

Introduction: Searching for Contemporary Legal Thought: History, Image, and Structure

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This book began with a deceptively simple question: Has the world of law entered a “contemporary” phase of legal thought? As soon as it was asked, a herd of follow-up questions came charging after it. Is there such a thing as Contemporary Legal Thought?¹ If so, how would one know? And “contemporary” for whom, or for where, and even for when? Perhaps most important, why is it even appropriate to pose the question at all?

The questions begged for an audience. Looking for intellectual assistance from friends and colleagues, in 2014 we invited a purposefully eclectic group of scholars to join us to discuss whether Contemporary Legal Thought was worth contemplating. David Kennedy’s Institute for Global Law and Policy, at Harvard University, provided generous support for the conference that followed in the summer of 2015. The presenters responded to our questions in many different ways, often in conflict, all of them fascinating. This book is the result. Loosely based on the conference papers, but proceeding far beyond them in scope and depth, the book’s chapters wrangle with the question of Contemporary Legal Thought in its many dimensions.

The chapters in this book expose innumerable standpoints from which the question of Contemporary Legal Thought may be approached, standpoints located both within current legal scholarship and outside it. But they are not a sampling of Contemporary Legal Thought. How could they be, given that our core collective purpose is to determine whether in fact there is a “something” to sample? Examination of *current* scholarship and adjudication will, of course, reveal a vast ongoing array of legal argumentation, to which this book adds. But for us at least, “current” is not the same thing as “contemporary.” Were the words synonyms, we could be content simply with a representative sampling

¹ In this introduction, as in our afterword, we have chosen to capitalize the words Contemporary Legal Thought to avoid the proliferation of scare quotes.

of all the styles of legal argument presently available for mobilization. This book attempts more, attacking the question of Contemporary Legal Thought in its historiography, doctrine, and jurisprudence. It is in these registers that the book's chapters search for Contemporary Legal Thought's whereabouts.

1 THE QUESTION'S PROVENANCE

How and why did that initial “deceptively simple” question emerge to be asked? It arose in the first instance from work by the American historian of legal thought Duncan Kennedy. Although this book is not a referendum on Kennedy's account of Contemporary Legal Thought, it is worth noting that of the book's twenty-seven chapters, two-thirds feature commentary to at least some degree on Kennedy's work. Given this prevalence, it is worth a brief summary of what that work entailed. In an essay entitled “Three Globalizations of Law and Legal Thought: 1850–2000,” published in 2006, Kennedy explained how a classical style dominant in Anglophone legal thought at the turn of the twentieth century came under savage assault in the United States during the first half of the twentieth century, and later elsewhere, from “socially-oriented legal thought” (Kennedy 2006). In its turn, even as it achieved intellectual ascendancy in the quarter-century after World War II, social legal thought itself became the subject of relentless critique prevailing into the century's final third. Again the United States was the initial site of critique. Critique completely discounted social legal thought and its central assumption, the possibility that “correct” social outcomes were objectively determinable using positivist methods. It took a variety of forms: “rights talk” from both the political left and the political right restated social interests unilaterally and hence incontrovertibly; assaults on the epistemology of objectivity denied the inherent meaningfulness either of social data or of legal concepts, and hence the possibility of arriving at objectively correct legal answers to social questions; contrary claims for the continued possibility of objectivity turned to a new form of classicism that founded objectivity on the correct parsing of economic rather than legal concepts – legality became a post-hoc shadow of “the market.” Finally, and in response, a neo-functionalist discourse of “balancing” arose whereby the jurist confronted by plural incompatible social demands was required to balance the various interests in the work of producing legal answers. The balancing jurist of course knew all the while that the balancing undertaken was postobjectivist, utterly complex, endlessly contextual, and hence always provisional.

Kennedy's argument has been that the critique of classical legal thought *produced* socially oriented legal thought, which underwent savage critique

in its turn. For the many authors who use Kennedy as a platform, a host of questions emerge: What lives in the wake of the critique of socially oriented legal thought? Is the outcome purely negative, leaving legal thought merely a zone populated by discredited styles of legal argument, impossibly bruised by waves of criticism yet sustained by rival bands of partisan adherents, staggering improbably onward through one of the current cinema's postapocalyptic zombie wastelands? Has the zone been colonized from elsewhere, as law-and-economics, or, more broadly, neoliberalism, suggest? Or, bobbing in the ocean of current socio-legality, can we discern fragments of matter from which might crystallize a new, meaningful, and distinctively contemporary style of arranging legal arguments?

