legal determinations, what does? What, in other words, allows for the determination of a given legal rule's application in a given circumstance? Contrary to a common and simplistic critique, not every legal determination in the CLS model is purely political or ideological.[31] Rather, legal determinations result from an interplay between society, legal materials, and legal consciousness. Legal consciousness is made out of a set of social practices, tools (arguments, logic, doctrines, reasoning modes, and other professional rituals), and values, part of the upbringing of lawyers and the power structures they inhabit. "Law is not just a mirror of social interaction, it is built through a set of specific categories shaped by the lawyers' beliefs, which structure the way jurists think and the world they consider possible" (González-Jácome 2017, 34). The dual experience of what legal practitioners want to say in a given case versus what they *should* believe (or do) will lead them to a cognitive dissonance or phenomenological aporia, which can be overcome by "modifying what [they believe] to correspond to what [they need] to believe in order to be effective" (Kennedy 2017, 371). In other words, jurists will sculpt the legal materials as much as

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[30] Borrowing from the Frankfurt School tradition, particularly Max Horkheimer, Duncan Kennedy uses the template of the death of reason with some variations (Hackney 2012, 26). "It is hard to see," Kennedy writes,

> this as the death of reason in Horkheimer's apocalyptic sense of 1941. Indeed, reason seems alive, if not well, as does critique. Over and over, since he wrote, the choice for particular groups of humans has been "barbarism or freedom," but that has not been the choice for the great mass of humanity. It has been most of the time for most people something in between, and, in the in between, reason has continued to sew by day and unravel her work at night. (Kennedy 2000, 175)

[31] In Duncan Kennedy's words:

> I often think that an answer to a legal question is clearly wrong, and jurists often appear to me to be engaged in abuse of literal meaning, precedent, deduction, teleology, or balancing. This means that I agree with the presupposition of the hermeneutic that legal reasoning is not so completely indeterminate that the only possible explanation of any and all legal outcomes is ideological, or at least extra-juristic. That jurists experience some answers as errors means that the range of interpretive possibilities is limited . . . My sixteen-year-old granddaughter will be turned away from the polls if she tries to vote in this year's congressional election. I believe that any answer other than this one is an error as to what will happen in fact. (Kennedy 2017, 369)

possible to fit their beliefs, but the fact that they are jurists in the first place means this experience is lived by people who have been habituated to certain patterns of thinking and behaving.[32] Despite this process of habituation, legal practitioners will likely experience moments of the indeterminacy of law when they tinker with legal materials in some desired direction, perhaps successfully, even though the materials seem *prima facie* determined, or when the materials appear radically open for interpretation, which for the trained eye might happen more often. Or they may experience moments of determinacy when they are incapable of twisting them to fit their desired goal. In both cases, political decision lies at the heart of legal decision, embedded in the rigid legal materials or in the judge's or the legal operator's decision that finds some loophole in them to foster a specific political aim. But this critical temperament in historiography comes with a caution: Legal materials have plasticity, not unlimited flexibility, and decision comes with a Weberian ethics of responsibility and the awareness that political decisions, even though committed to a normative goal, are made on unsolid ground. The decisionmakers will have to live with and be responsible for the intended and unintended consequences their decision caused.

At first glance, this seems to provide a powerful claim for the power and autonomy of law. However, it remains an open question how much autonomy law really has in this model. Law, even understood as a rationalizing mode of discourse, still responds to and reifies extralegal developments and political considerations. It is codifying social developments into its own mode of discourse or consciousness. Even legal pedagogical moves championed by some Crits like Kennedy were capable of effecting changes in society and political culture by modeling how lawyers could act, think, resist, and feel in professional roles as attorneys, lawmakers, law-interpreters, dealmakers, or public advocates.[33] But law does not seem to be doing much else. As Chris Tomlins summarized, "[C]ritical analysis of doctrine exposed, at least to its own satisfaction, not only the absence of any determining relationship between law (particular rules and processes) and society (particular social practices, structures, or other discourses), but also the absence of any determinate meaning attributable to the rule considered on its own terms, stemming from its own internal contradictions" (Tomlins 2007, 58). Even admitting "plenty of short and medium-run stable regularities in social life, including regularities in the interpretation and application, in given contexts, of legal rules," eventually legal regularities always decomposed, for the crits saw law as indeterminate "at its core, in its inception" (Gordon 1984, 114). Legal discourse may have power, but, in this historiographical style, it is a power that "could, at will, be employed to generate any outcome" (Tomlins 2007, 59). Given this malleability, it is also an open question whether this mode retains the critical political bite it once had.[34] After all, as some argue, an openness to contingency is not inherently a progressive position.[35]

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[32] The habituation process in legal education is described in the following terms: "Legal education structures the pool of prospective lawyers so that their hierarchical organization seems inevitable and trains them in detail to look and think and act just like all other lawyers in the system" (Kennedy 1982, 607).

[33] "Law teachers model for students," as Kennedy puts it, "how they are supposed to think, feel, and act in their future professional roles." (Kennedy 1982, 602)

[34] For instance, see Talha Syed staging a conversation between CLS and LPE on the scope and scale of indeterminacy and political economy (Syed 2022) and the resultant exchange, "Keywords: 'Indeterminacy' and 'Political Economy'" (LPE Project 2022).

[35] For example, Desautels-Stein and Moyn have recently argued that using legal history to show "how things could have been otherwise" was (and is) not an appropriate endgame for critical legal historiography, rather an intermediate stage of the project of explaining why the social order that came to be was the chosen one: "For all its fame in critical legal

In sum, we can specify what the critical legal historiographical temperament means by relative autonomy. First, the law can, at times, resist societal restructurings, much along the lines of the Marxist position; second, as a form of legal consciousness, law has the ability to recast social or political disputes in its own linguistic mode, which in turn can have great persuasive and reifying force—particularly in making political disputes seem rational, apolitical, and justified. In this way, law has a certain autonomy that we can recognize. However, law itself is not an independent source of enabling power: rather, law is indeterminate, requiring political and moral judgment to apply its precepts to any given circumstance. Law clearly has a certain autonomy here, but it is a structural one, even if one we cannot easily see outside of.

