FORUM:
RESPONSE

Historical Analysis of Law

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Kenneth Ledford’s and Michael Meranze’s insightful comments raise important questions about the nature of legal history in general, and of the history of punishment in particular. According to Ledford and Meranze, modern legal history is social history, to be distinguished from “old-style intellectual history.”¹ A product of the latter “historical method no longer in favor,”² “The Right to Be Punished” draws Ledford’s and Meranze’s criticism for its insufficient “root[s] . . . in the soil of social history”³ and for its inadequate “account of the . . . social basis of the modern will to punish”⁴ and “the social embeddedness of punishment.”⁵

In this reply, I sketch an alternative to Ledford’s and Meranze’s implicit vision of legal history by focusing on the question, What is the point of legal history?⁶ One may of course do legal history for many reasons and a debate about what the point of legal history is would be as unproductive as classifying a work of scholarship as history, legal history, or a particular kind of legal history. I am not interested in such a debate. Instead, I outline one approach that strikes me as promising and that I call historical analysis of law.

The point of historical analysis of law is to critique the legitimacy of a past or present legal practice. Analysis lays the foundation for critique. Historical analysis is only one among several modes of critical analysis of law. Others include the economic, philosophical, sociological, and psychological analysis of law. Historical analysis of law in particular charts the emergence and development of legal practices and their legitimation.

2. Ibid.
3. Ibid., 147.
5. Ibid., 157.
6. Recently, a growing body of work on “uses of history” and “lawyer’s history” has begun to explore this question, though not always explicitly. See, e.g., “Symposium on the Criti-
For purposes of the critical analysis of law, historical or not, legal practice is thought of as encompassing attitudes, behaviors, and norms of varying levels of generality. These practice norms, however, are distinguished from legitimating principles. Testing the legitimacy of a given legal practice means matching the practice in its various forms against these principles.7

The historical analysis of law merely identifies and describes the relevant principles and practices. It does not advocate for them. Despite its instrumental character, historical analysis of law thereby differs from traditional lawyer's history. Still, historical analysis of law can be thought of as nonpartisan lawyer's history. It is not history "for its own sake," but history with a point. From the perspective of historical analysis of law, legal history should not be wary of the lawyer's instrumentalism, but of her cynicism. The unremitting effort to expose ulterior motives on the part of opposing witnesses may be effective trial strategy. In the hands of a historian committed to the supreme explanatory power of membership in some group, say a class, this search for motives can result in a kind of lawyer's history that is less instrumental and partisan than it is beside the point. Foucault's greatest contribution was not to question the motives of Enlightenment reformers of punishment, but to locate their work in the formation of the modern state that is still with us today.

For purposes of testing the legitimacy of a practice, the motive underlying the promulgation or adoption of a given principle of legitimacy is simply irrelevant. For purposes of critical analysis, it is as irrelevant to expose the "true" motivation of a proponent of a legitimizing principle as it is improper for her to rely on that motivation in an effort to block critique.

This is not to say that the historical analysis of law can do without considering context. Context, however, is a means to an end, not an end in itself. Historical analysis seeks to understand principles and practices in their relation to other principles and practices. Rather than rushing to socially embed ideas, historical analysis first identifies and clarifies the ideas to be embedded. Instead of privileging one strand of, say, sociological theory, historical analysis moves freely among disciplines. For example, it might use the philosopher's tools to help locate a particular prescriptive principle both internally, within a

7. For example, "The Right to Be Punished" traces the emergence and development of both the modern practice of punishment and the attempt to legitimize that practice through the principle of autonomy.
given system of ideas, and externally, within the evolution and succession of ideas, then proceed to analyze the principle from some sociological, psychological, or economic perspective, as the availability of evidence permits.

Historical analysis of law thus eschews the unexamined adoption of a particular way of interpreting the past. It seeks analysis, not illustration. In its pursuit of analytic understanding, it indiscriminately, yet critically, scans the analytic disciplines for ways of understanding principles, norms, and behaviors. Instead of merely applying a prefabricated explanatory scheme, historical analysis attempts to construct analytical methods as much as it seeks to apply them. In their application, descriptive systems are also always tested.

Historical analysis of law always remains in the service of critique, description in the service of prescription. Historical accounts of class or race or gender or party or nation struggle have no critical power, unless they are tied to a prescriptive theory of legitimacy. Historical analysis draws this prescriptive theory from history. Its critical perspective is immanently historical as it considers entirely the recovery of past legitimacy problems and their principled solutions.

Given its immanent nature, historical analysis of current legal practices always leaves room for two practical responses. Assuming that these practices are found wanting in the face of past principles, legitimacy may be maintained or restored either by replacing previous efforts at legitimation or by conforming current practices to the principles already in place. The point of historical analysis of law is to critique, not to reform.

Although historical analysis of law pursues critique, it is not “critical history,” recently defined by Robert Gordon as “any approach to the past that produces disturbances in the field.” Historical analysis of law has both lower and higher ambitions. It cares little about the field; instead it concerns itself with the legitimacy of actual legal practices. It is less interested in disturbance than in critique. Uninterested in “invert[ing] or scrambl[ing] familiar narratives of stasis,” historical analysis of law is anxious to lay the foundation for a principled dialogue about past or present legal practices.

8. No comprehensive account of modern punishment, for instance, may ignore the role of class membership. To focus exclusively on this factor, however, obscures the more basic phenomenon of empathic identification among members of any community and the concomitant differentiation from nonmembers. To appreciate the complexity and significance of the phenomenon requires critical engagement with several disciplines, including sociology, (social and moral) psychology, and (political, moral, and social) philosophy.

9. So the legitimacy crisis of modern punishment identified in “The Right to Be Punished” may be remedied either by developing a theory of legitimacy independent of the principle of autonomy or by bringing existing practices into line with that principle.


Historical analysis of law springs from the violent reality of law past and present. It is this reality that distinguishes law from other practices and that any analysis of law, historical or otherwise, should reflect. This is why historical analysis of law strives to do more than accumulate accounts of how various groups have been affected by various legal practices, how various groups have adopted various legal practices to affect various other groups, or for that matter “invert” these accounts, once accumulated. Historical analysis of law instead aims to join the central enterprise of modern law: not merely to describe law’s violence, but to test its legitimacy.

Historical analysis of law thus belongs to a larger project: the critical analysis of law. This comprehensive project is designed to reinvigorate legal scholarship by refocusing it on the violent practicality of law. Critical analysis of law is instrumentally interdisciplinary. Instead of reducing legal life in its myriad manifestations to the playground of recent (and not-so-recent) trends in other disciplines, critical analysis of law presses these disciplines into the service of understanding and critiquing legal practices. In this way, critical analysis of law, historical and otherwise, helps reconstitute law as the paradigmatic practical discipline, and thereby makes truly interdisciplinary exchange possible.