What we have assembled here, both within the context of Kennedy's account and beyond it, is a substantial body of commentary, narrative, and analysis that addresses the precise question of *whether* a new and distinctively *contemporary* style of legal argument has become possible, and if so, *what* it might look like. In so plural a field as legal studies has become, it would be foolish to anticipate that a collection like this would arrive at a common destination. What we have constructed instead looks more like a three-ring circus. If you join us, here's what you will find up ahead.²

2 HISTORIES OF THE LEGAL CONTEMPORARY

We entitle the first ring "Histories of the Legal Contemporary." The very idea of *Contemporary* Legal Thought proposes a style of legal argument that is historically situated, a style that is engaged with a particular temporal conjuncture. In "Of Origin," Christopher Tomlins begins the labor of defining the *what* of Contemporary Legal Thought by examining its origin, not in the factitious sense of tracing its emergence, but in the sense of establishing its historical conditions of existence and recognition. For Tomlins, *contemporary* definitely means something other than "current," not least because of his rejection of the explanatory capacities of another c-word, "context." In this opening chapter Contemporary Legal Thought stands for the possibility

² As discussed elsewhere in the book (see in particular the book's afterword) we – Desautels-Stein and Tomlins – draw a distinction between "Law" and "Legal Thought." This distinction will not be found in every contribution to the book, however, and even among those authors who find the distinction useful the reader will find it employed in different ways. To accommodate these differences among authors we have chosen "legal contemporary" as the common point of reference for the three main divisions into which the book is organized. In our view, "legal contemporary" is sufficiently broad to encompass both those who distinguish legal thought from law in various ways, and those who do not.

that a mode of argument has crystallized that is characterologically differentiated from its formative intellectual context. Sympathetic to Kennedy's narration of successive styles of legal thought, Tomlins notes that the key characteristic of the contemporary is its severalty – its tendency (unlike the classical and the social) to repeat what has gone before rather than transcend it. One explanation is that its core is in fact other-determined: the key to Contemporary Legal Thought is that in origin it is not legal thought at all but grounded in neo-classical economics, in relation to which the surviving remnants of prior modes of thought have newly arranged themselves. Another, perhaps better, explanation is that in its very nature, Contemporary Legal Thought can only be understood historically. History, says Tomlins, is not a matter of developmental continuities or transcendent escapes but is continuously dialectical. The dialectic, however, is disjunctive, leaving Contemporary Legal Thought, unlike its teleological predecessors, living amid the rubble of what has been. To elucidate Contemporary Legal Thought requires determining where it stands in “the flow of becoming” (25).³ What is the nature of its “contemporality”? With what past, or pasts, is it consonant? With what future?

To understand the *what* of the contemporary, it is necessary to understand the *who* and the *when*. A crucial formative moment lies in the 1970s and 1980s, the years when modern functionalism was losing its canonical edge. But what is the precise significance of this moment? In his chapter, Peter Goodrich targets both the moment and the narratives that have given it a quintessentially American character. Goodrich embeds the successes and failures of Critical Legal Studies, the leading exemplar of the American critical project during this formative moment, in a much longer and broader history, an enduring project of critical self-reflection of which CLS is simply an instance – an instance, in Goodrich's view, epically distorted by the endemic thinness of the American legal tradition. “The critical jurist is not” *pace* CLS, “a novel invention” (59). The occidental legal imaginary is formed from an international archive and an enigmatic atemporality (another way, perhaps, of describing a disjunctive dialectic). Asking “Who Are We?” – who are the critical intellectuals whose scholarship must create the conditions for the argumentative style of Contemporary Legal Thought – Goodrich would push the peculiarities of the American well out of pole position. The legal historiography that identifies Contemporary Legal Thought's conjuncture, its politics, and its predictions must be situated much more broadly.

³ Unless otherwise indicated, all parenthetical page citations in this introduction refer to pages in Desautels-Stein and Tomlins (eds.) 2017.

In our third chapter, “On the Hinges of History,” Maks Del Mar takes up the idea of disjunction (although not of dialectics) in order to delineate its limits. Explanatory strategies wholly reliant on discontinuity in historiography place their emphasis on the identification of the contemporary as difference. Del Mar prefers a “relational” model in which Contemporary Legal Thought acquires its identity from ongoing relations with others over time, both past and future. So conceived, law and legal thought are always hybrid, “having adopted – consciously or not – concepts and devices from other traditions, which themselves are also hybrids, the tentacles of relations reaching back indiscriminately” (62). To illustrate his approach Del Mar invokes Patrick Glenn’s conception of “cosmopolitan” legality, exemplified in a rich European adjudicatory and philosophical tradition predicated on the negotiation of relations between legal orders. Del Mar argues that a relational conception of Contemporary Legal Thought is to be preferred to one that constructs the contemporary according to how it is differentiated from other modes.

