A Provocative Journey through the *Arcades* of Legal History

Author : Deborah Dinner

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Christopher Tomlins, *Historicism and Materiality in Legal Theory*, in **Law in Theory and History: New Essays on a Neglected Dialogue** (Maksymilian Del Mar & Michael Lobban eds., 2016).

Christopher Tomlins' fascinating essay, *Historicism and Materiality in Legal Theory*, reconsiders the purpose of legal history and its utility for legal theory. For the last three decades, Robert W. Gordon's landmark article, *Critical Legal Histories*, has served as the shining lighthouse by which the discipline navigated the murky waters between fact and theory, description and normativity.[1] Departing from the evolutionary functionalism of law and society and law and economics scholarship, Gordon extolled the virtues of a critical historicism. In showing the indeterminate character of law's past, this historicism destabilizes its present. As Tomlins sees it, critical historicism offers a post-structuralist interpretation of law, marked by contingency, complexity, and contradiction. The project of locating law in its socio-temporal context, he argues, generates an almost infinite set of relationships for examination. If critical historicism contends that the relationship between law and society is underdetermined, then Tomlins yearns for bolder causal explanations about legal and social change. Building on several prior pieces, Tomlins' essay calls for an alternative paradigm to historicism, what he terms "materiality." (P. 59.)

The essay begins by arguing that historicism has two problems. First, there exists a problem of intelligibility. If historical meaning takes shape only in its context, how can an observer—allegedly objective but also situated in time and place—access this meaning? Second, drawing on the work of legal philosopher Pierre Schlag, Tomlins elucidates the problem of differentiation.[2] This is no smaller than the problem of how to distinguish what authoritative texts, corps of experts, institutions, and ritualized practices constitute law. If law and society are mutually constitutive, how do we differentiate between them? Tomlins suggests that the project of legal history should be to examine the process of legal differentiation itself. The essay discusses historical works that illustrate this methodology. Cornelia Visman's study of state records, for example, explores the process by which administrative technologies produce law.

Tomlins offers Walter Benjamin's historical materialism as a mechanism by which to resolve the "differentiation problematic through attention to the material fabrication of the category 'law'…."[3] (P. 73.) The apex of Tomlins' essay discusses how Benjamin's attention to materiality, in particular the philosopher's use of montage and allegory, might resolve the problem of differentiation. He also suggests that Benjamin's dialectical approach might enable historians to explore the conjuncture between past and present, while avoiding the fallacy of objective historical understanding.

Tomlins' writing is characteristically erudite. While dense, the essay is accessible to a legal historian such as myself who is not an expert in the continental philosophy it engages. I found the essay exciting to read as I near completion of a book manuscript for a couple of different reasons. To begin, Tomlins concludes that legal historians too often retreat from theory. He urges scholars to reject ever-spiraling complexities of factual description in favor of stronger causal explanations. One might understand this as a mere stylistic challenge, but it is at heart a methodological and philosophical one. I took from Tomlins' essay the warning that legal historians risk giving up explanatory authority when they attribute the relationship between change in law and society wholly to contingency.

One question I had in reading the essay is how to explain structure without falling into the trap of the structure itself becoming a historical actor. Is there a risk that the historian might derive her structural account of legal change from a theory, rather than from a careful examination of archival sources? This would imperil the integrity of the historical project. Might materiality pose some of the same perils as the functionalism that Gordon criticized?

Of even greater significance is Tomlins' idea that the legal historian's understanding derives from a confrontation between past and present. Tomlins' essay offers insight for many who are concerned with the relationship between their professional discipline and present-day commitments. As I analyze the legal history of feminism in the late twentieth century, I am ineluctably engaged in its consequences for our present moment. The normative seems to me inescapable: it guides the research questions I ask and the analytic structure I endeavor to give historical facts. Of course, we are all perennially wary of law-office history: the use of historical narratives to advance predetermined ends, whether it be legitimating the status quo or recovering the vision of an alternative order. Yet acknowledging that one's normative commitments shape one's historical research does not lead inexorably to such instrumentalism. Indeed, it might lead a historian to be more self-conscious, analytic, and explicit about the way that such normativity shapes one's encounter with the historical record.

Tomlins' essay is part of a larger volume, edited by Maksymilian Del Mar and Michael Lobban, which reinvigorates a dialogue between history and theory. The wide-ranging essays examine the relevance of history to the study of jurisprudence. One quibble is that feminism's history and feminist jurisprudence receive barely a passing mention in the volume. A related but not equivalent criticism is that women scholars wrote only two of the seventeen essays in the volume. A reader might consider these absences a contingent product of the editors' selection process. Tomlins might instead point us toward a structural explanation: perhaps the artificiality of a divide between jurisprudence and the study of law's social effects, or the enduring role that gender plays in the construction of academic networks.

1. Robert W. Gordon, *Critical Legal Histories*, 36 **Stan. L. Rev.** 57 (1984). [?]
2. Pierre Schlag, *The Dedifferentiation Problem*, 42 **Continental Phil. Rev.** 35 (2009). [?]
3. Tomlins' essay takes as inspiration and partial subject Walter Benjamin, **The Arcades Project** (1999). [?]

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