D.   *Law and Society as Mutually Constitutive: The Millennial Consensus*

In the last decades of the twentieth century, the debate at issue in this article largely faded from view. While legal historians did incorporate this debate in their work, only rarely did they engage with it directly. Rather, over the succeeding decades, the dominant approach seems to have involved nodding to both the autonomy of law and its overall contingency, without engaging deeply with how the two interact either in general or in specific contexts. At risk of oversimplifying the wide variety of philosophies and methodologies utilized by legal historians in that period, we believe that there was a certain common approach or temperament in this regard. We are calling that approach "the Millennial Consensus," though clearly there were historians in that period who would not fall under this umbrella. To us, this approach not only elides an important debate on the nature of law (and the methods of legal history), but it also overlooks a key aspect of how the law makes and shapes the world around us—one present in other works of legal history and that we will outline in the final part of this essay.[36]

Generally speaking, as of at least the 1990s, legal historians accepted that the law is largely contingent—that it does not exist "in a vacuum," but "rather, it is formed by, and exists within, human societies, and its forms and principles, and changes to them, are rationally connected to those" (Phillips 2010, 295). Yet, this acceptance of contingency did not carry the critical political bite that characterized much earlier critical legal history. Rather, as Desautels-Stein and Sam Moyn have recently asserted, this general acceptance of contingency may, in fact, have worked to depoliticize legal history.[37]

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studies, which denounced 'false necessity' at every turn, the deeper goal was a critical social theory that left law's doctrinal role in outcomes open and that treated contingency as one feature of a social order whose specific forms in particular moments and places had to be explained" (Desautels-Stein and Moyn 2021b, 307).

[36] "The *and* that has characterized multi- and inter-disciplinary legal scholarship over the last half century hides a wealth of relational variation in socio-legal theory, from instrumentalism through evolutionary functionalism, to several distinct varieties of relative autonomy, to current predilections for a 'mutually constitutive' relationship between law and what lies beyond it" (Tomlins 2016, 61).

[37] As they put it:

> What is the purpose of the activity, then, since it comes near to a badly defended philosophical commitment to the contingency of every legal and social order, generated by case study after case study that could never singly or together rise to the level of a generalizable proposition, let alone furnish a reason for its importance? To be sure, there may be naturalized histories—say, the history of human rights—where an otherwise familiar dose of

A second part of the Millennial Consensus is that legal historians also tempered their general understanding of law's contingency with the caveat that the law is also, to some degree, autonomous. Contrary to the traditional Law and Society and classical Marxist approaches, historians did not often regard the law as a pure mirror of society or as mere superstructure, but as an active player in society's historical development, although one with a somewhat limited role.[38] The extent of this autonomy, furthermore, was generally an extension or combination of the approaches outlined above—that the law's autonomy arises from either the forum it provides or its ideological role.

In general, there were roughly three ways that legal historians in this period saw the law as effecting societal change. First, as in the classical Marxist approach, they understood it as a set of established institutions and practices that can resist change from the outside and drag or slow broader societal reform. Second, following the New Left, many legal historians in this period explored the law as an arena for social conflict that exerts influence by translating extralegal developments into its own forms, rules, logic, and procedures. Third, and here drawing inspiration from various traditions, many explored how the law can exert power as a form of ideology or legal consciousness, or by setting the background rules and institutional settings in the shadow of which social negotiations and human relationships occur and under which power is distributed.[39]

This was well summarized by Jim Phillips in a speech on the importance of legal history:

> [W]hile almost all legal historians now reject the notion that the law is in and of itself autonomous, most accept a degree of relative autonomy derived from the nature of legal institutions or the ideology of the law and legality, or both. This autonomy varies in its extent from time to time and place to place and subject to subject, but it is an important part of legal history and, consequently, an important lesson that legal history can teach about the nature of law, a lesson as important as the message of contingency. (Phillips 2010, 304)

Direct accounts of the contingency-autonomy debate were relatively rare at this time, with the statement that law and society are mutually constitutive often serving "more as a preliminary incantation than as a conceptual position that actually informs analysis" (Tomlins 2007, 59). It was taken as a given "that law and society are not two distinct realms of human activity and that each is constitutive of the other" with little effort to actually trace particular legal or extralegal variables and their historical effects (Fisk 2018, 490). There were, however, a few notable exceptions where the particular role of law was explored. The "Legal History from Below" approach represents a

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contingency might still usefully unsettle. But even a valuable case study of contingent outcomes still has to explain why it matters here and now. (Desautels-Stein and Moyn 2021b, 309)

[38] There is a major exception here in the form of empirical legal studies, which largely falls outside of the scope of our discussion here but has undoubtedly been a major component of legal historical work over the past several decades.
[39] While for interests of space it is not discussed at length here, it is worth noting that this period also saw a substantial growth in intellectual history and its application to law, often alongside or in conjunction with CLS approaches (Fisher 1997). For a widely read analysis of Gilded Age American law as embodying classical political economy, see Hovenkamp (2014).

particularly rich example that also shows how the three instantiations of law's autonomy mentioned above could be intertwined with one another. This approach, as outlined and illustrated in a seminal edition of the *Wisconsin Law Review*, took as its *raison d'etre* a reversal of the overt focus by both classical and critical legal historians on legal doctrine, at the expense of the lived experience of individuals within a given legal order.[40] They characterized both of these approaches as "legal history from above," and asserted that any account of the law's development must incorporate how individuals within a legal system acted within and in response to the legal developments of that system. While accepting CLS's contention that law is constitutive of the social order, they asserted that the social order must be equally co-constitutive of law, "and historical study can expose how the mutual constitution of legal and social life permit people to imagine and justify both mutability and continuity by reference to prior legal and social relations" (Minow 1985, 822). In other words, law is imagined as a forum wherein social dynamics and contests are carried out, and where both officials (judges, legislators, executives, and so on) and subjects are mutually contributing to the evolution of legal and social institutions. Law, to these scholars, was a forum for conflict between individuals in a society over their governance structure.[41] When looked at "from the bottom up," they asserted, law does not appear as a unified decree, but as a conflicted (and often contradictory) doctrine, with several, occasionally competing requirements: "People's resistance to law, as well as their obedience, forms an important part of what law meant" (Minow 1985, 118). Law is not a single coherent doctrine here, but a conflicted and various sphere of struggle:

> In defining law as the command of the sovereign we ordinarily deny the legitimacy of interpretive stances other than those . . . which have the benefit of formal authoritativeness . . . That way of thinking allows us to maintain our valued vision of law as a (single) text. But in doing so it represses the existence and the relative autonomy of competing and conflicting socially constituted visions of legal order. It is, as a result, clearly false to our own experience of political life. (Hartog 1985, 934)

In many ways, this is an extension of E. P. Thompson's New Left approach in that it explicitly adopts the idea of the law as a forum for social conflict. These historians also largely embrace the CLS critique of functionalist accounts of the law's development, emphasizing instead its contingency. While informed by critical theory, the "from below" perspective emphasizes how individuals lived with and adapted the law in their daily interactions, and thereby left considerably more room for analysis of legal institutions than most critical legal historians, largely focused on changes and conflicts in legal doctrine itself. Also, writers in this period typically eschew much of the more far-reaching and explicitly political aspects of the CLS critique, focusing less on the law as legitimating doctrine, and more on how it acts as a set of reifying social practices and institutions that individuals both adopted and resisted in turn.[42]

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[40] In a way, the "Legal History from Below" approach relocated the perennial question in jurisprudence, "What is the nature of the law?" in the field of legal history, as "a feature of the gritty disputes of everyday life . . . especially for members of subordinate groups" (Forbath, Hartog, and Minow 1985, 759).

[41] This, for example, is how we read Ernst (1995)—as charting the growth of American labor doctrine as a conflict between interest groups over their preferred governance structure.

[42] Forbath contests the traditional "Whiggish" history of US constitutional law, which sees constitutional developments as reflecting the more or less inevitable triumph of industrialists (and their vision of a constitutional democracy) over

Even from this perspective, however, the law is regarded primarily as a reactive force: resisting society's development, providing an arena for social conflict, and acting as a mode of ideological legitimation are all examples of *ex-post* influence. Law is described here as a rich and complex phenomenon, but it is still understood primarily as a forum one can adopt or resist, not an enabling power. The law may have some power in this view, but it is power *after the fact*. But what about accounts of the law as an enabling power—of its capacity to enable social change *in itself*?

III.   Law as Architecture

Anglo-American legal history today finds itself in a "methodological moment," exhibiting a "glorious variety" of new approaches and methods (Dubber and Tomlins 2018, v). We would like to make a small contribution to this "glorious variety" by turning a flashlight on legal history that takes the autonomy of law seriously, while admitting to the uncertainty that accompanies changes to it. We feel that much of this work implicitly adopts an approach that we would like to make explicit, and that we feel offers an important contribution to the debate over the autonomy of law not represented entirely by the historiographical styles outlined above.

Legal history is filled with unintentional consequences: situations in which legal devices developed for one purpose were later used in unforeseen ways, enabling and facilitating huge societal shifts over time. A classic example can be drawn from the work of Frederick Maitland (2003), who tells us that the trust instrument was originally devised in the fourteenth century in order to avoid paying a duty (*relevium*) on inheritance, but soon began to be used in new ways. By the nineteenth century, the sheer variety of uses the trust was put to defied summary. There is no explicit sense of progress or development in his account, but simply evolution and change over time. Similarly, in Christine Desan's *Making Money* (2014), we see that modern money developed haphazardly, following a plethora of experiments driven largely to facilitate government financing, but which later provided, on her account, much of the core of capitalism. In the work of K-Sue Park (2016; 2021), we see how mortgage foreclosure was originally developed in the American colonies in stark divergence from British law to expropriate land held by Indigenous nations, and how its use was then expanded among the colonists' own population. A device developed for colonization was turned to new purpose, exploiting a new population and permanently altering the American economic and social order. In his recent book on municipal finance, Destin Jenkins (2021) explores how cities' turning to bond issues for funding was central to the distribution of resources within postwar America, leaving us a legal architecture of credit and debt that any struggle for equality today must take account of. In William Forbath's (1991) classic account of the American labor movement, we see the impact of federalism directly affecting not only constitutional developments, but also the course of labor organizing in the United States, driving it to develop in stark contrast to corresponding movements in Europe. The structure of the Constitution directly shaped, in his account, the American labor movement. In an article published in the inaugural volume of this journal, Amy Cohen (2020a) traces the history of how negotiation—either as a dealmaking or as a dispute resolution tool—was

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labor. Rather, he sees labor as putting forth a competing "anticapitalist republicanism" during this exact time. On this view, late nineteenth-century constitutional law is understood as a contested field, where different groups were vying for their own republican vision (Forbath 1985).

used in the Progressive Era to integrate society and enable forms of association between workers and managers. She then shows how, from the 1970s onwards, negotiation has been rearranged to act as a tool to maximize value, downplaying its distributive and democratic potential. Not only norms but the methods devised to establish or make them work were transformed and used for different purposes, enabling and disabling forms of association.

Common to each of these examples (and others like them) is a treatment of law not merely as something people experience, but as a thing people *use*—that they employ, navigate, and remodel. These authors focus on law not merely (or even primarily) as a reactive force, conditioned by social and economic structures, but as an *enabling* one—providing modules and building blocks that people can adopt, knowing others will be bound by their choices, knowing that this enables new forms of cooperative enterprise and interaction (and, of course, of dominance, exclusion, and exploitation). Importantly, however, these authors do not describe law, broadly conceived, as enabling exactly its framers' intentions. Rather, each describes legal tools as, figuratively speaking, running away from their creators—as enabling new forms of social coordination and exploitation irrespective of the intent behind them. While these examples are distinct in many ways, and we would not claim that these authors have adopted (explicitly or in its entirety) the historiographical approach that we are outlining here, we feel that implicit in them is an approach to law's autonomy that stands, to some extent, in contrast to the approaches outlined above, and that has huge potential (and new risks as well). In this section, we would like to make the approach we find implicit in those works explicit, to elaborate on its theoretical contours, and to plug it into the debate over law's autonomy mapped above.

