1. *Introduction*[1]

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Any historian of the law or of legal records is bound to confront, sooner or later, the question of the autonomy of the law. In its crudest form, the notion of autonomy suggests that the law possesses internal structures which operate independently of the society within which it is situate.[2] These structures may have the capacity to act as a separate causal agent.[3] In recent years legal historians have been moving away from this approach. Historians of the English common law, for example, have been much concerned to enlarge the scope of their inquiries and to shift from the 'legal functionalism', or 'evolutionary functionalism', of the common-law mind which has long dominated the subject. Exactly how the legal historian should now proceed is problematic. The general widening of the project of legal history has been accompanied by a stark realisation that the subject of *law in history* involves more than the juxtaposition of 'law and society', 'law and economy' and so on; more than the setting of text within context.[4] Yet few serious scholars of the subject would be happy to subscribe to the antithesis of autonomy, the idea of law and legal practice as mere reflexes or expressions of social value and social change; still less with the law as constitutive, mechanistically, of an ideological superstructure. Most would have at least some sympathy with the manner in which E. P. Thompson voiced his famous reaction against this:

> 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

[1] I would like to thank Joanna Innes and Chris Wickham for their helpful comments on a first draft of this introduction.

[2] For the practical, legal consequences of this view see below, Andrew D. E. Lewis, 'The autonomy of Roman Law', p. 37.

[3] For a recent collection of essays on the subject see R. George (ed.), *The Autonomy of Law* (Oxford, 1996).

[4] See, in particular, David Sugarman, 'Writing "Law and Society" Histories', *Modern Law Review*, 55 (1992), pp. 292–308, this being a review of W. R. Cornish and G. de N. Clark, *Law and Society in England, 1750–1950* (London, 1989).

> 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 cotillon with religion, moralising over the theatre of Tyburn; it was an arm of politics and politics was one of its arms; it was an academic discipline, subjected to the rigour of its own autonomous logic; it contributed to the definition of 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.[5]

Not surprisingly, revisionist theses tend to take a two-way traffic as axiomatic: 'law shapes society and its social activities, while its rhetoric, structure and procedures can be regarded as a reflection of society's own perceptions of (and attempts to reproduce and change) social reality'.[6] For some this hardly goes far enough. In the USA the so-called 'Critical legal writers' or 'Critical scholars' in their reaction against the traditional legal discourse – in both its 'formalist' and its 'realist' manifestations – have dismissed even the idea of the 'relative autonomy' of legal structures as insufficiently theorised.[7] For them, law and society are so inextricably mixed, so deeply imbricated with one another, to use Thompsonian phraseology, as to render such a conception otiose. In short, law is 'omnipresent in the very marrow of society'.[8] In consequence the debate around how best to pursue historico-legal inquiries is a long way from being resolved.

Meanwhile, social and cultural historians have been turning to legal records with a new agenda, the reconstruction of the mental world of their chosen subjects. Most spectacularly in early modern studies, involvement in the law, and the language deployed in that involvement, has been seen to forge a direct entrée into the lives of individuals and of their communities.[9] The new accent upon language, in the wake of the so-called linguistic turn, has shown that it is not only in the words themselves that one can perceive the interpenetration of law and society but in the narrative and linguistic strategies employed.[10] It is here that critical theory has been brought

[5] E. P. Thompson, *The Poverty of Theory* (London, 1978), p. 96. At the same time, Thompson was perfectly well aware that the law operated formally under its own rules, rules which could be difficult for the outsider, even an upper-class outsider, to penetrate. See *Whigs and Hunters* (London, 1975), ch. 10, section iv.

[6] Anthony Musson, *Public Order and Law Enforcement: the Local Administration of Criminal Justice, 1294–1350* (Woodbridge, 1996), p. 1.

[7] See Robert W. Gordon, 'Critical Legal Histories', *Stanford Law Review*, 6 (1984), pp. 57–125.

[8] Ibid., p. 109.

[9] Perhaps the widest known example is C. Ginzburg, *The Cheese and the Worms: The Cosmos of a Sixteenth-Century Miller* (London, 1982).

[10] See, for example, the recent studies of rape narrative in England: Miranda Chaytor, 'Husband(ry): Narratives of Rape in the Seventeenth Century', *Gender and History*, 7, no. 3 (1995), pp. 378–407, and Garthine Walker, 'Rereading Rape and Sexual Violence in Early Modern England', *Gender and History*, 10, no. 1 (1998) pp. 1–25.

effectively into play. For historians employing the historical record of the law in new, or for that matter in the old, ways it is clearly a vital matter that the relationship between what went on in the courtroom and what went on in the society outside of that courtroom should be properly understood.

