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# HISTORIOGRAPHY, LAW, RESISTANCE: NAVIGATING THE FUTURE OF THE PAST

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Hannah Phillips



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contents and bibliography)

# Abstract

This thesis examines the relationship between historiography, law and resistance by exploring the ways in which historiography can come to be thought of as a form of resistance in its own right. In doing so it reflects on how we implicate historical knowledge in not only our understanding of what it means to resist but also what it is that is resisted, ultimately identifying the grand narrative form as its target of resistance. To do this the study draws on the theoretical insights of German historian Reinhart Koselleck, paying particular attention to how his theory of multiple temporalities is able to expand our understanding of history and its writing to reveal how alternative engagements with historiography can challenge the power structures within which they are produced.

For the sake of clarity this thesis has been divided into two parts. In Part I the relationship between historiography and resistance is examined through an engagement with the concepts of national identity, tradition and legitimacy. Here it is argued that popular social science based understandings of resistance are too narrow, creating a need to imagine a form of resistance that is able to operate within the confines of power relations when other (more visible) forms of resistance appear impossible. The relationship between historiography and resistance is presented as a potential solution to this problematic narrowing, with engagements with alternative (more flexible) theories of history writing being cast as a potential form of resistance that can be used to alter power dynamics. In Part II law is introduced into the relationship between historiography and resistance through an examination of the ancient constitution and post-Franco Spain. Here law's preoccupation with linear understandings of temporality is identified as posing a challenge to its relationship with historiography as a form of resistance, signalling a need to revisit not only law's relationship with different temporalities, but also a need to revisit its relationship with historiography more generally if it is to avoid succumbing to the lure of the grand narrative form.

# Acknowledgements

I would like to thank the Economic and Social Research Council and Kent Law School for their generous financial support, without which this thesis would not have been possible.

In addition to this I would like to thank my supervisors Professor Maria Drakopoulou, Dr Donatella Alessandrini and Professor Judy Fudge for their invaluable knowledge, time and generosity of spirit. The guidance, encouragement and patience of the first has enabled me to develop not only as a scholar but also as an individual, while the experience and vigilance of the second and third has acted as an important check on my tendency to wander. I would also like to thank my examiners Professor Shaun McVeigh and Dr José Bellido for their thoughtful comments and guidance. Any inadequacies that remain are entirely my own.

I would also like to thank my friends and family for their ongoing support and encouragement. In particular I would like to thank my parents Ann and Colin. While the former has taught me that there are many ways in which a person can be strong, the latter has taught me the value of sacrifice and hard work in a world that often overlooks the quieter forms of fortitude. In doing so they have not only furnished me with the means of facing all of the challenges that life has thrown at me so far, but have also set a standard of conduct to which I can aspire. Their love, support and belief in my dreams has sustained me during this long journey, and for that I am eternally grateful. Thanks are also owed to my sister Lucy, who has always acted as a source of reassurance when I have needed it. Finally, I would like to thank Jo Pearman and Naomi Linnell for their kindness and hospitality. Their friendship, food, folding bed and sense of humour made this journey more bearable when things became too much.

# Response to Examiners Comments

I am very grateful for the feedback provided by my examiners. I have taken their insightful comments and suggestions on board and have used them to revise my thesis accordingly. My introduction has been re-written so as to provide readers with a clearer overview of my thesis. I have started by providing a stronger thesis statement where I have delineated both the sources and limits of my argument. In doing so I have sought to position myself more clearly in relation to the literatures that I touch upon throughout my thesis. I have also sought to define my terms more clearly, which has included being more explicit about what I mean when I refer to law. For the sake of clarity (and ultimately brevity), I have removed my material on the Australian history wars, as I agree with my examiners when they say that it did not add to my central line of argument.

In order to address the methodological issues that were discussed during my viva I have decided to frame this thesis in terms of the work of Reinhart Koselleck, Hans-Georg Gadamer and Paul Ricoeur. While I agree that Foucault's genealogical method offers much promise when it comes to exploring the issues that this thesis engages with, for the purposes of this thesis I have elected to focus on exploring law's relationship with historiography and resistance via its relationship with temporality. This is something that I feel is best achieved through an engagement with Koselleck's theory of multiple temporalities, as it is via his use of philosophical hermeneutic that he is able to advance a theory of history that is able to accommodate both stasis and change. References to Foucault and concepts such as constellation and apparatus have largely been removed as they belong to a tradition of thought that in many ways stands at odds with the strain of philosophical hermeneutics that unites Koselleck, Gadamer and Ricoeur.

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# Part I

## Introduction

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*History indicates the conditions of a possible future that cannot be solely derived from the sum of individual events. But in the events which it investigates there appear structures which condition and limit room for manoeuvre in the future. History thus shows us the boundaries of the possible otherness of our future, without being able to dispense with the structural conditions of possible repetition.*

Reinhart Koselleck<sup>1</sup>

*The promise of an historical event is always more than what was actually realised. There is more in the past than what happened. And so we have to find the future of the past, the unfulfilled potential of the past.*

Paul Ricoeur<sup>2</sup>

*Modern historical research itself is not only research, but the handing down of tradition. We do not see it only in terms of progress and verified results; in it we have, as it were, a new experience of history whenever the past resounds in a new voice.*

Hans-Georg Gadamer<sup>3</sup>

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This thesis serves to contribute towards ongoing debates surrounding the nature and scope of critical legal histories by exploring the relationship between historiography, law and resistance. In doing so it aims to test the boundaries of critical legal history writing by establishing historiography as a form of resistance in its own right, extending our understanding of the nature and function of not only processes of critical legal history writing but also resistance more generally. In order to pursue such an exploration, I have elected to frame my project in terms of different philosophies of history and history writing. It is anticipated that such an

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<sup>1</sup> Reinhart Koselleck, 'Representation, Event, and Structure' in *Futures Past: On the Semantics of Historical Time* (Keith Tribe tr, Columbia University Press 2004) 114

<sup>2</sup> Paul Ricoeur, 'Memory and Forgetting' in Richard Kearney and Mark Dooley (eds), *Questioning Ethics: Contemporary Debates in Philosophy* (Routledge 1999) 14

<sup>3</sup> Hans-Georg Gadamer, *Truth and Method* (Joel Weinsheimer & Donald G. Marshall trns, Continuum 2012) 285



approach will facilitate an exposition of the ways in which history writing, and its interactions with law's writing, have been instrumental in the formation and subsequent manipulation of notions of national identity, tradition and legitimacy. By focusing on issues of national identity and the deployment of notions of tradition and legitimacy when examining the potential relationship between historiography, law and resistance I will draw attention to how certain forms of historiography have been used to perform specific functions in both times of unrest and in the immediate aftermath of widespread conflict. While some of these functions will be associated with the grand narrative form and attempts to create strong singular narratives designed to form a bridge between the past and present, others will be identified as potential instances of resistance to such narratives. As a consequence of this, my observations will focus on the temporal assumptions that are built into forms of historiography that are used to underpin appeals to shared national identities. More specifically, my observations will be concerned with examining the scope of theories of history writing that rely on linear understandings of temporality by reflecting on the broader consequences of histories that are produced with such understandings of temporality in mind. It is anticipated that rather than preventing or settling conflicts, such histories bear the potential to provoke or perpetuate conflicts by forcing those that are either unwilling or unable to conform to the singular narratives that emerge from these histories to find alternative outlets of expression. Insights found in the work of German historian Reinhart Koselleck will be drawn upon to make this point more fully, as it is through his theory of multiple temporalities that I believe it is possible to reveal some of the shortfalls of adopting a linear view of temporality when assessing both the nature and function of history writing. The significance of this point will be reiterated throughout this thesis, not only in relation to exchanges between history writing and the entrenchment of national identities and notions of tradition and legitimacy but also in relation to how law can be seen to mediate this relationship. All of this will be done with the view of establishing history and its writing as something capable of informing our understanding of what it means to resist and what it is that is to be resisted, especially when thought of in relation to law.

In order to provide my exploration of the relationship between historiography, law and resistance with direction I will seek to answer the following questions:

1. To what extent can historiography be linked to ideas of resistance?

- a. How can processes of history writing become bound to our understanding of what it means to resist and what it is that is resisted?
  - b. In what ways can claims of national identity, tradition and legitimacy shape an encounter between historiography and resistance?
  - c. To what extent can our view of the relationship between past, present and future create renewed possibilities for resistance?
2. In what ways, if any, can a historical understanding of law be implicated in the relationship between a historiography of resistance?
- a. What is the relationship between a historiography of law and a historiography of national identity? Can they be thought to be constitutive of a historiography of resistance?
  - b. Can memory be thought of as a site in which law and historiography as resistance can meet?