We term this approach "law as architecture." The term "architecture" here is meant to express how the law provides an array of tools that forge the building blocks of our society, that dictate what sorts of collaboration and competition are possible and who gets to participate in them. As we see it, the tools offered by the law come in at least two forms: legal devices and legal institutions. By "legal devices," we refer to specific forms the law offers that facilitate various types of collective action: the corporate form, various forms of contract, the trust, government bonds, money issued through commercial banks, and so on. By "legal institutions," we refer to more freestanding bodies that can grow, shift, and develop cultures/norms/discourses over time, such as the modern nation-state, central banks, the judiciary, and so on. Legal devices and institutions, on our account, are not fixed, and can take on a radical variety of procedural designs (for example, different means of appointing decisionmakers, designing dispute resolution methods, fixing plausibility requirements, choosing evidence standards, and other procedural requirements to access the legal architecture, travel its corridors, and use legal devices and institutions).[43] Legal forms are remarkably persistent and

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[43] This point was recently raised in the LPE blog by Luke Norris, albeit limited to the domain of civil procedure and not explicitly extending it to all sorts of processes working as the hardwires of the legal devices and institutions: "Procedure increasingly clogs up the pathways that members of the public might travel to interpret and entrench political economy commitments" (Norris 2022, n.p.). Amy Cohen, we think, gestured toward a similar point, but instead of focusing on civil procedure, she traced the genealogy of interest-based negotiation to invite us to rethink how dispute resolution methods (negotiation, mediation, DSD) shape how we collaborate and compete, how we distribute and produce value, and how we can imagine alternative forms of social cooperation. According to her:

remarkably protean, as their specific powers and core functions can often shift gradually over time.[44] Nevertheless, they are consistent enough at any given moment to provide considerable enabling power. Law here does not merely prohibit certain conduct, provide a forum for managing social conflict, or translate social dynamics into a reifying mode of discourse; law enables specific social arrangements *ab initio*.[45] Law, in these accounts, *builds* things; it creates the conditions of possibility for specific social arrangements. Conversely and invariably, law also creates the conditions of impossibility for other social arrangements.

As we understand it, there are four aspects of the "law as architecture" approach that distinguish it in key respects from those outlined above and that warrant discussion here. First, this approach does not simply focus on law as enabling new modes of social coordination, but also as simultaneously disenabling other modes. It thereby distinguishes itself from more functionalist approaches and Whig history that sees legal development as, more or less, a simple story of progress. Second, this approach emphasizes the extent to which law is inherited with every generation, leaving legal actors (for the most part) to iterate on the architecture they were born into rather than designing legal arrangements *ab initio*. Third, law as architecture evokes a material and spatial quality in social collaboration and conflict, where the configuration of these spaces' modularity touches lives in their bare materiality; it affects them, sometimes, profoundly. Fourth, and lastly, we describe the "law as architecture" as "existential"—meaning that, while it is somewhat determinate at any given moment, we can never fully predict the long-term uses to which changes in a given piece of legal architecture will be put, nor the long-term social consequences that will result. The remainder of this section will address each of these three points in turn.

First, while emphasizing the ability of legal devices and institutions to create the conditions of possibility for specific social arrangements, conversely and invariably, law also creates the conditions of *impossibility* for other social arrangements. Before modern cash and employment contracts, work was largely regulated through property relations and statutes (Steinfeld 1991; Hay and Craven 2004). Before general incorporation and the ability of corporations to purchase shares in other corporations, businesses adopted other legal forms and rarely reached the scale they do today (Kessler 2017).

Realist analysis of value creation illuminates the constitutive power of legal and social orders. I have therefore described it as a useful tool for LPE scholars who wish to engage in microsocial analysis in order to argue that different background rules could produce different, more egalitarian distributions. But it does not alone invite alternative social imaginations grounded in a belief in human sociality and cooperation. LPE readers interested in the social constitution of value may also wish to advance Follett's complementary project in the socialization of value and decision-making authority. (Cohen 2020a, 160)

[44] Central banks, for example, are legal institutions that have adopted various roles over time. (Desan 2016; Knafo 2013)
[45] We feel that we should emphasize here a way in which the law as architecture approach contrasts with that of Willard Hurst (1956), who likewise emphasizes law's enabling power. However, while he undoubtedly allows for law to move in unforeseen directions, his approach to legal history continually refers to law reacting to demands placed upon it by extralegal actors and circumstances, and how the law enables those actors to act out their visions. The law as architecture account, by contrast, focuses on how innovating on legal forms enables change not foreseen previously. This is not simply a vision of law unfettering human capacity generally, but of law enabling change *ab initio*.

Before the expansion of adversarial adjudication and its sympathetic connection with market freedom, people used other, less individualistic and competitive, dispute resolution mechanisms (Hovenkamp 2014). In each case, the legal architecture available to people enabled certain paths of development, and, in so doing, inherently hived off, or at the very least discouraged, others. In so doing, changes to the legal architecture themselves affected (even if not exclusively) the path of history.

In this opening and closing dynamic of legal architecture, we draw from the work of Wesley Hohfeld and Robert Hale. Hohfeld's deciphering of the logic of legal concepts and legal relations clarifies how the choices in the architecture of legal devices and institutions can rearrange social relations (Hohfeld 1913; 1917).[46] In Hohfeldian analysis, modifying one person's rights *necessarily* entails the altering of another's duty.[47] Hohfeld's jural correlatives and jural opposites illustrate how altering legal rights and powers is distributive in nature, with inherent social and economic effects.[48] "It is wired into Hohfeld's *conceptual economy*," wrote Pierre Schlag, "that any selection of a legal regime will have differential distributive implication for the *real economy*" (Schlag 2015, 216).

Robert Hale's analysis extends this to the realm of real-world freedom and coercion, by emphasizing how the state's decision to enforce or abstain from enforcing a right inherently shifts the power dynamics within social relations (Hale [1923] 2018; Hale 1943; Fried 1998). As Hale famously put it, "In protecting property the government is doing something quite apart from merely keeping the peace. It is exerting coercion whatever that is necessary to protect each owner, not merely from

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[46] As David Kennedy puts it, "Hohfeld's article has become canonical not as a grammatical rule book for correct usage, but as the origin for a style of critical analysis which has become central to American legal thought" (Kennedy 2006, 51).