For these, and other, considerations, therefore, it seemed to Chris Wickham and myself that the time was ripe for a direct confrontation with the issue of the courtroom and society, and that this was an ideal theme for a *Past and Present* conference of the classic type, ranging across historical time and across space, and complementing the earlier and highly successful conference on the study of disputes and settlements.[11] A conference on *The Moral World of the Law* was duly held at the University of Birmingham on Friday 12 and Saturday 13 July 1996. The idea of a separate moral world, with its Thompsonian overtones,[12] seemed to us to offer the most direct approach to the issues which we wished to confront, that is to say it offered the most immediate prospect of entering into the legal experiences of people in the past. Accordingly, our speakers and discussants were given a specific brief, which was to look at some of the following issues:[13] how legal rituals, and the culture of the courtroom itself (including the modes of discourse permissible in it), differ from those of the rest of society; how these rituals are generated (whether by legal theory, legal practice, the cultural assumptions of the ruling class, or all three); whether they are internally consistent – for there are often several, competing, legal systems in a given society (canon versus civil law, Roman versus local law, 'native' versus colonial law, and so on), all of which may be more or less opaque to outsiders; and how much coercive power they really have. We were also interested in whether periods of sharp institutional change could be identified, when the relationship between law and everyday morality gets particularly out of sync, and in the ways in which access to the practical knowledge of the law may be gendered or class bound.

Not all of these issues were addressed, at least not to an equal degree, and the conference took us in some unexpected directions. The theme itself, if not an aunt sally, was slightly tongue in cheek in that it tended to presuppose the issue in question, i.e. whether or not there were indeed such separate moral worlds and whether or not we should approach the legal record in this way. As is normal with such proceedings, the essays published here do not represent all of the papers and discussants' rejoinders that were delivered. Several represent fuller and further thoughts on the part of the

[11] John Bossy (ed.), *Disputes and Settlements: Law and Human Relations in the West* (Cambridge, 1983).

[12] See, especially, E. P. Thompson, 'The Moral Economy of the English Crowd in the Eighteenth Century', *Past and Present*, 50 (1971), pp. 76–136.

[13] What follows is taken from the advance notice of the conference in *Past and Present*, 146 (February, 1995), pp. 188–9.

discussants and one, by Andrew Lewis, was specially commissioned to help produce, as it were, a more rounded volume. At the conference Roman law, if not exactly the spectre at the feast, was at least an absent presence. Most speakers referred to it, none directly addressed it. We are most grateful that Andrew Lewis and Paul Hyams have significantly filled this gap.

The volume begins, as did the conference, with Stephen Todd's paper on 'The language of law in Classical Athens'. Todd takes us directly into the question of the autonomy of legal language which, he points out, has two distinct though related dimensions. On the one hand there is 'a technical legal vocabulary which non-lawyers are in danger of mis-using', while, on the other, there is language used in legal contexts which 'has autonomy of meaning over the intention of its users'. Athenian law lacked the formalism of Roman and other ancient legal systems; indeed, it lacked even the degree of formal linguistic usage present in modern civil- and common-law systems. There are a number of reasons for this. Essentially, Athens lacked the means by which precise legal terminology could arise. The necessary preconditions were simply not present. Statutes tended to be imprecise in their meaning, a profession of jurists failed to develop, and the fact that most cases were decided by the verdict of several hundred *dikastai* – without discussion and by majority vote – left no room for authoritative rulings to which one might subsequently appeal. In a carefully nuanced essay, to which a brief précis is in danger of doing violence, Todd takes us through the use of language by litigants, or more precisely by the logographers or ghost-writers who produced speeches for them, showing how the system worked through the art of persuasion rather than the reception of established interpretation and rules. The language and the rhetoric, however sophisticated, needed to be comprehensible by an essentially non-professional court, where litigants spoke on their own behalf. However, this is not to say that the language of the court and the language of the street were mutually exchangeable. Ordinary words did develop specialised meanings in the courts. What they did not do was to develop autonomous meanings which carried independently of their users' intentions.