For the sake of clarity, this thesis will be divided into two parts where the first set of questions stated above will form the focus of Part I and the second set of questions will form the focus of Part II. The first part of this thesis will examine how the concept of resistance has been understood within the social sciences, paying particular attention to the ways in which this concept has been both narrowed and extended over time. It will examine the framework within which resistance has often been put to work, identifying an opportunity to move away from strict definitions that confine resistance to particular contexts towards more flexible and subtle understandings of resistance that do not concern themselves with readily quantifiable results. The concepts of national identity, tradition and legitimacy will then be used to identify history and its writing as a potential site of resistance by revealing how history has often been put to work to secure very narrow visions of the present. Here Koselleck's theory of history and temporality will be explored as a means of resisting the effects of such histories by drawing attention to the broader consequences of adopting linear understandings of temporality to construct narrow visions of the present. In order to contextualise this issue, I will examine specific examples of more normative forms of history writing to show how less visible sites

of resistance often emerge in relation to singular visions of the past. This will result in me identifying the grand narrative form as an important target of resistance where stories of legitimation ought to be rooted in localised “little” narratives rather than metanarratives that seek to organise and legitimate present political arrangements by positing clear points of origin.

The second part of this thesis will then move on to examine how law’s writing can be seen to provide a frozen picture of history by borrowing from the stabilising influence of the grand narrative form and the linear sense of temporality that it endorses, thus indicating a need to revisit law’s understanding of the nature and scope of history and its writing. This issue will be examined in light of two case studies where history writing and law’s writing have met to secure particularly narrow understandings of national identity, tradition and legitimacy. The first case study will relate to the discourses surrounding the use of the Ancient Constitution during (and indeed after) the English Civil Wars and the second will relate to post-Franco Spain. Both case studies will aim to expose the limitations of linear understandings of temporality by acting as sites of engagement with the writing of history where law is brought into being through its relation to specific historical events. In both instances law will be cast as an expression of the historical processes by which a society maintains and reproduces itself, establishing a strong connection between law and history that cannot be ignored. More specifically both of these examples will demonstrate how processes of state formation can be tied to static representational practices, something which will, in turn, indicate a reliance on the the grand narrative form as a means of securing exchanges between history and law.

By orienting my thesis in this way I will bring my use of Koselleck to navigate the relationship between historiography, law and resistance into conversation with a number of existing literatures. These literatures relate to examples of law’s story of legitimation, literatures relating to law and temporality, literatures on legal history, literatures that attempt to bridge the gap between research on temporality and legal history and literatures that seek to determine the operational scope of key concepts such as resistance within the social sciences. Due to the diverse and rich nature of these literatures, it will be important to look closely at the different types of histories that these literatures can be associated with and how they become tied to particular ideological standpoints. However, it will be important to note that the intended outcome of this thesis is not to place myself in a position where I am able to say

that one type of history is “better” than another. Instead, I simply wish to focus on their distinguishing features and the broader consequences of their use. My interventions will not, therefore, be made at the level of the substance of historical events, instead, they will be made at the level of methodological reflection.<sup>4</sup> By this I mean to say that it is not my intention to attempt to write a critical legal history, but rather to examine some of the considerations that emerge when attempting to do so. I have elected to focus on issues of methodological reflection because while I agree that recent scholarship concerning law and history is indeed indicative of a genuine desire to find new and innovative ways to use history to further enhance critical legal scholarship, I nevertheless believe that the methodological reflections that usually accompany such surges in intellectual activity are lagging behind. So instead of focusing on the identification of new sites of historical legal scholarship, I would prefer to direct attention towards how we, as legal scholars, conceive of the relationship between law’s writing and history writing more generally. It is for this reason that I will make use of insights drawn from the philosophy of history to identify the potential for more fluid understandings of temporality to inform our interest in history and its writing, something which will, in turn, hopefully, serve to broaden our perception of the relationship between law, historiography and resistance.

i. Establishing Connections: Historiography, Law and Resistance

The nature of the relationship between law and historiography is difficult to map, not least of all because of how interactions between law and historiography as distinct academic disciplines have come to be subsumed within broader projects that aim to re-orient our study of law on a more general level. Whether this be in relation to the spread of socio-legal studies within the academy or transformations within the critical legal studies movement in both North American and European contexts, exchanges between law and historiography have often faded into the knotty fabric of our endeavours without being subjected to the processes of unremitting methodological reflection that are frequently associated with these

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<sup>4</sup> By focusing on issues of methodological reflection I aim to explore the work of the legal scholar within the field of theory rather than the work of the legal scholar within the field of social sciences or the philosophy and practice of history writing. In doing so I limit the scope of this thesis so that it focuses on issues of theory rather than practice. So rather than focusing on the different things that historians and lawyers do, I instead focus on the shared theoretical concerns of both lawyers and historians and attempt to bring them into conversation with literatures on the relationship between law’s writing and history writing.

approaches to legal scholarship. For example, while many socio-legal approaches to legal scholarship can be seen to borrow their conceptual apparatus from disciplines such as sociology and anthropology with a keen awareness of the ethical implications of doing so, the same cannot always be said of borrowings from history. Similarly, while a diverse range of approaches to the study of law have been embraced by the critical legal studies movement, here too there is a noticeable silence when it comes to reflecting on the extent to which processes of history writing are somewhat unwittingly being used to set the boundaries of our critical endeavours.

It is with this in mind that I advocate a return to Maitland's observations concerning the need to think carefully about not only the nature of the relationship between law's writing and historiography, but also the importance of reflecting on the writing of legal history as a process fraught with difficulties. In his famous lecture delivered in 1888, Matiland warned that:

A mixture of legal dogma and legal history is in general an unsatisfactory compound. I do not say that there are not judgments and text-books which have achieved the difficult task of combining the result of deep historical research with luminous and accurate exposition of existing law- neither confounding dogma nor perverting the history; but the task is difficult. The lawyer must be orthodox otherwise he is no lawyer; an orthodox history seems a contradiction in terms. If this truth is hidden from us by current phrases about "historical methods of legal study", that is another reason why the history of our law is unwritten. If we try to make history the handmaid of dogma she will soon cease to be history.<sup>5</sup>

Debates surrounding the potential commensurability of law and history on a disciplinary level have largely remained untouched since the above statement was made. Instead, legal scholars have often bypassed the uncomfortable task of looking more closely at the relationship between law's writing and history writing in

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<sup>5</sup> Frederic William Maitland, *Why the History of English Law is Not Written: An Inaugural Lecture Delivered in the Arts School at Cambridge on 13<sup>th</sup> October, 1888* (Cambridge University Press 1888) 14-15  
<<https://archive.org/stream/whyhistoryengli00maitgoog#page/n22/mode/2up>>  
accessed 22 March 2016

favour of simply identifying history as something that can be used to either delineate the scope of a project in temporal terms or to contextualise a pressing problem to be addressed. I would argue that such a willingness to adopt a view of history as a straightforward contextualising device limits our use of history on two important levels. Firstly, by focusing on the contextualising function of history we are missing opportunities to extend both the analytical and critical potential of history writing in relation to law. By this I mean to say that by focusing on how history can be used to provide vital context to present issues or particular developments in the practices of the law we often overlook the elements of conflict that accompany history and its writing in the first place. In doing so we perhaps narrow the scope of our endeavours too quickly, allowing assumptions about a presumably stable and univocal past to seep into the framing of our projects and the questions that we pose. Secondly, I would argue that by focusing on issues of context we deny ourselves a chance to re-evaluate our understanding of the relationship between past, present and future. In doing so we overlook the renewed possibilities for resistance that emerge when we engage with history and its writing and instead risk allowing context to prefigure our findings. It is for this reason that I will attempt to recapitulate Maitland's plea for a turn to history, albeit with a slightly different aim in mind. Rather than urging the lawyer to gather together traces of law's development with the view of constructing evolutionary narratives of the *practices* of law and an appreciation of the different things that are done by lawyers and historians, I will suggest that history (or to be more precise history writing) could be used to facilitate a re-evaluation of how law interacts with other key practices and concepts by shifting my focus onto issues of methodology. In particular, I will suggest that by taking a step back to look at issues of methodology, it is possible to use history to broaden our understanding of resistance and its relationship with law by relocating discussions to the field of theory.