[47] Said another way, if *X*'s right's claim is tweaked in relation to *Y*, *Y*'s correlative duty morphs accordingly. Hohfeld's jural correlatives and opposites have been extensively distilled in legal scholarship. For a broad overview and an assessment of Hohfeld's impact on American legal thought, see David Kennedy (2006, 47–54). For an accurate mapping on Hohfeldian thought strands (for example, the analytical, the property, and the critical strand), see Schlag (2015). Recently, it appears as if there are mixed strands drawing from these strands but rethinking Hohfeldian categories as property blocks (resonating with the building blocks of law as architecture) for proposing a legal-institutionalist analysis of property (di Robilant and Syed 2022, 223–257). In conversation with the analytical strand tradition of Hohfeldian thought, see Singer (1982).

[48] Joseph Singer has explained as clearly as possible the notion of Hohfeld's jural correlatives (right-duty, privilege-no right, power-liability, immunity-disability) and its cash value. "The concept of 'correlatives' is harder to grasp," writes Singer:

> Legal rights, according to Hohfeld, are not merely advantages conferred by the state on individuals. Any time the state confers an advantage on some citizen, it necessarily simultaneously creates a vulnerability on the part of others. Legal rights are not simply entitlements, but jural relations. Correlatives express a single legal relation from the point of view of the two parties. "[I]f X has a right against Y that he shall stay off the former's land, the correlative (and equivalent) is that Y is under a duty toward X to stay off the place." If A has a duty toward B, then B has a right against A. The expressions are equivalent. Rights are nothing but duties placed on others to act in a certain manner. Similarly, privileges are the correlatives of no rights. "[W]hereas X has a right or claim that Y, the other man, should stay off the land, he himself has the privilege of entering on the land; or in equivalent words, X does not have a duty to stay off." If A has no duty toward B, A has a privilege to act and B has no right against A. Thus, if A has the privilege to do certain acts or to refrain from doing those acts, B is vulnerable to the effects of A's actions. B cannot summon the aid of the state to prevent A from acting in such a manner no matter how A's actions affect B's interests. (Singer 1982, 987)

violence, but also from peaceful infringement of his sole right to enjoy the thing owned" (Hale [1923] 2018, 471). Hale thereby shows that agency can be expressed both positively (intervening by doing *x*) and negatively (leaving it alone by not doing *x*); when the state protects a legal entitlement, it distributes freedom and coercion among the people within specific forms. Given the pervasiveness of legal rules within societal interactions broadly, "law is at least partially responsible for the outcome of every distributive conflict between classes" (Kennedy 1991b, 331). Among other things, this type of analysis fundamentally undermines both the public/private divide and the division between the political/legal and the economic, by emphasizing the connections between positive and negative freedom in legal prescriptions and their role in setting the background rules of economic conflict (ibid.).

As histories of the kind we are drawing from reveal, analysis like this not only applies to power relations under law at any given moment, but also to law's power to change the course of history. For, like the protection of rights in Hohfeld's and Hale's analysis, the enforcement of specific legal devices and institutions is necessarily distributive, offering specific modes of cooperative action at the expense of others. When they are altered, the structure of societal ordering changes with them.

In this way, we would contrast law as architecture with functionalist approaches common in much legal and economic history that characterize history as a story of progress or linear development (North and Weingast 1989). It might be tempting to characterize our description of law as an "enabling" or developmental force in this way, and we are certainly trying to channel the way in which legal devices do enable new modes of governance, production, and exploitation. However, in every bit of enabling that legal developments provide, as we've said above, there must be a simultaneous "disenabling" of other modes.[49] Therefore, these histories do not provide stories of "development" or economic expansion along some sort of pre-set path, but rather narratives of change more generally understood. Societies and economies may expand or contract, develop or regress based on some metric, but the legal historians we are drawing from rarely if ever rely on such models. Indeed, they often underline the ways in which legal forms act as explicit tools of exploitation—devices that that can rope people and institutions both explicitly and illicitly into bonds of inequality and underdevelopment (Marable 2015). Understanding law as architecture does not emphasize "progress," but rather how changes to the character, sphere, and direction of a society can be enabled through iterations (and experimentations) on its legal framework.[50]

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[49] This is another place where our view differs fundamentally with that of Hurst. Like us, Hurst emphasizes law's role as an enabling power—in his language, its power to "protect and promote the release of individual creative energy" and "to mobilize the resources of the community." However, in his narrative, the momentum is always towards an expansion of "human freedom;" emphasis is never placed on the simultaneous disenabling of other possible modes of mobilizing the resources of a given community (Hurst 1956, 6).

[50] This is a place in which we would distinguish the approach we're presenting from that of the so-called new legal institutionalism outlined in Deakin et al. (2017). Like our law as architecture approach, that account of legal institutionalism emphasizes the constitutive role of law in broader social and economic relations, while not denying its "complexity and uncertainty." However, the account there is still, perhaps despite its intention, remarkably functionalist in character. Law throughout is contrasted with "custom" or "customary law," which is "associated with politico-economic underdevelopment," and is deemed only necessary in "large, developed economies" associated with Western capitalism. By contrast, the historical works that we are drawing from here do not rely on nearly so linear a notion of "development," or so functional a definition of law.

Second, like physical architecture, legal devices and institutions are rarely, if ever, made from scratch. As we noted at the outset of this article, every one of us was born into a given legal system (or a plurality of them), which offered (and offers) up to us a given array of devices and institutions, privileges and exclusions, that we use (or are affected by) daily. Our ability to change the law is conditioned by this fact, and by the fact that society relies on these institutions at nearly every moment. Legal architects (legislators, judges, legal advocates, activists, citizens, and others) curate, restore, and remodel the legal system into which they were born, thereby carving and re-carving the building blocks of our social order piece by piece, patch by patch.

In this regard, law as architecture resonates with legal scholarship around the turn of the twenty-first century focused on cyberspace that likens law to "code." In this work, the code writer is often likened to an "architect," and code seen as a form of architecture to shape power relations in the virtual domain.[51] Lawrence Lessig, for example, asserts that "we can build, or architect, or *code* cyberspace to protect values that we believe are fundamental . . . or to allow those values to disappear" (Lessig 2006, 6). In other words, spaces inherently have values: they enable (and disable) ways of existing and interacting, defining who can participate in and access them and who has power to modulate them. Architectural arrangements in cyberspace shepherd people to compete and collaborate in some ways (and not others) for all sorts of benefits (knowledge, power, resources, status). In cyberspace, people became gradually aware of how architecture regulates us, embedding certain values, and thus fueling rising demand for questioning who should define these structures and how they should be defined (Lessig 2006, 7).