The lack of a specialised legal profession did not mean, however, that people were not advantaged or disadvantaged before the courts. Participation – as *dikastai*, as witnesses and as public officials, and of course as litigants – was wide in democratic Athens; or it was for adult male citizens. As large numbers of *dikastai* were required, many male citizens would have become quite experienced in the ways of the court. This inevitably created difficulties for others, whatever the level of transparency in the proceedings. Strangers, for example, could be significantly disadvantaged. Metics, the free non-citizens who were resident in Athens, enjoyed only limited participation while women, who could not testify, were represented

by male citizens when litigants and rarely seem to have been present in court. We find that those who had social influence outside of the court are likely to have had distinct advantages inside the court too. Rich men who had financed public works had reason to feel that they were in credit with the citizens who would be giving their verdicts. The drama of the court had much in common with Athenian theatre, not least in that the cases were judged by non-experts: 'what made the process "democratic" was not that poor contestants would have stood an equal chance if pitted against rich ones, but that it was the *dêmos* (common people) which was allocating the prizes among the elite'.[14] Just as the Athenians lacked the autonomy of legal language, so they appeared to have lacked the notion that the operation of the law was autonomous from outside pressures. Indeed, this appears to have been a Roman construct, and has been traced to Cicero in the first century BC.[15] One might also reflect that as far as the law courts are concerned the practical advantages possessed by the rich and otherwise socially advantaged in human society are not necessarily dependent upon access to legal counsel and other professional expertise. In some societies the relationship between power and influence inside and outside of the courtroom can be much more direct.[16]

When we turn to Roman law we are, needless to say, in a radically different world. Andrew Lewis, in 'The autonomy of Roman law', elegantly re-examines the development of legal autonomy from the time of Cicero in the first century BC through the classical period in Roman law, from the first century AD to the beginning of the third. In so doing he tells us a great deal about the relationship between jurists, advocates and judges and their respective relationships to the law. Two principal factors combined to promote autonomy. One was the separation of the roles of jurist and advocate. The other was the primacy of procedure. The jurists, the legal specialists whose writings were transmitted to posterity through Justinian's codification of the law in the sixth century, developed 'a highly specialised framework of peculiarly juridical argument'. Consequently, it was 'no longer sufficient to present a court with a series of arguments drawn from commonplaces about honesty, justice and piety'.[17] The advocates (orators, not lawyers), who represented their clients in court, became detached from the legal consequences of their pleading, while the judges, who were laymen or officials and generally lacking in legal training, were required to pay

[14] Todd, below p. 24.
[15] B. W. Frier, *The Rise of the Roman Jurists: Studies in Cicero's* Pro Caecina (Princeton, 1985); Todd, below p. 22.
[16] It is also the case that the richer Athenians had greater access not only to logographers but also, presumably, to the 'interpreters' who offered advice to litigants: Todd, below pp. 21, 28.
[17] Lewis, below p. 40.

attention to the detailed arguments of the law according to criteria presented, via a rather complex mechanism, by jurists. The outcome of cases was much dependent upon precedent with only marginal interaction with 'general moral and ethical thought'. The situation is encapsulated in an anecdote by Aulus Gellius in his *Attic Nights*, written during the first century AD. Called upon to act as judge in a case of debt, he found that his instincts favoured the creditor as opposed to the debtor, who was of ill repute. However, the failure of the plaintiff, without witnesses, to make a *prima facie* case meant that he should find for the defendant. Gellius consulted a philosopher, Favorinus, who urged him to proceed on moral grounds. But this did not help him. As he would have no option but to reach his decision upon formal grounds as directed by the jurists and their rules Gellius asked to be relieved of his case. The dictates of conscience were thus external to the court and should not intrude upon its peculiar moral world. Nevertheless, there must always have been ways in which external pressures could bend the law. Most interestingly, Cicero's speeches reveal that advocates sought to obfuscate the issues in such a way as to impede the application of the law.

Justinian's reification of the writings of the jurists in his *Digest* led the way to their magisterial treatment during the legal revival that began in the late eleventh century. In his 'Due process versus the maintenance of order in European law: the contribution of the *ius commune*', Paul Hyams examines the decisive moment in the appropriation of Roman legal thinking by the medieval world. He shows how the West's 'highly significant differentiation' – from ancient Athenian and early medieval law, for example, as much as from non-western systems – 'came as a result of choices made in the period between the eleventh and thirteenth centuries'.[18] As a result of the legal revolution of the period 1175 to 1215 lawyers came to refer to the principles they knew to be common to western Christendom as the *ius commune*. Hyams outlines the characteristics of this *ius commune*, concentrating on its concept of natural rights and its protection of the individual in the courts through the *ordo iudicarius*, the high medieval equivalent of 'due process', itself a term coined in fourteenth-century England. He points out, however, that procedures were not employed uniformly in the middle ages but varied according to gender, social status and reputation, and he adds the cautionary note that 'mere notions of fairness, however attractively packaged in maxims, are likely to be ineffective until they are provided with procedural teeth'.[19] The long reach of medieval principles into the modern world is illustrated through the Fifth and Sixth Amendments to the US Constitution. The principal long-term significance