The task of re-evaluating the relationship between law and resistance via its interactions with historiography is a worthwhile endeavour as while law and its practices can easily be associated with repression, work within the critical legal studies movement has also shown how law can be linked to resistance.<sup>6</sup> By placing law, historiography and resistance in conversation with each other I hope to add to this literature, extending discussions to include a consideration of how our

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<sup>6</sup> For an example of this see: Ian Grigg-Spall and Paddy Ireland, 'Law as Resistance' in Peter Fitzpatrick (ed), *Law as Resistance: Modernism, Imperialism, Legalism* (Ashgate 2008) 35

understanding of each can be extended through methodological reflection. In order to do this, I will need to construe law broadly by characterising it as something that is constructed by reference to historical events, thus firmly establishing law as an inherently social phenomenon.<sup>7</sup> One way of achieving this involves thinking of law as a tradition, as something that is always brought into being through its relation with history.<sup>8</sup> However in order to think of law in this way I will need to adopt a Gadamerian understanding of tradition, as it will only be through a more flexible understanding of tradition that it will be possible to argue that the value and force of law is derived from its continual performance rather than an origin story that takes the form of a grand narrative.<sup>9</sup> To make this point more fully, and explore the temporal insights that can be gained from viewing law in this way, I will frame my exploration of the relationship between historiography, law and resistance using the concepts of national identity, tradition and legitimacy as they can be understood through Koselleck's approach to the study of concepts. This is because by suggesting that all social and political concepts derive their meaning from the semantic fields from within which they operate and the temporal assumptions that are built into them, Koselleck alluded to the idea that such concepts contain within them a program for action that is capable of shaping relationships.<sup>10</sup> When thought of in this way, it is possible to see how notions of national identity, tradition and legitimacy are able to act as navigational instruments that do not only record given facts at any moment in time but also inform the formation of consciousness. The processes of history writing that feed into their construction, therefore, act as an important insight into how notions of national identity, tradition and legitimacy *do*

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<sup>7</sup> By characterising law as a social phenomenon I move away from the work of Yan Thomas and his work on the Roman conception of law as object. For a discussion of the broader consequences of understanding law as object see: Alain Pottage, 'Law after Anthropology: Objects and Technique in Roman Law' (2014) 31(2/3) *Theory, Culture and Society* 147.

<sup>8</sup> For example in chapter four it is possible to see how law comes into being through the narrative of the Ancient Constitution, something which in turn makes it possible to see how law can be connected to history via the grand narrative of modernity. For a discussion on the drawbacks of this see: Gurminder K. Bhambra, 'Historical Sociology, Modernity, and Postcolonial Critique' (2011) 116(3) *The American Historical Review* 653.

<sup>9</sup> The significance of locating the force and value of law in its continual performance relates to how such a view of law could release it from the grand narrative form, creating an opportunity for law to re-forge its relationship with history and processes of history writing.

<sup>10</sup> More will be made of this point in the next chapter where I introduce Koselleck's theory of history writing as a potential form of resistance to the grand narrative form.

things. Which in turn makes it possible to identify history and its writing as an important locus of activity. Regarding law as a tradition will, therefore, allow me to see law as something that is constituted by an ongoing dialogue between experience and expectation, thus securing an enduring connection between law and history that is in constant need of re-evaluation and re-adjustment due to its concomitant attraction to the past and pull towards the future.

By construing law as a tradition I also aim to expand my understanding of resistance by showing how history and how we choose to engage with its (re)production can be seen to betray some of our innermost beliefs about not only who we are, where we come from and where we are going, but also our broader ideological commitments and goals. Moreover, I hope to show how our attitude towards the past can reveal to others what is important to us, how we organise the world around us and that which we fear the most, by emphasising how we have attempted to control the reach of the past in the present using law. Engagements with history and its writing will, therefore, be characterised as being intimately linked to particular values whether we desire them to be or not, and it is because of these values that historical enquiry will be identified as a source of great promise. However, while I acknowledged that this promise bears the potential to manifest itself in many different ways, for the purpose of this thesis I will confine myself to the stabilising and destabilising function that is embedded within history itself. I will achieve this by showing how history, like law, is something that is continuously re-enacted rather than something that can be objectively sought out, thus casting it as an important actor in everyday life. There are two central themes of historiography that will assist me here, the first of which relates to the writing of grand narratives and the other to historiography as a method of reflection. The writing of grand narratives (especially in relation to state formation) will be of crucial importance to my identification of potential targets of resistance, as it will be through a reflection of their universalising effects in chapter two that I will establish their propensity to secure fixed/frozen notions of national identity, tradition and legitimacy. The propensity for historiography to operate as a method of reflection will then be used to allude to a means of re-visiting more fixed notions of national identity, tradition and legitimacy by creating an opportunity to explore the challenges surrounding historical representation, especially when examined in the context of the temporal assumptions that underpin the grand narrative form.



ii. Sources of Research: Identifying my Interlocutors

In chapters two, four and five instrumental understandings of history that focus on the ideological value of past events will be contrasted against more critical theories of history writing that regard history as a mode of reimagining or rethinking the present.<sup>11</sup> This will be done with the view of revealing the function that is performed by the temporal assumptions that underpin particular forms of historiography, something which will, in turn, enable me to assess the extent to which our understanding of the relationship between past, present and future creates renewed possibilities for resistance. Chapters four and five will serve to further explore these issues by assessing the extent to which a historiography of law and a historiography of national identity can be thought to be constitutive of a historiography of resistance. In order to provide context to my exploration of these questions, I first need to engage with a number of interlocutors. Broadly speaking these interlocutors fall into three overarching categories: those concerned with developments within legal history, those concerned with the writing of normative history and those concerned with refining social science based understandings of resistance. To start with, in chapter one I will outline some common social science based conceptualisations of resistance, focusing on the ways in which attempts have been made to define this concept narrowly. In doing so I will introduce the problem of intelligibility that is created when resistance is read/interpreted through fixed categories, suggesting that the potential for history to act as a form of resistance only becomes visible if we eschew the temptation to develop strict definitions.

In chapter two I will then move on to examine some specific examples of normative history where static representational practices have been deployed in an attempt to construct strong notions of national identity. In doing so I will draw attention to the repressive aspects of the grand narrative form and the universalising discourses that they feed into. The examples I have selected here pertain to contexts where national identity has deliberately been constructed along narrow lines to provide relatively new regimes with strong roots that are designed to protect

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<sup>11</sup> For example, many nationalist histories have relied upon the ideological value of the past to add justificatory force to their arguments in the present. For a well known example of such a history see: Theodor Herzl, *The Jewish State* (Sylvia D'Avigdor tr, Quid Pro Books 2014). For an example of an attempt to re-imagine the present/reveal conditions of possibility using historical enquiry see: Michel Foucault, *Maddness and Civilisation: A History of Insanity in the Age of Reason* (Richard Howard tr, Routledge 2006).

them from potential challengers. They also pertain to situations of where repressive approaches to the past have attracted a great deal of criticism not just from those that have been deliberately excluded from sanitised versions of the past, but also those that have been co-opted into them against their will. Arguments advanced by critics of such histories will be examined in detail, with particular care being given to looking at how concerns about attempts to establish singular national identities that are predicated upon the denial/suppression of the other are used to advocate more wide-ranging engagements the past. While I will ultimately agree with many of the conclusions that are reached by critics of such histories when it comes to the need for plurality, I will distinguish myself from them by turning to Koselleck and Gadamerian hermeneutics to explore the utility of a more malleable understanding of tradition that is less threatened by change/alternative accounts rather than attempt to advocate a “more inclusive” approach to history writing.<sup>12</sup> I will do this not because I wish to diminish the value of what have come to be recognised as emancipatory histories of the repressed, but rather because I wish to distinguish forms of historiography that I identify with resistance from those concerned with fixed meanings and other trappings associated with the grand narrative form.

Another form of historiography that I wish to distinguish myself from because of its connections with the grand narrative form is that of epiphenomenalism. Here an individual’s thoughts and convictions are divorced from their actions by embracing a belief that the mind ‘although perfectly real, does not causally determine our behaviour’,<sup>13</sup> something which can be said to project a potentially repressive view of history.<sup>14</sup> The potentially repressive aspects of histories that adhere to this view of the mind arguably stem from the belief that mental activities are thought to emanate from physical processes and not the other way around.<sup>15</sup> Marxist

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<sup>12</sup> By turning away from attempts to write “more inclusive” histories I am not attempting to argue against giving voice to previously suppressed histories. Instead I am attempting to relocate the debate and make an intervention on a methodological level.

<sup>13</sup> Peter Bieri, ‘Trying Out Epiphenomenalism’ (1992) 36(3) *Erkenntnis* 277, 283

<sup>14</sup> For an example of the application of epiphenomenalism in historical method see: Lewis Namier, *The Structure of Politics at the Accession of George III* (Palgrave Macmillan 1978).

<sup>15</sup> John Greenwood, ‘Whistles, Bells, and Cogs in Machines: Thomas Huxley and Epiphenomenalism’ (2010) 46(3) *Journal of History of Behavioural Sciences* 249, 277

historiography has tended to adopt such an approach in the sense that focuses on 'determinate social, political or economic structures in [its] analysis of meaning',<sup>16</sup> creating a specific framework through which to examine the past that does not account for the role that an individual may play in the (re)shaping of these structures. For example, Marxist historian Eric Hobsbawm claimed that:

... plan historical experience without much theory can always tell us a good deal about contemporary society. This is partly because human beings stay much the same and human situations recur from time to time. Just as older people can often say "I've seen this before"; so can historians, on the basis of the accumulated record of my generation.<sup>17</sup>

Hobsbawm argued that the past is the most 'useful tool for coping with constant change',<sup>18</sup> suggesting that despite arguments to the contrary lessons can and must be learnt from history (an understandable desire given the context out of which his work emerged). As a result of this belief, Hobsbawm centred much of his historical work around the notion of the *dual revolution*, identifying the French Revolution and the Industrial Revolution as being of central importance to the creation of modern Europe.<sup>19</sup> However, while his view of history in some ways secures its continued relevance to the present, this sense of relevance comes at a price. If we approach the past in an attempt to address questions the present there is a danger that we read intentions into past occurrences/writings that did not exist within the minds of those that created them. In addition to this, it is possible to see how a notion of progress is incorporated into what Hobsbawm identified as the didactic potential of the past, something that does not necessarily sit well with my understanding of history writing as something that does not necessarily have to be equated with acts of prefiguration to secure its significance.