Like Lessig's understanding of code, we emphasize how law "urbanizes" a space, protecting some values and some ways of being over others. The materiality of this urbanization process, we think, has effects on real people. Law as architecture determines who has access to what, how, against whom, and for how long—who is *in* or *out* of a specific space and, therefore, who has a voice to tinker with the code, shaping at the same time their social relations and their access to knowledge, power, and resources. However, unlike Lessig's account of cyberspace, the legal historians we are drawing from invariably emphasize the extent to which real-world legal architecture is more inherited than created *ab initio*. "Code," Lessig says, like a legal constitution, "is never found; it is only ever made" (ibid., 6). In contrast, legal regimes are almost never made from scratch.[52] Furthermore, where Lessig distinguishes architecture/code from other regulatory elements, like law, markets, and norms, the histories from which we draw the law as architecture approach rarely (if ever) draw such sharp lines between these various sectors. On the contrary, law as architecture sees legal devices and institutions as (in large part) constitutive of the broader social and economic order, by providing the specific modes of cooperation on which that order depends. In this way, law as architecture both overlaps with and resonates with efforts within Law and Political Economy scholarship to "bring the law back into the economic"—that is, to recognize and develop "the law's centrality in creating and regulating the economic domain" (Harris and Varellas 2020).

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[51] According to Ethan Katsh, one of the pioneers of online dispute resolution, "If a comparison to the physical world is necessary, one might say that the software designer is the architect, the builder, and the contractor, as well as the interior decorator. Software determines structure as well as appearance" (Katsh 1996, 340).

[52] To be fair, Lessig is very much alive to this distinction between code and law, understood broadly (see, in particular, Lessig 2006, chapter 16).

Third, law as architecture evokes law's material and spatial quality, enabling specific forms of collaboration, conflict, and exploitation. These histories describe law as embedded in society, structuring social relations at a given time and place. This material quality gives the law not just contextual nature but emphasizes how it draws boundaries—inside and outside contours guarded by gatekeeping mechanisms, structures that determine who can access the law, who can speak it, and what allegedly is and is not law itself. This approach also contextualizes the footprint of inherited divisions, letting us see the traces the law has left in our surroundings, just as rocks, sediments, and fossils leave signs of what happened before. This spatial aspect of the law opens a way to read, resist, or solidify the material traces in specific places where boundaries were (and are) established.[53]

Lastly, but crucially, individuals can rarely, if ever, fully know what purposes and what uses the legal tools they are developing or modifying may later be turned to. For this reason, we describe this approach as "existential."[54] Existential architecture sounds like an oxymoron. Is not architecture a way to order collective experience, and is existential not an adjective that hints at the exact opposite: how individual decisions shape our relations to others, the world we live in, and ourselves? One turns our gaze to society's devices and tools that shape our lives, and the other turns our attention to the agendas and projects of the people "calling the shots" or strategizing, making often difficult choices that might have unforeseen social consequences (Kennedy 2018, 269–273). So, how do we blend these approaches?

The set of legal devices and institutions that build our society are contingent in the sense that we can tinker with them (hopefully) to generate different social and economic relations. However, tinkering with our legal architecture requires that we make decisions. Although it might seem *prima facie* that these decisions will *necessarily* lead to particular desired outcomes, history reminds us how often this is not the case. This is so because tinkering with legal materials is a human action, and human actions are contingent and opaque. We are embedded in contexts of opacity, which means there is a gap between the desired effects, the uncontrolled variables surrounding them, and the actual effects.

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[53] It is important to note that although law's spatial quality strongly evokes a material dimension, it can also evoke a virtual or symbolic dimension (for example, symbolic and virtual spaces). The law's spatial quality redraws ontological boundaries. For a genealogy of the material turn in the humanities and history, see Johnson (2018).

[54] We are drawing from the work of Søren Kierkegaard to articulate our notion of the "existential bent:" in particular, his account in *Fear and Trembling* of facing an impossible choice where no grounds exist to justify one course of action over another and, therefore, the decisionmaker has to make a "radical choice" and be responsible for the foreseen and unforeseen consequences (Kierkegaard [1843] 2003; Evans and Roberts 2013). We think it is possible to trace some strands of the existentialism in legal scholarship:

> Doing a distributional analysis can pave the way for engagement. But it makes enchanted engagement much harder. Now you can see that to help your friends you might have to hurt some group of even less well-off players; that not all players enjoying more bargaining power than your friends are evil dominators (some of them may have merely a different, slightly higher-ranking but similarly precarious perch in an asymmetric game); and that you can befriend a group without completely understanding its own investment in the game and misconstrue what the people in it think is their best outcome. You cannot intervene while keeping your hands clean. (Halley et. al. 2018, 265)

Human action is made in the shadow of what might be called "a time is running out experience."[55] We can develop a plan, know the options available, review what history can tell us, and develop a solid ground on which to stand for advocating one type of rearticulation of the legal devices and institutions over another. But as smooth as this "method" might look, there are always bumps along the way. Human action is contingent because time is never enough to develop a bird's-eye view of all the factors that we have to consider to achieve a desired social output. On the other hand, human action is opaque because the contexts upon which we want to intervene are saturated with uncontrolled variables which cannot be easily known, let alone tamed in our favor.[56]

In other words, the effects and consequences of human actions can never be fully predictable. Our decisions will be covered with the mantle of uncertainty about how our legal tinkering will play out in any particular social context or historic moment. But, as decisionmakers, as architects, we *have* to assume the responsibility for those unforeseen consequences. This cannot discourage us from continuing to reorder our legal architecture to advance certain interests or battle perceived injustices and structural inequalities, knowing that time runs out and that we don't completely own (and control) our actions, much less their effects (Kennedy 1986, 523). An existential architecture is a framework responsive to the structural and institutional side of the law as something that changes (and is changed) over time by society. Yet, it is also responsive to the decisional moments where this architecture is reshaped by fallible, finite, and contingent human beings, who, following their agendas, will have to do their best responding to their worst nightmares. In other words, while legal devices and institutions are determinate in the sense that they enable certain forms of cooperation over others, they can never be fully determinate over their life span. Even if our desired effects come into fruition, there is always the risk of future reappropriations of our interventions, retooling them for purposes we did not preconceive nor wanted to habilitate. The architecture is always up for grabs.