[18] Hyams, below p. 62. [19] Hyams, below p. 75.

of the *ius commune*, arguably, is that the notions of human rights that we see as 'self-evident' are so 'engrained' in our culture as to give 'the illusion of their indisputable rightness', and it is this illusion which underlies much of the conflict between western and non-western ideas in the modern world.[20]

Hyams also points out that we seek two barely compatible goals from our legal system; both safeguards for ourselves under the law, and protection against the criminal activities of others. The tension between these two desires was as present in the early centuries of the *ius commune* as it is today, and he traces the development of summary process alongside 'due process' from the formation of the 'persecuting society', as R. I. Moore famously put it, in the thirteenth century onwards.[21] One of the most absorbing features of this discussion is the frequent use of legal maxims. Their usage here reflects the fact that they were in themselves 'one of the routes by which the teachings of the *ius commune* passed into the legal culture of the west'. In an appendix Hyams examines why legal maxims should have so developed and have carried the legal weight that they did. But their significance is greater even than this. Some of them passed from the law into other dimensions. Hence their appearance in literary texts. In a call for further research on the subject, he suggests that those maxims that reached a general public 'must have contributed in many ways of which we currently know very little to inform ordinary folk (those whom lawyers call laymen) what law was about'.[22] Maybe they were assimilated to the general compendium of proverbs, to be deployed in similar ways. Here, perhaps, is a novel way of approaching 'the boundaries of the law's autonomous domain within western culture',[23] of examining what Robert Gordon calls its 'positive feedback loop'.[24]

In 'Local participation and legal ritual in early medieval law courts', Wendy Davies examines the situation in western Europe from the seventh to the tenth centuries, prior that is to the legal revolution which Hyams describes. She finds that there were considerable similarities across time and space and across language groups. In those we can designate rulers' courts litigants usually spoke through advocates, and women necessarily so, although these advocates (Ireland excepted) were not generally professional lawyers. There was a heavy emphasis upon correct procedures and courts were highly ritualised. Although many of the rituals may appear to the twentieth-century observer as quaint, and the language arcane, below the surface there was broad consistency in practice and much of what went

[20] Hyams, below p. 62.
[21] R. I. Moore, *The Formation of a Persecuting Society* (Oxford, 1987).
[22] Hyams, below p. 90. [23] Hyams, below p. 84.
[24] Gordon, 'Critical Legal Histories', p. 60.

on was in essence mundane. It was the 'emphasis on right order' which 'proclaimed both the existence of a distinctive system and its separation from "everyday life"'.[25] Tellingly, Davies points to the existence of contempt of court – for producing false written evidence, for example, or for sending a substitute to answer a charge – which in itself indicates 'systems with their own rules and own logic'.[26] In this sense, the courts constituted a world apart, but they tended nevertheless to be large public gatherings and, as in ancient Athens, this appears to have added rather than detracted from the courtroom as the scene of dramatic performance. Some of the drama took place, in fact, outside of the court as a designated space; in the highly ritualised walking of the boundaries, for example.

Rulers' courts were often political instruments, and there is no necessary separation between judicial and political functions. However, it was not only rulers who manipulated courts for personal ends. They tended to be seen by litigants as 'an instrument for securing personal advantage'.[27] Participation in the law courts may have been wide, but it was restricted to only a proportion of the population – those who were adult, male and free. As in the ancient world, the unfree played little or no part. Serfs are to be found at rulers' courts claiming free status. When they did so they were likely to be defeated. Unfamiliarity with the courts and inexperience in the use of evidence generally told against them. They could be defeated by superior witness or on the basis of written texts. Peasants seeking fairer treatment would often fare no better. Even where, as at Fiesso in the ninth century, a group of peasants challenged a written text in a fairly sophisticated way, they were defeated by the greater ingenuity of their monastic opponents. Written evidence, 'part of the special apparatus of the world of the law',[28] was highly selective in the benefits it conveyed.

Most importantly, Davies contrasts rulers' courts with local courts. The latter differed in important respects. The litigants tended to speak for themselves, and there was less formality, less emphasis upon procedure. Perhaps the greatest difference, however, was the much stronger emphasis upon settlement. At the village level, in particular, the drive to settle was born from practical necessity. What was at stake was the social harmony of the small community. Male, free peasants were solving their own problems in the courts. 'At this level', Davies points out, 'the world of the law does not seem to have been so morally distinct.'[29]

Paul Brand's 'Inside the courtroom: lawyers, litigants and justices in England in the later middle ages' gives us a picture of a highly professionalised court at work. This is the English Common Bench, the royal court