However benevolently framed, attempts to locate the value of history and its writing in its didactic potential have only too often seen history put to work in the service

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<sup>16</sup> Robert Lamb, 'Quentin Skinner's Revised Historical Contextualism: A Critique' (2009) 22(3) *History and the Human Sciences* 51, 56

<sup>17</sup> Eric Hobsbawm, *On History* (Abacus 1997) 36

<sup>18</sup> Eric Hobsbawm, *On History* (Abacus 1997) 23

<sup>19</sup> Eric Hobsbawm, *The Age of Revolution: Europe 1789-1848* (Abacus 1962)

of ideology, creating distorted views of the past that have been used to legitimate very narrow visions of the present. The false sense of legitimacy that history of this kind can lend to particular visions of how things ought to be is potentially dangerous and can be seen to manifest itself in attempts to (re)create histories of national identity that secure the privileging of some individuals over others. It is for this reason that theories of history writing that focus on the didactic potential of the past will be excluded from the theories of history writing that I will associate with resistance. Instead, they will be identified as potential targets of resistance. In order to make this point more fully, chapters four and five will engage with some of the issues that surround writing history from the perspective of the present.<sup>20</sup> In doing so they will indirectly build on the debates initiated by G.W.F. Hegel where histories are categorised according to the relationship their authors have with the events that they engage with.<sup>21</sup>

Hegel's claim that there are three main types of history (original, reflective and philosophic) will be helpful when attempting to assess the functions that are being performed by particular engagements with history and its writing. This is because while for Hegel original history is produced by individuals that have lived through the events that they are describing, the limitations that he imposed on this form of history nevertheless introduce an element of selectivity that can be used to undermine the inherent value of such histories.<sup>22</sup> By claiming that original history can only be generated by people that know 'what they are or what they wanted'<sup>23</sup> he excluded more 'obscure modes of memory'<sup>24</sup> from the history writing process. In doing so he relegated legends, traditions, myths and other oral based practices

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<sup>20</sup> For an interesting account of debates surrounding not only the potential utility but also the potential dangers of presentism see: Craig Bourne, *A Future for Presentism* (Clarendon Press 2006).

<sup>21</sup> For example while Hegel identified original history as being particularly authoritative because of who it is produced by, he nevertheless identified it as being of limited value to present problems. He claimed that while lessons can be discerned from such histories, these lessons cannot be directly applied to present problems. Instead all they tell us is how the past was experienced by its authors.

<sup>22</sup> G.W.F. Hegel, *Introduction to the Philosophy of History* (Leo Rauch tr, Hackett Publishing Company 1988) 3

<sup>23</sup> G.W.F. Hegel, *Introduction to the Philosophy of History* (Leo Rauch tr, Hackett Publishing Company 1988) 4

<sup>24</sup> G.W.F. Hegel, *Introduction to the Philosophy of History* (Leo Rauch tr, Hackett Publishing Company 1988) 4

to obscurity. Hegel justified characterising original history in this way by stating that the 'culture of the author'<sup>25</sup> and the 'events in his work'<sup>26</sup> are inextricably bound to one another. For him this meant that only people of 'high social standing' operating from 'a superior position'<sup>27</sup> were able to create a clear overview of the events they were recording, providing the examples of Herodotus, Thucydides and Xenophon as masters of this historical form. Here, Hegel can be seen to betray a tendency within western historiography to deliberately suppress historical accounts produced by individuals that are either unwilling or unable to articulate their experiences in particular textual forms. In doing so he reveals how the writing of history has traditionally been tied to an office (i.e. position of power), something which has often resulted in the privileging of singular approaches to the past. This is something that will become particularly apparent in chapter four where it is possible to see how narratives surrounding the Ancient Constitution were used to stifle the emergence of alternative understandings of political obligation.

Hegel's second form of history, reflective history, is also worth bearing in mind when attempting to assess the functions that are performed by certain approaches to history writing as it focuses more closely on processes of mediation. His decision to subdivide reflective history into universal history, pragmatic history, critical history and specialised history creates an opportunity to see how historians are able to develop different strategies for approaching events and materials drawn from a different time. For example, by constructing overviews of the past using categories of their own making, authors of reflective histories are confronted with the challenge of establishing the extent to which they are able to extricate themselves from their work.<sup>28</sup> Specialised reflective histories raise further questions about the relationship between the historian and the events that they

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<sup>25</sup> G.W.F. Hegel, *Introduction to the Philosophy of History* (Leo Rauch tr, Hackett Publishing Company 1988) 4

<sup>26</sup> G.W.F. Hegel, *Introduction to the Philosophy of History* (Leo Rauch tr, Hackett Publishing Company 1988) 4

<sup>27</sup> G.W.F. Hegel, *Introduction to the Philosophy of History* (Leo Rauch tr, Hackett Publishing Company 1988) 6

<sup>28</sup> For further discussion on the importance of where the historian places themselves in relation to their work it is helpful to consider Leopold von Ranke's position on this. See: Leopold von Ranke, 'On the Relations of History and Philosophy' in *The Theory and Practice of History* (Georg G. Iggers trs, Routledge 2010).

engage with, as it is here that Hegel saw a use for ‘universal viewpoints’<sup>29</sup> in the construction of specialised histories of art, law or religion. Such histories would appear to feed into the grand narrative form by adopting a singular focus, creating important questions as to the scope of specialised histories in general. Hegel’s final (and preferred) form of history was philosophic history.<sup>30</sup> However, like the previous two, this type of history has also important questions. Historian Karl Popper has suggested that Hegelian philosophic history is enmeshed within a very particular vision of progress, resulting in a linear understanding of temporality being built into histories of this kind.<sup>31</sup> All of these observations make it possible to identify some core tensions that exist within history writing itself, as it is possible to observe how the type of history that is being written will ultimately come to impact on its scope and potential uses.

While some historians have welcomed the challenge of examining how their chosen form of history impacts on the broader function that their work performs, others have been less accommodating. For example, Irish historian J.B. Bury associated such reflections with a tendency to confuse history with literature, something that he condemned when he asserted that:

I may remind you that history is not a branch of literature. The facts of history, like the facts of geology or astronomy, can supply material for literary art; for manifest reasons they lend themselves to artistic representation far more readily than those of the natural science; but to clothe the story of human society in a literary dress is no more the part of a historian as a historian, than it is the part of an astronomer as an astronomer to present in an artistic shape the story of the stars.<sup>32</sup>

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<sup>29</sup> G.W.F. Hegel, *Introduction o the Philosophy of History* (Leo Rauch tr, Hackett Publishing Company 1988) 9

<sup>30</sup> G.W.F. Hegel, *Introduction o the Philosophy of History* (Leo Rauch tr, Hackett Publishing Company 1988) 62

<sup>31</sup> Karl Popper, *The Open Society and Its Enemies: Volume 2 Hegel and Marx* (Routledge 2002) 40

<sup>32</sup> J.B. Bury, *Selected Essays* (Cambridge University Press 1968) 9

A century later, Lawrence Stone lamented that 'language-based models of criticism' have plunged history as a distinct academic discipline 'into a crisis of self-confidence about what it is doing and how it is doing it.'<sup>33</sup> He claimed that increased epistemological and methodological reflection had resulted in historical texts being reduced to 'a mere hall of mirrors reflecting nothing but each other, and throwing no light upon the "truth", which does not exist.'<sup>34</sup> Statements such as these represent an attempt to close the borders of history to the influence of disciplines such as philosophy and literature where facts are often thought of on more flexible terms. Historians that have adopted this view have sought to maintain the integrity of their discipline by establishing a distance between history and other more subjective forms of academic enquiry, emphasising the idea of identifiable and verifiable historical data or the presence of strong (truthful) grand narratives.