Indeterminacy in the law as architecture model extends not just to norms and determinations, but to the effects of legal decisions. For instance, the Colombian Constitutional Court declared in 2013 that pregnant women could not be fired, regardless of whether the employer knew about the worker's

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[55] We are borrowing the phrase "shadow of the law" from Robert Mnookin and Lewis Kornhauser (1979), but instead of using the law as the alternative, we are introducing the critical notion of "time runs out," as developed by Duncan Kennedy (Kennedy 1986, 518) in the following sense: "If I manage to develop a legal argument against the injunction, the ideal of impartiality requires me to rest that argument in turn against a newly worked-out best counterargument in favor of the company. Eventually, my time will run out, and I'll just have to decide."
[56] For how this notion of human action resonates with the notion of critique, we recommend Wendy Brown's and Janet Halley's capacious understanding of critique:

> So critique is risky. It can be a disruptive, disorienting, and at times destructive enterprise of knowledge. It can be vertiginous knowledge, knowledge that produces bouts of political inarticulateness and uncertainty, knowledge that bears no immediate policy outcomes or table of tactics. And it can include on its casualty list a number of losses—discarded ways of thinking and operating—with no clear replacements. But critique is risky in another sense as well, what might be called an affirmative sense. For critique hazards the opening of new modalities of thought and political possibility, and potentially affords as well the possibility of enormous pleasure—political, intellectual, and ethical. (Brown and Halley 2002, 28)

condition, without a specific process, to protect women against discrimination.[57] What the constitutional justices didn't know is that this had an unforeseen effect: fewer women between ages 25–35 were hired. A legal decision aimed to protect women discouraged their inclusion in the job market.[58] We take indeterminacy seriously. Legal decisions are embedded in contexts of opacity and their effects in the world are unpredictable. It is possible to harm the players you are rooting for.

Law as architecture both draws inspiration from and differs slightly with that of Katharina Pistor's influential book *The Code of Capital*, which also employs the notion of "coding"—though in a somewhat different sense than Lessig's.[59] In her account, the core of capitalism as a legal and economic system can only be understood by attending to how the law allows particular assets to be "coded" into capital. In other words, to act as capital, a given asset must be bestowed specific legal attributes—in her account, priority, durability, universality, and convertibility (Pistor 2019, 3). Lawyers are the code's "masters," who, through their mastery of law, "can turn any ordinary asset into capital" and who thereby take on a special place in her account (ibid., 6). Pistor highlights how the masters of the code, who often work in big law firms, create a space to protect with surgical precision power-asset holders through legal modules by converting their assets into capital (13–15). Lawyers as architects of the code of capital, as Robert Gordon puts it, "modestly pretend to be valets of their corporate clients, but are actually the "masters of the code"—its curators and innovators who ceaselessly extend its modules to create novel forms of capital" (Gordon 2020, 3). Pistor's historical account places the corporate lawyer (a player traditionally sidelined and characterized as just a helpful auxiliary) at the very center of our political economy, explicitly emphasizing how they shape power dynamics through the law of contracts, trusts, property, dispute resolution, and bankruptcy law (Pistor 2019, 212).

While we draw from and are inspired by Pistor's work, it differs from the works we are primarily relying on, specifically with regard to what we're calling its existential aspect. For Pistor, lawyers are the key actors, molding the law nearly at will to suit the needs of their clients. In contrast, the approach we are trying to articulate here emphasizes not the law's plasticity to the immediate demands of the powerful, but its autonomy—the tendency legal devices have to "run away from" their creators, opening up inadvertent avenues of change and allowing new and unforeseen modes of organization in spite of the intentions behind them. This applies to bank-issued money, municipal bonds, mortgage foreclosure, and any of the other examples discussed above. Legal architects in these works (not limited, of course, to corporate lawyers) are never described as fully grasping the long-term effects of the changes they pioneer, but as both changing them and being bound by the consequences that they enable.

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[57] Colombian Constitutional Court, SU-075/18. https://www.corteconstitucional.gov.co/relatoria/2018/SU075-18.htm.
[58] The judicial decision that reviewed the legal protection (*fuero objetivo de maternidad*) highlighted some of the unforeseen and "negative" effects against women.
[59] As Pistor puts it, "The legal code confers attributes that greatly enhance the prospects of some assets and their respective owners to amass wealth, relative to others—an exorbitant privilege. Choosing the assets and grafting onto them the legal attributes of priority, durability, universality, and convertibility is tantamount to controlling the levers for the distribution of wealth in society" (Pistor 2019, 183).

In sum, seeing law as architecture understands it as a set of devices and institutions that we are born into and bound by. Contingency and indeterminacy are fundamental aspects of the law, but they are not all of it; legal tools do not merely respond to social developments, but enable them, simultaneously disenabling others. In this sense, they can have very determinate impacts. This approach does not look primarily at the original intentions behind the creation of legal devices and institutions, nor even what they might have expressed or how they exhibited or reified a given mode of discourse, but at the forms of collaboration (and exclusion) that they facilitated and the power relations they enabled, regardless of whether they adhere in any way to their original designs. We may iterate on the legal architecture that we inherit, in order to try and build a new society (indeed, we *must* do so), but when we do—and here is the existential facet—we must take responsibility for new and expanded ways in which the law might alter our world, and how our decisions to change that can lead to unintended and unforeseen developments. Building society in this way brings both hope and anxiety: the hope that rearranging the architecture to modulate social spaces is viable and powerful, and the anxiety that doing so might produce an uncertain outcome, another disenchantment.