Ben Golder’s “Contemporary Legal Genealogies” also undertakes the development of a method that can serve as a model for Contemporary Legal Thought, conceiving the latter as a process rather than, as in Kennedy’s terms, a *langue*. Golder’s candidate is genealogy, which he identifies as “a predominant tendency within contemporary critical legal thought” (80). Taking Samuel Moyn’s *The Last Utopia: Human Rights in History* (2010) as an example of genealogy in action, Golder identifies genealogy as a means, written from the standpoint of the present, to historicize, denaturalize, and render contingent received categories of legal thought – not least those that the present treats as peculiarly durable. Genealogy identifies legal thought as a process of active and continuing and contested *construction* of narrative rather than as a means to the discovery of “positivistic truth.” Golder realizes this may not be new news: in the current epoch it is precisely the “unsettling” of what is received that historians routinely embrace as their *metier*. The point is, what comes after? What can critical legal thought produce other than more critique? Del Mar’s relational model of the contemporary has already suggested one possibility. Golder sees in genealogy a similar opportunity to remain on the side of flux. “A critical genealogy of contemporary legal thought . . . would be one in which the stability and coherence of ‘the contemporary’ was posited, but not enduringly or definitively so, and definitely not with the effect of ruling out other renditions of the contemporary” (97).

In “Legal Theory among the Ruins,” the scholar that Golder takes as exemplar of a critical genealogical method, Samuel Moyn, offers us a taste of the technique, applying a genealogical perspective to the question of the formation of the contemporary as a category of thought. Moyn highlights the role

of US critical legal studies, and the fractures within it, both in creating the intellectual void that a category of “the contemporary” might fill, and, simultaneously, in comprehensively inhibiting its actual emergence. To imagine that what exists currently can be organized into a category called Contemporary Legal Thought is to misunderstand recent history, which is a history of fragmentation rather than creation. If Contemporary Legal Thought is to exist, it must be newly invented, implicitly out of whole cloth (104). We see here a return to the tension that Goodrich and Del Mar have illustrated: Can the promise or possibilities of the contemporary be sufficiently instantiated by reference to a parochial US argument? Alternatively, should we anticipate that, if it is to be recognizable, the contemporary must resemble its predecessors? Tomlins, after all, argues that it is precisely its historicity – a characteristic not exhibited by either of the prior modes of thought in Kennedy’s scheme – that is the distinguishing characteristic of the contemporary.

Paulo Barrozo’s “Institutional Conditions of Contemporary Legal Thought” moves us in a new direction while offering an indirect response to Moyn, in the shape of a “factual claim” that sustains a variation on the argument advanced by Goodrich and Del Mar. Barrozo’s new direction conceives of legal thought in terms of the environment that sustain or inhibits it. Thinking initially in the very long term, like Goodrich, rather than simply in consideration of recent spats in the American academy, Barrozo postulates the factual existence of “a chain of dependency that runs from the high traditions of legal thought to the conditions of possibility of democracy in complex societies” (115). On this empirical claim rests a normative thesis “that the legal academy ought to provide a better institutional home for the long and polyphonic tradition of legal thought” that the past has bestowed upon us (115). What follows is a polemic against intellectual and organizational failings that inhibit or prevent the legal academy from playing the role that Barrozo deems appropriate – practicicism (the dictatorship of technicality), minimalism (the hobgoblin of small minds), and parochialism (the cowardice of narrowed horizons). Assuming that the chain of dependency is worthy of preservation, Barrozo outlines concrete proposals that would render the legal academy a fitting home for legal thought rather than its uneasy container.

Yves Dezalay and Bryant Garth offer a history that complements Barrozo’s polemic, but from a quite distinct angle that leads to distinct conclusions. Written from a standpoint informed by Pierre Bourdieu’s sociology of law, their “Strategies of Learned Production” proposes that in any given circumstance it is the configuration of economic and political power that explains strengths and weaknesses on display in the field of learned law. Dezalay and Garth’s case study of the United States illustrates the contention. Legal theory, they argue,

has always been marginal to “the reproduction of lawyers and the compilation of legal knowledge” in the US legal field, which is dominated by corporate law firms and the elite judiciary (137). The “outsourcing” of these roles to American law schools toward the end of the nineteenth century did not change matters. Law professors managed to elevate their standing during the 1930s, and with it, the prestige of legal theory, but without bringing about any fundamental alteration in “the hierarchy of power within the US legal field” (144). Similar developments in the second half of the century further enhanced the place of legal theory, creating what looks like a “golden age” of academic theory in the 1980s. But in fact legal academics and legal thought are no more than a relatively minor element – a sideshow – in what is a perduring story of “adaptation and relegitimation” of existing hierarchies. The field of learned law in the United States is characterized by “relatively weak autonomy” (137).