The historian Hayden White has responded to this debate by stating that the 'insistence that only historians know what historians really do is similar to modern scientists' objections to being studied by sociologists, ethnographers, philosophers and *historians*.'<sup>35</sup> He has suggested that little is to be achieved by attempting to ignore the influence of other disciplines and that in the past history has itself encroached upon the remit of other disciplines in order to expand its own borders. I would argue that Koselleck took this point a step further when reflecting on the role of theory in his own work by stating that in order to escape total isolation (and perhaps marginalisation) history must consider 'a new relationship to other disciplines.'<sup>36</sup> In order to negotiate a new relationship with other disciplines, Koselleck indicated a need for historians to "recognise... [the] need for theory or, rather, face the necessity of doing theory if history still wants to conceive of itself as an academic discipline.'<sup>37</sup> This is not to say that in order to survive be believed

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<sup>33</sup> Lawrence Stone, 'History and Postmodernism' (1991) 131 *Past and Present* 217, 217

<sup>34</sup> Lawrence Stone, 'History and Postmodernism' (1991) 131 *Past and Present* 217, 217

<sup>35</sup> Hayden White, 'Response to Arthur Marwick' (1995) 30 *Journal of Contemporary History* 223, 245

<sup>36</sup> Reinhart Koselleck, 'The Need for Theory in History' in *The Practice of Conceptual History: Timing History, Spacing Concepts* (Kerstin Behnke tr, Stanford University Press 2002) 1,1

<sup>37</sup> Reinhart Koselleck, 'The Need for Theory in History' in *The Practice of Conceptual History: Timing History, Spacing Concepts* (Kerstin Behnke tr, Stanford University Press 2002) 1,1

that history must become more like other disciplines, instead he simply proposed that 'we can push our way out of our own characteristic bottlenecks only by concentrating on those points that are themselves in need of theory or that promise theoretical insights.'<sup>38</sup> Here we are able to see how an engagement with other disciplines has the potential to free history from its own limitations by assigning it a task that reaches beyond the act of simply recording or restating past events. In adopting a more fluid understanding of what history is or can be the historian is presented as being able to approach their chosen objects of study from a wider range of perspectives with greater sensitivity. In addition to this, by acknowledging that 'by definition, all that is past does not exist' and that 'history is whatever is *represented* as having hitherto existed'<sup>39</sup> we are able to see history as something that is engaged in a constant dialogue rather than as something that is fixed and immutable. The historian's work is, therefore, recast as being bound to particular 'ideological positions'<sup>40</sup>, thus making it possible to see a space within history and its writing for renegotiation and possibly even resistance.

Debates such as those outlined above do not, however, appear to have been widely acknowledged within historically oriented legal scholarship. Instead it is possible to see within much legal history scholarship an assumption that the past is governed by three principles: that 'the past is gone forever', that 'to understand the meaning of a text you must first put it in the context of its time and place'; and that 'you cannot tell where you are going unless you know where you are coming from.'<sup>41</sup> Constantin Fasolt has argued that these principles rest upon 'assumptions about time and eternity, truth and meaning, [and] freedom and responsibility'<sup>42</sup> that

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<sup>38</sup> Reinhart Koselleck, 'The Need for Theory in History' in *The Practice of Conceptual History: Timing History, Spacing Concepts* (Kerstin Behnke tr, Stanford University Press 2002) 1, 2

<sup>39</sup> Barry Hindess and Paul Q. Hirst, *Pre-Capitalist Modes of Production* (Routledge 1975) 309

<sup>40</sup> Ann Wordsworth, 'Derrida and Foucault: Writing the History of Historicity' in Derek Attridge, Geoff Bennington and Robert Young (eds), *Post-Structuralism and the Question of History* (Cambridge University Press 1987) 116

<sup>41</sup> Constantin Fasolt, *The Limits of History* (The University of Chicago Press 2013) ix

<sup>42</sup> Constantin Fasolt, *The Limits of History* (The University of Chicago Press 2013) ix



are in dire need of revisiting. He expresses this belief by asserting that 'our knowledge of the past cannot be separated from the actions that we take to change our fate'<sup>43</sup>, forging a strong connection between history and politics. In addition to this, he draws attention to an aspect of history that would appear to go unrecognised in much legal scholarship, namely the idea that history 'is not as innocent as it pretends to be'; and that because of this we ought to see it as 'a weapon that was invented on a battlefield, a dangerous form of knowledge that can do harm to both its subjects and its practitioners.'<sup>44</sup> However rather than incorporating these considerations into our understanding of how law relates to history and its writing, we would appear to repeatedly return to the grand narrative form that has long since been discredited within both socio-legal studies and the critical legal studies movement in when attempting to tie history to law.<sup>45</sup>

As legal scholars, our habitual reliance on the grand narrative form is somewhat counterintuitive, especially when thought of in relation to the great lengths that many scholars have gone to when carving out critically oriented projects in an attempt to distinguish themselves from that which went before. Nevertheless, while the irony of using one grand narrative to replace another grand narrative is yet to be widely recognised within legal scholarship, some historians have come to recognise the challenges faced by lawyers when attempting to move away from universalising discourses. For example, historian Barbara Weinstein has commented on how in some contexts postcolonial studies has inadvertently 'revived or sustained an interest in the grand historical narrative' despite a more general move away from the grand narrative towards the privileging of 'microhistories'<sup>46</sup>, a form of history writing that bears the potential to act as a form

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<sup>43</sup> Constantin Fasolt, *The Limits of History* (The University of Chicago Press 2013) ix

<sup>44</sup> Constantin Fasolt, *The Limits of History* (The University of Chicago Press 2013) 3-4

<sup>45</sup> When referring to the grand narrative form I draw on Jean-François Lyotard's work on grand narratives, more specifically his discussions in: Jean-François Lyotard, *The Postmodern Condition: A Report on Knowledge* (Geoff Bennington and Brian Massumi trs, Manchester University Press 1986)

<sup>46</sup> Barbara Weinstein, 'History Without a Cause? Grand Narratives, World History, and the Postcolonial Dilemma' (2005) 50(1) *Internationaal Instituut voor Sociale Geschiedenis* 71, 71-72

For example, within the growing field of world history it is possible to see debates on the return of the grand narrative form emerge. For a collection of essays in this

of resistance. Weinstein has suggested that 'far from discarding the master narrative, or disengaging from concepts of causation' attempts to revise the 'standard macro-narrative of "Western civilisation" have come to treat it as so thoroughly embedded in our cultural framework that it does not even require acknowledgement.'<sup>47</sup> She argues that because of this apparent naturalisation of macro-narratives, instead of rejecting the master/grand narrative form we have secured its success as 'the historians "common sense".'<sup>48</sup> As a consequence of this I would argue that many innovative projects directed at critiquing 'traditional historiography'<sup>49</sup> are being held back by an ongoing commitment to law's relationship with the grand narrative form.

In order to examine the issues identified above in greater detail part two of this thesis will focus on specific engagements between law and history where the grand narrative form can be seen to shape law's perception of the nature and function of history writing. While chapter three will focus on providing an overview of some of the literatures on law and temporality with the view of revealing law's commitment to linear understandings of temporality, chapters four and five will explore how this commitment has played out in practice. Chapter three will seek to examine some of the tensions that have emerged amongst legal historians with regards to law's uses and abuses of processes of history writing by building on the concerns raised by Robert W. Gordon in the context of the North American strain of the critical legal studies movement. In 1984, Gordon surveyed the field of socio-legal history with the view of advancing a guide to the various theoretical and methodological positions that had come to be adopted by legal historians working within the academy. In doing so he sought to draw attention to a narrowing in American legal scholarship that he believed to result from an increasingly problematic commitment

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field see: Gayan Prakash, *After Colonialism: Imperial Histories and Postcolonial Displacements* (Princeton University Press 1994).

<sup>47</sup> Barbara Weinstein, 'History Without a Cause? Grand Narratives, World History, and the Postcolonial Dilemma' (2005) 50(1) *Internationaal Instituut voor Sociale Geschiedenis* 71, 77

<sup>48</sup> Barbara Weinstein, 'History Without a Cause? Grand Narratives, World History, and the Postcolonial Dilemma' (2005) 50(1) *Internationaal Instituut voor Sociale Geschiedenis* 71, 77

<sup>49</sup> Barbara Weinstein, 'History Without a Cause? Grand Narratives, World History, and the Postcolonial Dilemma' (2005) 50(1) *Internationaal Instituut voor Sociale Geschiedenis* 71, 82

to an understanding of law as a 'functional response to a typical modernising process.'<sup>50</sup> He attached the label of *evolutionary functionalism* to this understanding of the relationship between law and society, arguing that one way of breaking free from ever more deterministic visions of law and society would involve a turn to the discipline of history, or to be more precise, historicism. Drawing on the historicism of Collingwood and Kuhn, Gordon advanced a mode of legal history that enabled him to reframe law and society as being mutually constitutive of one another. In doing so he argued that not only are 'the conditions of social life and course of historical development... radically underdetermined' but that the 'causal relations between changes in legal and social forms'<sup>51</sup> are also radically underdetermined. For Gordon, law was not to be understood simply as a response to historical processes. Instead 'legal forms and practices' were recognised as 'political products that arise from the struggles of conflicting social groups that possess very disparate resources of wealth, power, status, knowledge, access to armed force, and organisational capability.'<sup>52</sup> However, in spite of their status as a political product, Gordon argued that legal forms and practices 'tend to become embedded in relatively autonomous structures that transcend and, to some extent, help to shape the content of the immediate self-interest of social groups.'<sup>53</sup> It is for this reason that legal forms and practices cannot be explained by reference to social, political and economic factors alone. Instead, it becomes necessary to think of them as what he referred to as 'independent variables in social experience' that possess their own 'internal structures.'<sup>54</sup>