[25] Davies, below p. 54. [26] Davies, below p. 53. [27] Davies, below p. 58.
[28] Davies, below p. 61. [29] Davies, below p. 61.

which specialised in civil pleas. From around 1270 the formal records of the court, the plea rolls, are supplemented by unofficial law reports, produced for the most part by law students (apprentices) who were present in the court. Unlike the plea rolls which are in Latin and in indirect speech, the law reports are in French, the language actually spoken in the court, and are in direct speech. They afford us the kind of access into the deliberations of a law court which we lack for almost any previous time or place. Rarely did litigants speak for themselves in this court, although they were not formally barred from doing so. Most employed attorneys to act on their behalf. Attorneys, however, did not plead for their clients but acted as intermediaries between them and the court. Anyone could be appointed attorney but increasingly it became the preserve of the 'exclusively male, professional attorneys'. What the reports reveal in detail is the pleading dominated by highly experienced professional lawyers, the serjeants at law. Generally speaking, the litigants were thus at two removes from the court, separated by the attorneys who handled their cases and then serjeants who spoke on their behalf. Litigants (or their attorneys) could be asked to avow (that is, confirm or deny) what was said on their behalf, but as often as not those litigants were not even present in court. In one respect, Brand argues, the employment of professional serjeants could have been of particular value to lower-class litigants: 'For a man of lower social standing engaged in litigation with a man of higher social standing, it may have been valuable to have someone speaking for him whose very appearance and way of speaking was not a constant reminder to the court of the relative position of the two sides in the case.'[30] The rich, of course, could be advantaged through their personal contacts with the professionals. On one occasion we learn of a judge inviting himself to sit alongside the judge who was presiding over a case, as a 'well-wisher' of one of the parties, a fact that was the subject of a later complaint.

It was partly the language itself that made much of the pleading inaccessible to lay people. It was not just that it was in French – although by 1300 it could no longer be relied upon that even members of the gentry automatically spoke French – but because the vocabulary had become technical and specialised. The law reports reveal the phenomenon once again of words bearing meanings in a legal context which they did not possess outside. There is little wonder that the court was a classroom as well as a court of law.

In common with other contributors, Brand reflects on the resemblance between litigation and dramatic performance: serjeants spoke as if playing a part; people, including judges, made entrances and exits; props were

[30] Brand, below p. 95.

brought in; the demeanour of a litigant might be noted – one defendant was said to be 'sighing' and 'in tears'. The court was not the sedate forum suggested by the formal plea rolls, but a lively, even rowdy place. Above all, everyone had their role to play. The judges intervened in a variety of ways. After a man admitted that he was of unfree condition, a judge directed his lord to 'take him by the neck, as your villein'. Part of a judge's role seems to have been to introduce a note of humour into the proceedings. Brand suggests that they may have been the only people who were truly at their ease in the court. The coarseness of some of the reported humour may reflect the fact that this was a drama in which all the parts were played by men.

In 'Moral and legal conflicts in a Florentine inheritance case of 1422', Thomas Kuehn argues that 'the historian needs to come to grips with specific and not generic forms of moral and legal dilemma'.[31] The case in question arose from the will of ser Viviano di Neri Viviani, one of Florence's wealthiest citizens. Two issues were contested between one of Viviano's eight sons, Giovanni, and the hospital of the Innocenti, testamentary beneficiary of Giovanni's brother, Ludovico. One of the issues revolved around the legal technicalities resulting from the several types of substitution. It was effectively decided by the Florentine jurist, Benedetto Barzi, and his fellows. In a fascinating display of verbal dexterity and specialised learning – combining acute clausal analysis and centuries of juristic commentary – they resolved the issue in favour of the hospital. The second issue went to arbitration, but in practice the arbitrators sought resolution, once again, from the jurists: this time the college of jurists of Genoa. The underlying conflict was born of tensions between brothers and between the demands of the family and the demands of the soul. What the jurists contributed to the dispute, however, was not 'a perception of conflict or of the interests at stake'. 'They brought a professional expertise that could determine what rules to apply, a presumed impartiality even when retained by litigants, a type of charisma captured in their wax seals and textual citations, and a certainty of judgement.'[32] The parties themselves, however, were not entirely ignorant of the law and its potentialities. The law itself contained ambiguities to be exploited by those parties and their professional counsel. They could do so because of another set of ambiguities, those surrounding the contemporary ideology of inheritance. Both family interests and individual rights warranted protection. It is the potentiality for conflict here which demands that the modern commentator should view a case such as this from an anthropological as well as a legal perspective. In short, what we see is a complex interaction between

[31] Kuehn, below p. 113. [32] Kuehn, below p. 131.