

BUFFALO LAW REVIEW

VOLUME 64

JANUARY 2016

NUMBER 1

Opportunities for Law's Intellectual History

MARK FENSTER†

JOHN HENRY SCHLEGEL††

In October 2014 a conference with the above-indicated title was held at the Law School. It was generously supported by its Baldy Center for Law and Social Policy. Sixteen scholars presented papers on four different topics: bureaucracy, capitalism and risk, doctrine, and popular culture. Long-ago Buffalo faculty member Robert Gordon, kindly accepted the role of commentator at the end of our discussion.

The point of the Conference was to explore the possibility that methods and materials of intellectual history might be used to shed light on topics related to law that are not traditionally associated with the field of intellectual history. The topics for discussion were not selected because they are matters of current academic concern on the part of legal historians, but rather because they were not. The absence of concern suggested to us that the methods of inquiry currently dominant in legal history were not particularly suited to these topics and that perhaps intellectual history as a method of inquiry, defined broadly, might be more suited to their subject matter.

Our collective attempt to address this seemingly elevated topic was quite tentative. Despite the modest similarity in title, we expected nothing like the famous 1977 Wingspread

† Cohen, Wagner, Nugent & Toth Torts Professor, Levin College of Law, University of Florida.

†† UB Distinguished Professor and Floyd Hurst and Hilda L. Hurst Faculty Scholar, SUNY Buffalo Law School.

Conference, “New Directions in American Intellectual History,” which set the agenda for intellectual history for a generation or more.¹ Our attempt was also a bit self-consciously ironic. The cover to our program featured a picture of the participants in the famous Fifth Solvay Conference, where, in the midst of a discussion of quantum theory, Albert Einstein said “God does not play dice” and Nils Bohr answered, “Einstein, stop telling God what to do.” In our version, a photo-shopped picture of Britney Spears was to be seen sitting next to Einstein. The Conference website featured, again with attendant irony, a still from Goddard’s classic film *La Chinoise* showing three May 1968-era intellectuals using Mao’s *Little Red Book* as both shield and weapon. Perhaps this light touch is what resulted in what one participant called “a graduate seminar for adults” so that a good time was had by, if not all, at least most.

The organizers resolved to publish as many of the papers as the invitees felt that they had time to expand from the modest ideas of about fifteen hundred words that were the ticket for admission to the Conference to around six thousand. Oddly, no one writing about bureaucracy was able to contribute, but nine participants have taken the time to offer suggestions for possible opportunities for expanding the range of the intellectual history of law. Robert’s comments on the Conference round out our collection.²

On the topic of Capitalism and Risk, Ajay K. Mehrotra uses the history of American tax law and policy to consider the relationship between intellectual history and the growing field of study coming to be known as the history of capitalism.³ Edward A. Purcell, Jr., examines the economic fallacies and political biases embedded in changing ideologies that have claimed to identify the essence of capitalism.⁴ And

1. NEW DIRECTIONS IN AMERICAN INTELLECTUAL HISTORY (John Higham & Paul K. Conkin eds., 1979).

2. Robert W. Gordon, *Observations on Opportunities for Law’s Intellectual History*, 64 BUFF. L. REV. 215 (2016).

3. Ajay K. Mehrotra, *A Bridge Between: Law and the New Intellectual Histories of Capitalism*, 64 BUFF. L. REV. 1 (2016).

4. Edward A. Purcell, Jr., *Capitalism and Risk: Concepts, Consequences, and Ideologies*, 64 BUFF. L. REV. 23 (2016).

Christopher Tomlins explores the consequences of understanding that law acts as a medium for the communication of what capitalism is at any given point in time.⁵

On the topic of Legal Doctrine, Charles Barzun attempts to show why histories that try to remain agnostic as to the driving causal forces in their accounts are either insufficiently critical, insufficiently historical, or both.⁶ Mark Fenster argues that the best way to understand legal intellectual history is as the street sweeper cleaning up after the circus parade of law's history and its uses of history.⁷ Cynthia Nicoletti uses the legal history of the American Civil War to argue for the necessity of recognizing the importance of legal doctrine for lawyers in their day-to-day activities of advocacy.⁸ And John Henry Schlegel uses a detailed analysis of a possible theory of civil obligation implicit in American law to reflect on the importance of paying attention to what is not said in understanding intellectual life.⁹

Finally, on the Topic of Popular Culture, Susanna Blumenthal carefully explores a mid-nineteenth century forgery prosecution to begin an exploration of the interaction of popular and legal conceptions of fraud.¹⁰ And Laura F. Edwards shows the way that popular culture simply ignored the law of marital and slave property to permit married women and women who were slaves to use textiles as an entree to participation in economic life.¹¹

5. Christopher Tomlins, *Organic Poise? Capitalism as Law*, 64 BUFF. L. REV. 61 (2016).

6. Charles Barzun, *Causation, Legal History, and Legal Doctrine*, 64 BUFF. L. REV. 81 (2016).

7. Mark Fenster, *Mr. Peabody's Improbable Legal Intellectual History*, 64 BUFF. L. REV. 101 (2016).

8. Cynthia Nicoletti, *Writing the Social History of Legal Doctrine*, 64 BUFF. L. REV. 121 (2016).

9. John Henry Schlegel, *On Absences as Material for Intellectual Historical Study*, 64 BUFF. L. REV. 141 (2016).

10. Susanna Blumenthal, *Humbug: Toward a Legal History*, 64 BUFF. L. REV. 161 (2016).

11. Laura F. Edwards, *Textiles: Popular Culture and the Law*, 64 BUFF. L. REV. 193 (2016).