While thirty-two years have passed since Gordon made this intervention, it is still possible to see how the question of what a lawyer is to do, or can do with history still persists in many strains of legal scholarship. Gordon's identification of three key modes in which lawyers have traditionally made use of history (the static, the

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<sup>50</sup> Robert W. Gordon, 'Critical Legal Histories' (1984) 36 Stanford Law Review 57, 100-101

<sup>51</sup> Robert W. Gordon, 'Critical Legal Histories' (1984) 36 Stanford Law Review 57, 101

<sup>52</sup> Robert W. Gordon, 'Critical Legal Histories' (1984) 36 Stanford Law Review 57, 101

<sup>53</sup> Robert W. Gordon, 'Critical Legal Histories' (1984) 36 Stanford Law Review 57, 101

<sup>54</sup> Robert W. Gordon, 'Critical Legal Histories' (1984) 36 Stanford Law Review 57, 101

dynamic and the critical) are still perceptible to us today.<sup>55</sup> In static modes, lawyers argue that legal rules and principles possess fixed meanings that are derived from past usage. Such uses of history often involve the privileging of a particular time and place, establishing a sense of universality that can be attached to the legal rules and principles in question. Here, special attention is paid to the idea of original meaning and the maintenance of a sense of continuity between past and present practices. In contrast to this, those that adopt the dynamic mode argue that legal rules and principles can and must change over time to adapt to changing circumstances. Here lawyers link the evolution of law to specific instances of economic, political or social change. Gordon has suggested that in the American context dynamic modes usually draw upon narratives of 'recovery, progress, or teleology.'<sup>56</sup> While narratives of recovery focus on the attempt to recover the purity of past principles that have become corrupted by time, narratives of progress focus on laws relationship with a long-term process of historical transformation. Teleological narratives allude to what Gordon described as a 'core of immanent principle'<sup>57</sup>, suggesting that legal forms are able to work themselves pure over time. Irrespective of their differences both modes of using history are identified by Gordon as appeals to authority, whether it be to justify a continuation of the same as is seen in the static mode, or to advocate real change as can be seen in the dynamic mode. It is in this respect that he has claimed that 'the past is *read* as if it were a legal text with binding force', enabling it to control the present by reference to narratives of either 'stasis or tradition' or 'progress or decline.'<sup>58</sup> As a consequence, these modes of history pertain to a very particular understanding of history, one that is tied to ideas of a continuous link between past and present much as the grand narrative is. They identify history as an important source of legitimation and characterise the law and legal systems as 'facilitative technologies

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<sup>55</sup> Robert W. Gordon, 'The Struggle Over the Past' (1996) 44(2) *Cleveland State Law Review* 123, 124

<sup>56</sup> Robert W. Gordon, 'The Arrival of Critical Historicism' (1997) 49 *Stanford Law Review* 1023, 1023

<sup>57</sup> Robert W. Gordon, 'The Arrival of Critical Historicism' (1997) 49 *Stanford Law Review* 1023, 1023

<sup>58</sup> Robert W. Gordon, 'The Struggle Over the Past' (1996) 44(2) *Cleveland State Law Review* 123, 125

that are adaptive responses to social needs and demands.<sup>59</sup> This is why Gordon places these modes of history under the heading of evolutionary functionalism, a tradition of legal historiography that regards the 'natural and proper function of a legal system' as being the facilitation of the 'proper evolution of [a progressive] society... towards the type of liberal capitalism seen in the advanced Western nations.'<sup>60</sup>

I would argue that the prevalence of evolutionary functionalism within legal scholarship can be interpreted as an ongoing preoccupation with the grand narrative form and the sense of progress that it advances, something which has led to the perpetuation of a series of problematic assumptions regarding the nature and function of law which hinder its ability to re-shape its relationship with history. Gordon has identified five of these assumptions. Firstly, he claimed that the presence of evolutionary functionalism indicates a belief that law and society are separate yet related social categories. Society is the realm of 'social experience' whereas law is a 'specialised realm of state and professional activity'<sup>61</sup> designed to serve the needs of society. While there is great debate about the exact nature of the relationship between these two spheres within legal functionalism itself, it is nevertheless thought to be important to maintain a distinction between the two. Secondly, it is claimed that societies have needs and that these needs may be either universal in nature or they may be specific to a particular stage in social or economic development. These needs then act as both pressures and constraints that ensure society develops according to a particular evolutionary path.<sup>62</sup> This proposition alludes to a belief in an 'objective, determined, progressive social evolutionary path'<sup>63</sup> that can be followed. Again, while much variation can be seen in different accounts of this process Gordon unites them by showing how they all

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<sup>59</sup> Robert W. Gordon, "'Critical Legal Histories Revisited": A Response' (2012) 37(1) *Law and Social Inquiry* 200, 201

<sup>60</sup> Robert W. Gordon, 'Critical Legal Histories' (1984) 36 *Stanford Law Review* 57, 59

<sup>61</sup> Robert W. Gordon, 'Critical Legal Histories' (1984) 36 *Stanford Law Review* 57, 60

<sup>62</sup> Robert W. Gordon, 'Critical Legal Histories' (1984) 36 *Stanford Law Review* 57, 61

<sup>63</sup> Robert W. Gordon, 'Critical Legal Histories' (1984) 36 *Stanford Law Review* 57, 61

share what he refers to as ‘determinist teleologies whose elemental parts... are all linked together in a master process of social evolution.’<sup>64</sup> Fourthly, as a result of this legal systems are ‘described and explained in terms of their functional responsiveness to social needs.’<sup>65</sup> Here various stages of social development are identified and used to measure the functional success of particular legal forms and their institutions. Gordon’s fifth and final assumption is that legal systems adapt to changing social needs and that while the law may sometimes lag behind in certain areas, it ultimately seeks to ‘work itself pure’ to become more ‘efficient’<sup>66</sup> and responsive to social needs. Although Gordon conceded that evolutionary functionalism constitutes a varied and often diverging tradition within legal scholarship, it is nevertheless shown to be a tradition that is tied to a highly deterministic view of the world where the contingent nature of specific developments or changes are often obscured by appeals to necessity. When used in this way history becomes a force within law that serves to distort key moments in our historical consciousness.<sup>67</sup> It is perhaps for this reason that Gordon himself advocated critical modes of engaging with history, where the authority of the past is brought into question through the identification of breaks between the past and present.

For Gordon, critical modes of legal history can be defined as ‘any approach to the past that produces disturbances in the field’, that ‘unsettles the familiar strategies that we use to tame the past in order to normalise the present.’<sup>68</sup> This broad definition has resulted in the development of a broad range of historical approaches, as can be seen in the work of subsequent adherents of his strain of

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<sup>64</sup> Robert W. Gordon, ‘Critical Legal Histories’ (1984) 36 Stanford Law Review 57, 63

<sup>65</sup> Robert W. Gordon, ‘Critical Legal Histories’ (1984) 36 Stanford Law Review 57, 63

<sup>66</sup> Robert W. Gordon, ‘Critical Legal Histories’ (1984) 36 Stanford Law Review 57, 65

<sup>67</sup> For example in chapter four I will explore how the ancient constitution was used to obscure the source of the common law’s legitimacy, something which served to suppress criticisms of existing power structures and form an historical outlook shaped by notions of immemoriality.

<sup>68</sup> Robert W. Gordon, ‘The Arrival of Critical Historicism’ (1997) 49 Stanford Law Review 1023, 1024

critical legal history. However by rooting the value of history in the idea that where lawyers seek to recover 'a single authoritative meaning from the past' historians 'look for plural, contest, or ambiguous meanings'<sup>69</sup>, Gordon has assumed the absence of a sense of functionalism within the discipline of history itself. This view marginalises the ongoing debates within the discipline of history surrounding not only the nature and function of history and its writing, but also the role of theory in history. It is in this sense that I would suggest that both law and history are disciplines that can be seen to be haunted by similar insecurities surrounding their status, insecurities which have in turn restricted their engagements with broader questions surrounding the temporal assumptions that underpin their approach to their objects of interest.<sup>70</sup> In order to avoid becoming trapped by such insecurities, I would argue that it would be helpful for legal scholars to turn to the work of Koselleck to see how it is possible to incorporate greater moments of reflexivity into our work without marginalising/denying the position/office from which we speak.

When Koselleck noted that 'in practice, the object of history is everything or nothing, for history can declare just about anything to be a historical object by the way in which it formulates its questions' and it is because of this that 'nothing escapes the historical perspective'<sup>71</sup>, he identified history as a discipline faced with a unique set of methodological challenges. To a certain extent, the same is perhaps true of law on a disciplinary level.<sup>72</sup> However because it is possible to argue that law is brought into being through its relation to history, it is also possible to see within law a particularly stubborn adherence to understandings of history that are constructed around very linear understandings of temporality survive in spite of broader methodological concerns. As a consequence of this, many legal scholars

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<sup>69</sup> Robert W. Gordon, 'The Arrival of Critical Historicism' (1997) 49 *Stanford Law Review* 1023, 1025

<sup>70</sup> Both law and history emerged as distinct academic disciplines in the shadows of the natural sciences during the 19<sup>th</sup> century, something which resulted in each discipline seeking to carve out its own distinct sphere of activity with the view of emulating the rigour and influence of the natural sciences. As a consequence of this it is possible to see the appeal of adopting more linear understandings of temporality.