In “Law and Language as Information Systems,” Marianne Constable returns us to our original question in this part of the book. If the idea of *Contemporary Legal Thought* proposes a style of legal argument engaged with a particular temporal conjuncture, what is that style? Constable argues that the empirical and instrumental command/control style of modern functionalism – what she calls “sociolegal positivism” – has been succeeded by “a problematic twenty-first century transformation of law into system and information,” housed in “performance-oriented institutions” and “associated with the terms ‘new public management’ and ‘neoliberalism’” (155–6). As in law, so in legal thought: twentieth century legal thought’s social scientific focus on the problematic of law as the interplay of power and rules is becoming a humanities-inspired focus on law as mediated performance. Constable’s concluding “provocation” is unnerving: *Contemporary Legal Thought* may be a contradiction in terms: the systems-thinking of contemporary law and legal institutions threatens the loss of thought itself.

If Constable asks what is the style of legal argument in the current conjuncture, the final chapter in Part I, Alain Pottage’s “Our Geological Contemporary,” asks us to think about the nature of the conjuncture itself. “The ‘contemporary’ is, after all, a matter of time” (182). What is the temporal nature of the contemporary? Pottage argues it is composed of two interacting registers: the spatial and the informational. The interaction is figured in “the topos of the Anthropocene” – the geological period the course and character of which is marked by the domination of the human over climate and environment. But the Anthropocene is space inhabited not by forensic geology but by information, which, like Constable, Pottage figures as mediated performance, a recombinant cascade that “constitutes the infrastructure of the contemporary” as an ambiguity without material base except in its own media. “If or

when the Anthropocene becomes a major theme in political and economic decision-making,” Pottage concludes, “the span of the age that it defines will be generated by the dynamics of medial ‘irritation’” (193). Pottage has in effect at once relativized the contemporary and exposed the sand on which it stands. “This, more fundamentally than any geological ground, is the *nomos* of our contemporary” (193).

3 IMAGES OF THE LEGAL CONTEMPORARY?

To exit the ring of history is to enter immediately on the second circus ring of our search for Contemporary Legal Thought. We have named the second ring “Images of the Legal Contemporary?” The interrogative is appropriate, for we encounter here a series of studies that offer, as it were, snapshots of legal thinking in the current conjuncture. The question they provoke is whether searches of the current conjuncture also yield clues that we can recognize as indexing the performance of Contemporary Legal Thought. Such searches are surely necessary. Are they sufficient?

Our second ring begins with several chapters that take international or transnational modalities of law as their point of departure. Martti Koskenniemi’s “International Law as Global Governance” contrasts international law to the national legal systems that have provided most of the substance of our discussion to this point. Whereas national legal systems are informed by custom and tradition and hence overtly historical in their jurisprudence, international law purports to define itself throughout by its relationship to its present – to that which is contemporaneous with itself. International law’s present-mindedness is not ahistorical; as a mode of thought it is grounded in natural law and progressive history. But, Koskenniemi argues, this orientation produces a regime that is overtly cosmopolitan and futuristic in ethos. The current expression of this ethos “imagines a sovereign-independent, neutral system of managerial techniques through which ‘development’ and ‘welfare’ are brought to the world” (201). Koskenniemi’s chapter deconstructs the basis of this current expression and its bias “towards binding political communities to the priorities of a global elite” (216) and argues for a reversal of field that would find in an altered relationship to the present a new way of thinking about the future.