IV.   Conclusion

Nearly everything we accomplish, we accomplish together—almost invariably through law. Therefore, most of what we set out to do (either as individuals or as a society) is done with and on top of our existing sociolegal architecture. Certainly, legal procedures, norms, and institutions can limit our actions and resist change initiated from outside the law; certainly, the law's symbolic and legitimizing power is central to its impact; certainly, the law provides a forum in which society's broader conflicts are acted out; certainly, the law shapes in different ways how we think, act, and feel. But the law's power is not limited to this! The law is not just a mode of discourse, a restraint placed on individual action, or a process of habituation. The law is also a set of tools that people use daily, often in the most menial and unnoticeable of ways. Every employment agreement entered into, every marriage undertaken or absolved, every decision by a school board, every purchase made at the corner store, relies on dozens of legal devices and institutions. The weight of history is exactly this—the connections between us that we rely on in every moment. They allow us to cooperate and to achieve great things, but in doing so they also bind us into narrow forms of cooperation that we cannot easily see out of, and even less can we *act* outside of. It is always in our power to change (to some degree) this vast and complex legal architecture; indeed, we do this routinely. And such change can lead to fundamental and widespread shifts in the manner of individual and group cooperation, cutting across the whole of society. But it is also nearly inevitable that individuals will use those novel or altered legal devices in manners that were unexpected and unforeseen at their formation. We can always change the legal tools on which our society is largely built, but we can never fully know the long-term results of those iterations. It is in tracing these narratives that legal history gives us a glimpse of law's true power to make or remake our societies and offers a caution to the tough choices we are called upon to make on unsolid grounds and misty horizons.

Contingency is perhaps the governing concept of Anglo-American legal history today, and explicit debates over law's autonomy are largely absent from contemporary legal historical discourse (Marks 2009). Inspired by historical works like those mentioned above, we assert that the autonomy of the law should not be so easily disregarded. Certainly, the way such autonomy was depicted in Classical Legal Thought was overly focused on the law enabling its own internal change as a process of fixing

the internal contradictions, lacunae, and ambiguities that were spotted as law developed, but the idea that law's force shapes human relations is not something to be sneezed at. Law is not simply a reactive force, but a generative one. If we tinker with the law, if we shake legal arrangements, then human relations will be modulated, though sometimes in unexpected ways. Legal devices enable (and disenable) human relations in myriad ways. To regard all legal determination as contingent or reactive is to deny that sometimes legal designers and policy makers exercise real agency to arrange and rearrange society. But this agency unfolds in contexts of contingency and opacity.

Following the Realists, Law and Society scholars furthered an insight that has become second nature: law is responsive to and nested within society. To decouple law from society is like decoupling the yolk from the white and still calling it an egg. Like Law and Society, we agree that the law responds to social dynamics, can operate as a functional tool to make social changes, and sometimes adapts its own *modus operandi* to new social realities. Likewise, Marxist legal historians deepened our understanding of how the law responds to power in society and is entangled in economic processes. Specifically, their insight that the law modulates and codes forms of production helps us understand how the law is imbricated in entrenching and securing existing social forms and economic relations.

The New Left expanded our view beyond the analytics of law and its relation to society (and economic processes). It provided us with a new lens to see how law works, namely as a forum in which society's conflicts are acted out or as a discourse legitimizing existing power relations and understandings of social reality. Law has the capacity to appear impartial and fair while simultaneously favoring the interest of a social group or class in society.[60] CLS highlighted these same aspects of law as a legitimating force, while also emphasizing its indeterminacy and the constitutive nature of legal consciousness. It thereby underlined the plasticity of both legal forms and the shaping of consciousness. Unlike much work in this vein, however, the works we are highlighting focus less on the plasticity of legal forms or individual legal determinations, and more on the uncertainty attending the long-term uses specific legal forms can be put to. Legal tools (such as mortgage foreclosure, money issued by banks, procedural designs, municipal bonds, and so on) are often described as having determinate impacts in a given moment, impacts that have important structural effects on the social order. The uncertainty in these accounts stems instead from the fact that we never know how people will use the legal tools available to them: these eventualities are indeterminate in the sense that their ultimate effects and possible uses are unforeseen.

Finally, the Millennial Consensus reclaimed everyday life and the importance of bottom-up approaches to the law and legal history. The law is not just a social ordering machine; it is a mechanism to govern our daily lives in ways that are sometimes unnoticeable. Law is not a unified system: it is, as Patricia Ewick and Susan Silbey (1998) put it, something you can play and relate *with,*

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[60] Let's remember the words cited above by Douglas Hay to catch this ideological dimension of the law: "The criminal law was critically important in maintaining bonds of obedience and deference, in legitimizing the status quo, in constantly recreating the structure of authority which arose from property and in turn protected its interests" *(*Hay 2011, 66).

against, and *before.*[61] The fresh perspective of turning the order upside down to study the law from below, from its impact on the everyday people who use, strategize, and resist the law has prompted legal historians to engage with sociologists and anthropologists who focus on the concrete, and discard levels of generality that abstract from everyday life in favor of general principles.

The approach we are attempting to make explicit here preserves and builds on these elements from the approaches just outlined. After a century of theoretical discourse on law's contingency and malleability, on law as a largely reactive force, attention is due to how law *makes change* in itself, to how it provides an institutional toolkit that enables (and disenables) modes of collaboration, competition, and exploitation. And, as legal history repeatedly reminds us, attention on autonomy should be paired with modesty and with awareness of the uncertainty and unpredictability of everything we try to accomplish through law. The dynamic here is reciprocal: Each of us is born into a given network of legal devices, institutions, and procedural designs that empower some, often at the expense of others, and that funnel our activity into certain modes of cooperative action. Legislators change them frequently, sometimes fundamentally but more often iteratively; through experimentation and happenstance, these changes routinely run away, in a sense, from their creators, eventually being put to uses that their designers never intended or foresaw. These tools, institutions, and procedural designs chiseled by lawyers and other "experts" both change over time and change the structure of society with them. We are made by our environment, and we make it in turn, often inadvertently. We believe that legal history that looks at this aspect of the law, on its architectural capacity and its existential moments, still has huge capacity to teach us how our society was designed, how much of it is still up for grabs, how little we often know about the consequences of our decisions, and what hopes we can hold for the future or, more specifically, for alternative futures.

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[61] In Ewick's and Silbey's words, "Because law is both an embedded and an emergent feature of social life, it collaborates with other social structures (in this case religion, family, and gender) to infuse meaning and constrain social action" (Ewick and Silbey 1998, 22).

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