<sup>71</sup> Reinhart Koselleck, 'The Need for Theory in History' in *The Practice of Conceptual History: Timing History, Spacing Concepts* (Kristen Behnke tr, Stanford University Press 2002) 4

<sup>72</sup> By this I mean to say that like history, law is able to expand its field of study by posing questions to objects emanating from other fields.

have adopted an exemplar theory of history writing where the past is treated as a repository for present action. Even those concerned with modulating the impact of the past on the present by showing how a particular principle or approach emerged out of a context which is no longer acceptable to modern tastes can often only too easily become trapped by unhelpful overarching narratives of progress.<sup>73</sup> In order to explore the broader consequences of these issues, chapters four and five will utilise the concepts of national identity, tradition and legitimacy introduced in chapter two to focus on how law performs a vital role in the production of national identity via its interaction with processes of history writing. More specifically, these chapters will demonstrate how the grand narrative form has often come to be regarded as the preferred form of history writing by law when generating national identity by focusing on its propensity to establish a sense of tradition and legitimacy capable of shielding those that produce history from direct challenges. In doing so they will entrench the grand narrative form as something that is to be resisted whilst also signalling the potential for alternative forms of historiography to lead the way in this process.

iii. Methodology: Establishing Parameters

The uncomfortable realisation that modes of history that maintain a sense of distance between the historian and their objects continue to be favoured by many legal historians is difficult to reconcile with our growing recognition of the drawbacks of focusing on the evolutionary tracing potential of historical study.<sup>74</sup> However, in spite growing scepticism with regards to our ability to fully distance ourselves from the events that we write about, it is nevertheless possible to observe a steady growth in static legal history which can, in turn, be seen to entrench a stifling commitment to ideas of continuity and progress into laws engagements with its past. This is especially unfortunate given the flourishing of other critical modes

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<sup>73</sup> For examples of how the critical legal studies movement (both in North American and European contexts) has responded to history see: Mark Kelman, *A Guide to Critical Legal Studies* (Harvard University Press 1987) 213, Alan Norrie, 'Law, Ethics and Socio-History: The Case of Freedom' in Dermot Feenan (ed), *Exploring the 'Socio' of Socio-Legal Studies* (Palgrave Macmillan 2013) and Roberto Mangabeira Unger, *The Critical Legal Studies Movement* (Harvard University Press 1986).

<sup>74</sup> By adopting a causal approach to history, many legal historians have adopted a linear understanding of temporality into their works.



of engaging with law that have emerged in recent years. However, hope can be seen in the work of legal historians such as Christopher Tomlins where a critique of historicist sense-making in the domain of law is emerging. Drawing on the work of Friedrich Nietzsche and Walter Benjamin, Tomlins argues that ‘the past, present and future do not compose a natural order: their lineage is an artefact of human invention.’<sup>75</sup> In doing so he re-establishes history as a dangerous form of knowledge and raises questions about Gordon’s suggestion that historicist approaches to law can be used as ‘expansive, even subversive’ exercises ‘when deployed to make sense of law.’<sup>76</sup> Tomlins observes that adherents of ‘Critical Legal Studies... [have] seized upon history’s latent insurgent capacities to wage war against anachronistic orthodoxies in legal scholarship’ whilst also remaining alert to how ‘all orthodoxies begin as insurgencies.’<sup>77</sup> In doing so he is able to see how ‘CLS [can] embraced historical analysis of law as a means to countermand the internalised mythologies of traditional jurisprudence by flooding them with an exterior “reality” that bound them in place and time’<sup>78</sup> whilst also identifying the limitations of using historicism to do this. By identifying a disarming rather than subversive element to Gordon’s brand of critical historicism, Tomlins issues an exciting call to re-visit our understanding of the relationship between law and history to see how the critical potential of legal histories can be released.

In chapter three I will draw on the insights of Tomlins and other critical legal historians to identify an opportunity to revisit laws relationship with history and its writing by examining laws changing relationship with temporality. I will start by examining the linear understanding of temporality that can be seen to exist within law and then move on to look at literatures that have sought to disrupt such understandings of temporality. I will then seek to bring these literatures into conversation with each other by re-stating the ways in which it is possible to think of law as a tradition via an engagement with Peter Goodrich’s work on law as

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<sup>75</sup> Christopher Tomlins, ‘The Strait Gate: The Past, History, and Legal Scholarship’ (2009) 5(1) *Law, Culture and the Humanities* 11

<sup>76</sup> Christopher Tomlins, ‘The Strait Gate: The Past, History, and Legal Scholarship’ (2009) 5(1) *Law, Culture and the Humanities* 11, 28

<sup>77</sup> Christopher Tomlins, ‘The Strait Gate: The Past, History, and Legal Scholarship’ (2009) 5(1) *Law, Culture and the Humanities* 11, 28-29

<sup>78</sup> Christopher Tomlins, ‘The Strait Gate: The Past, History, and Legal Scholarship’ (2009) 5(1) *Law, Culture and the Humanities* 11, 29-30

rhetoric. However, in order to do this, my observations will be confined to an engagement with the relationship between law and temporality as they appear in relation to the spread of the critical legal studies movement. This is because while key transformations in laws relationship with the grand narrative form (and the linear sense of temporality that it embodies) can be seen to date back to the secularisation of law, my intention in this thesis is not to write a history of law's relationship with temporality or any particular grand narrative. Instead, my intention is to show how by re-evaluating law's relationship with temporality in light of Koselleck's theory of history it is possible to identify renewed possibilities for historiography to operate as a form of resistance to the grand narrative form more generally (i.e. narratives about the past that seek to establish clear origins or end points so as to secure a particular sense of progress). In doing so I wish to establish an ongoing connection between history writing and law's writing that is in need of constant revision, with the consequences of failing to revise this relationship being explored in chapters four and five.

While similar questions have been engaged with by legal scholars that draw upon Foucault's genealogical method to explore the disruptive potential of history writing, I have nevertheless elected to frame my project in terms of Koselleck's theory of history and the elements of Gadamerian hermeneutics that he drew upon to develop his theory of multiple temporalities. By drawing on Gadamer's rehabilitation of the concepts of tradition and prejudice, Koselleck was able to develop a theory of history that establishes the centrality of context without sacrificing the element of conflict that emerges during history writing processes. This approach to history writing is particularly useful when examining the relationship between law and history as it facilitates an examination of both change and stasis, a relation that will be examined in closer detail in chapter three through an engagement with the philosophical hermeneutics of Ricoeur. Framing my project in terms of theories of history writing drawn from the tradition of philosophical hermeneutics will also enable me to place tradition at the core of my understanding law, something which will in turn enable me to secure a firm connection between law's writing and history writing. This is because by characterising law as a tradition in a Gadamerian sense, I am able to identify the importance of law's continual performance, which in turn enables me to establish its relationship with history writing as a crucial site of activity. In addition to this Koselleck's theory of multiple temporalities, as understood in relation to Gadamerian hermeneutics, furnishes me with a means of examining law's

relationship with temporality from a perspective that has not yet been fully explored within current literatures. So while chapter three will indeed show how many scholars have identified a tension within law that sees it cling to notions of stability whilst simultaneously seeking out change, it will also show how this tension is yet to be addressed effectively because of a reluctance to look at issues of context and continuity. By turning to Koselleck and Gadamer I believe that I will be able to allude to a way of accounting for laws commitment to stasis whilst also accommodating change, as by drawing on Gadamerian hermeneutics Koselleck was able to secure a valuable (albeit limited) place for context within his theory of history by suspending it as a moment of intelligibility. I will, therefore, focus on the benefits of a tradition of history writing that roots itself in philosophical hermeneutics rather than other traditions of history writing that also concern themselves with questions surrounding history writing as means of problematisation.