Leila Kavar’s “Recasting Labor Standards for the Contemporary” offers a particular test of Koskenniemi’s analysis of international law’s present-mindedness by examining the legal and regulatory practices of the International Labour Organization (ILO). Kavar describes the ILO as an institutional embodiment of the socially oriented legal thought that Duncan Kennedy

identifies as the twentieth century's response to classical legal thought. As an institution, however, the ILO has (in Koskenniemi-like fashion) continued to grapple with and attempt to adapt to a present that has ceased to accommodate its brand of modern functionalism. Kavar looks to those efforts for evidence whether piecemeal institutional adaptation instantiates a qualitatively new modality of legal thought that we can call "contemporary." She describes what she finds as a "creative ferment" (221) that reaches beyond preexisting functionalist and formalist conceptual structures – the ruins of Samuel Moyn's landscape – but that is not (not yet?) susceptible to structuralist description. Kavar's research suggests that the altered relationship to the present for which Koskenniemi calls is possible, but that it is unlikely to constitute a reversal. If we were to attempt to characterize the ILO's "efforts to revitalize [its] normative machinery for social regulation" (234) – notably the impulse to shelve the prescriptive in favor of "soft law" – in the form of coherent principles, it seems more likely we would be led in the direction of Constable's "system and information," her "performance-oriented institutions," her "'new public management' and 'neoliberalism.'" Still, Kavar finds that in the ILO, considered as the subject of organizational rather than intellectual history, this trajectory is not yet obvious.

Like Kavar and Koskenniemi, and like many of the authors in Part I, Judith Surkis argues that to locate "the contemporary" requires that we write a history of the present. Most of the authors represented here consider Duncan Kennedy's work a useful preliminary guide to major components of that history, and Surkis is one of them, not least in her case because of Kennedy's sensitivity to colonial articulations of globally transmitted legal consciousness. But, like Kavar, Surkis locates as an immediate problem "the relationship between overarching theoretical structures and their contingent and practical articulation" (238). Kavar investigates that relationship through the analysis of ILO legal projects conceptualized as "organizationally situated practical assemblages" (220); Surkis does so through a distinct form of situated analysis. Her "Effective and Affective History of Colonial Law" is an attempt to use a specific case of legal diffusion – the French colonization of Algeria in the 1830s – to investigate the microcosmic uncertainties attendant on *any* description of macrocosmic diffusion. Surkis's project envisions two outcomes. By plumbing "legal and economic structures" and tracing "affective and local contingencies," she will illustrate terms of their conjunction in past circumstance that will inform the history of the present (240). By doing so in the specific realm of colonial law, she will render visible the particular shadow cast by *colonial* history on the history of legal globalization. In both cases her ultimate objective is not to be content with history per se, but to determine

“how disruptions and discontinuities” that “coincide with and contribute to apparently structural logics” can illuminate openings in the future (254).

Surkis having introduced us to the tension between “legal and economic structures” and “affective and local contingencies” in a historical colonial domain (240), Louis Assier-Andrieu follows her with a comparable exploration of the tension in that domain between a particular legal structure endemic in current national and international legality – the discourse of rights – and its “other” – the discourse of culture. The tension arises “when, by its own growth, the progress of the rights ideal hits upon the resilience of alternative conceptions [of justice] imputable to culture, including legal culture” (256). The tension is ultimately confrontational, and “not only according to the Western/non-Western dichotomy but also inside the West, where cultural oppositions to the conception of the universal good are expressed” (257). Understanding rights discourse to have originated in a specifically Western legal culture, and taking “culture” seriously as a resilient corpus of localized opposition to universal righteousness, Assier-Andrieu tests the capacity of “legal culture” to serve as a halfway house, an instantiation of compromise between universal and particular. But he finds legal culture unequal to the extrinsic challenge of “an economic reason which desires a worldwide market” indifferent either to rights or to cultural variation. Rights are not a panacea in this contest. Assier-Andrieu does not claim that a rights-invoking rule of law *will* resist the rule of economy as a matter of “logic.” But he is ready to assert that it *might*, as “a matter of time and conflict” (271) where “legal culture” cannot. “Economic reason claims to substitute the preeminence of its normativity for the ancient preeminence of legal normativity. The difference is that legal normativity has granted human experience a rule of law, differentiated from raw political power and from religious power” (271). In that differentiation, says Assier-Andrieu, lies hope.

A “test,” as it were, of rule-of-law’s capacities follows in Denise da Silva’s account of the killing of Amadou Diallo, “The Scene of Nature.” The results are not pretty. In Diallo’s killing we see “acts that would otherwise be defined as a crime, a subjectively (particular) determined act” transformed by “representations of blackness – as refigured in the black body and urban spaces” such that they become “objectively (universal) determined events that are taken as *expressions* of how ‘laws of nature’ regulate collective existence” (276). This is not, da Silva contends, a “cultural” qualification of law’s claim to universality – an incident in Assier-Andrieu’s confrontation in which culture limits law’s “zone of deployment.” Rather, law’s claim to “absolute universality” is undone by a superior universal, “racial ‘laws of nature,’” posited by social science, which “position the black person in a moral region inhabited by