My decision to focus on a tradition of history writing that builds on the concerns of philosophical hermeneutics has not been made in an attempt to single out Koselleck's theory of history as the only theory of history writing that is capable of functioning as a form of resistance. Instead by focusing on Koselleck I am simply attempting to secure a level of coherence within this thesis by confining my discussions to a tradition of history writing that adopts a common understanding of power and notions of truth. For example, while Paul Veyne's characterisation of history as 'a palace whose full extent we do not discover'<sup>79</sup> certainly fits in with my overall argument about the potential for certain forms of historiography to act as a means of resisting totalising/universalising accounts of the past, Veyne writes from a tradition that has very different goals from those espoused by the likes of Koselleck and Gadamer. Similarly, while the late Cornelia Vismann can be seen to have completely rethought the history of law by adopting a media materialist perspective that enabled her to re-conceptualise the archive as a meeting place for law and history, she too can be seen to have worked from within a very different tradition of history writing. By focusing on files and the archive, Vismann loosely defined law 'not as an instrument or medium for the arbitration of conflicts but as a repository of forms of authoritarian and administrative acts that assume concrete shape in files.'<sup>80</sup> For her, this meant that 'law and files mutually determine each

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<sup>79</sup> Paul Veyne, *Writing History: Essay on Epistemology* (Mina Moore-Rivoluceri tr, Wesleyan University Press 1984) 261

<sup>80</sup> Cornelia Vismann, *Files: Law and Media Technology* (Geoffrey Winthrop-Young tr, Stanford University Press 2008) xiii

other.<sup>81</sup> While I find this way of thinking about law intriguing, especially in terms of its potential to rehabilitate our interactions with history and its writing, it does not enable me to gain access to the understanding of resistance that I seek to advance. Users of Vismann's conceptualisation of the archive tend to frame their projects in terms of examinations of the archive and the construction of counter-archives.<sup>82</sup> This is not the intended direction of this thesis. Instead of focusing on what can be gained by writing counter-histories and microhistories, this thesis is concerned with the task of redirecting attention back to the question of the nature and scope of critical legal histories. Or to put it another way, rather than identifying the production of histories of the oppressed as a solution to the continued prevalence of singular approaches to history and its writing, this thesis makes a plea for a return to thinking about how we (as legal scholars) think about history and its writing in the first place.

#### iv. Concluding Remarks

In order to move forward, this thesis will, therefore, undertake an examination of the relationship between historiography, law and resistance in light of the methodological reflections of Reinhart Koselleck and Hans-Georg Gadamer. In doing so it will expand upon existing social science based understandings of resistance by identifying the grand narrative form as a target of resistance. The silencing effects of grand narratives will be explored in relation to issues of national identity, tradition and legitimacy where it is possible to see law's writing and the writing of history meet. All of this will be done with the view of exposing the formative aspects of our historiographical choices, something which will in turn allude to future opportunities to examine the extent to which law is capable of accommodating the type of temporal flexibility that is needed for alternative engagements with history and its writing to act as a form of resistance in their own right.

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<sup>81</sup> Cornelia Vismann, *Files: Law and Media Technology* (Geoffrey Winthrop-Young tr, Stanford University Press 2008) xiii

<sup>82</sup> For a particularly insightful collection of essays that make use of the archive as a means of re-orienting law's relationship with history see: Stewart Motha and Honni van Rijswijk (eds), *Law, Memory, Violence: Uncovering the Counter-Archive* (Routledge 2016).

# Chapter 1

## Conceptualising Resistance: Extending the Function of Historiography

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*"Sticks and stones may break my bones, but words (or names) will never hurt me." Like all sayings, this one contains an evident of truth... But, like all sayings, this one gives us only a partial truth- for it might be verbal aggression that causes one to resort to "sticks and stones". Words, too, can destroy.*

Reinhart Koselleck<sup>83</sup>

*To question historically means to set free into motion the happening which is quiescence and bound in the question.*

Martin Heidegger<sup>84</sup>

*The struggle of man against power is the struggle of memory against forgetting.*

Milan Kundera<sup>85</sup>

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The concept of resistance is a complicated one that has come to be deployed in a wide variety of circumstances across a diverse range of disciplines. Within the context of the social sciences, resistance has proven itself to be of great analytical utility, providing those that engage with it a valuable lens through which to explore issues of power and social change. However, the proliferation of scholarship examining practices of resistance would appear to have culminated in a belief in resistance as an essentially material practice, with many seeking to define this concept in terms of its visible outcomes. As a consequence of this resistance has come to be treated as an essentially pragmatic concept, generating a wealth of literature directed towards emancipatory aims. Rather than allowing theoretical

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<sup>83</sup> Reinhart Koselleck, 'Linguistic Change and the History of Events' (1989) 61(4) *The Journal of Modern History* 649, 649

<sup>84</sup> Martin Heidegger, *What is a Thing?* (W. B. Jr Barton and Vera Deutsch trs, University Press of America 1967) 48

<sup>85</sup> Milan Kundera, *The Book of Laughter and Forgetting* (Aaron Asher tr, Faber and Faber 1996) 4

considerations to frame discussions of this concept, scholarship in this area can be seen to allow practical concerns to dominate the deployment of resistance as an analytical tool. For example, it is possible to see how for many working within the social sciences resistance has come to be thought of as a visible oppositional act performed by an identifiable individual or collectivity existing outside of the resisted network of power relations.<sup>86</sup> This has resulted in the emergence of categories such as scale, location, organisation/intent and visibility as a means of furthering an understanding of resistance as an empirically measurable practice that directs itself towards change. I would argue that by allowing pragmatic concerns to trump theoretical reflection we have somewhat unwittingly narrowed the scope of resistance, incorporating a series of assumptions into our understanding of not only how resistance operates and what it seeks to achieve, but also what can be identified as amounting to resistance in the first place. In this chapter I explore some of the core characteristics that we have come to attach to resistance, arguing that a belief (albeit in many cases a tacit belief) that these characteristics provide a satisfactory framework through which to explore resistance imposes strict limitations on what can be identified as resistance and how we are to measure its relative successes and failures. I will suggest that by sidestepping questions pertaining to the normative dimension of assigning core characteristics to practices of resistance we have come to privilege certain types of practices over others, often identifying actions involving open political resistance as the most obvious route for securing visible change. Moreover, in attempting to develop a reliable 'empirically useful measure'<sup>87</sup> focused on ideas of positive change to help distinguish acts of resistance from other activities, I will argue that even some of the most innovative engagements with this concept can be seen to be bound to a stifling notion of progress.

The extent to which questions of resistance have become tangled up in claims relating to progress and more general notions of improvement is a thorny issue, as it introduces a problematic element of evaluation into the identification of resistive practices. Nevertheless, it is possible to see how even more individualised context-

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<sup>86</sup> For an example of such an understanding of resistance see: Jocelyn A. Hollander and Rachel L. Einwohner, 'Conceptualizing Resistance' (2004) 19(4) Sociological Forum 533

<sup>87</sup> Rose Weitz, 'Women and Their Hair: Seeking Power through Resistance and Accommodation' (2001) 15(5) Gender and Society 667, 670

specific approaches to resistance are plagued by a need to determine what amounts to positive change, as is reflected in statements such as this:

...if power, resistance and their agents are seen as context-specific then we can have no justification for “resistance in general”. Unless we assume *a priori* the “evil nature” of power and the “liberatory nature” of resistance, then there is little alternative to conducting a case by case, site by site assessment.<sup>88</sup>

Appeals to normative judgment, however benevolently framed, present an enormous challenge to our ever growing reluctance to accept ‘totalising standpoint(s) from which to judge overall social progress.’<sup>89</sup> I would argue that the challenge of reconciling the immediate utility of normative judgment with our mounting distrust of it signals a need to create a way of conceptualising resistance that does not depend on our ability to justify resistance by reference to its desirability. In order to bypass the perceived need to pass such judgments when examining potential instances of resistance, I will eschew the temptation to strictly define this concept. I will instead elect to explore the extent to which our understanding of resistance can be expanded to include less visible practices, and in doing so I will argue that the value we attach to resistance as a potentially transformative concept does not lie in its most readily measurable outcomes, its presumed stability of meaning over time or the proliferation of its deployment in everyday speech. Instead, I will locate the usefulness of this concept in its latent contestability and propensity to adapt according to new usages. To do this I will need to tackle the issue of intelligibility that is created by using categories such as scale, location, organisation/intent and visibility to determine what amounts to resistance. I will also need to show how while I acknowledge that broad definitions of resistances may sometimes appear unhelpful, ‘allowing some scholars to see it

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<sup>88</sup> David Knights and Theo Vurdubakis, 'Foucault, Power, Resistance and all That' in John M. Jermier, David Knights and Walter R. Nord (eds), *Resistance and Power in Organisations* (Routledge 1994) 167, 186

<sup>89</sup> David Couzens Hoy, *Critical Resistance: From Poststructuralism to Post-Critique* (The MIT Press 2005) 8

almost everywhere and others almost nowhere<sup>90</sup>, that the uneasiness that stems from loose definitions is indicative of a more general distrust of the uncertainty that emanates from flexibility rather than any inherent defect in construing concepts broadly.

One way of approaching the task of expanding our understanding of resistance so that it may include less visible practices involves pursuing the idea that rather than strengthening resistance, attempts to stabilise it by establishing consistent indicators and measures have the potential to erode the dynamic core of resistive practices themselves. It is for this reason that it is helpful to refer to the work of David Couzens Hoy and his suggestion that 'resistance is contextually bound to the social and psychological structures that are being resisted'<sup>91</sup>, paying particular attention to how it is from *within* particular power dynamics that resistance becomes most visible. For example I will argue against the proposition that without clear categories such as scale, location, organisation/intent and visibility resistance risks becoming a hollow concept lacking a clear purpose by bringing it into conversation with the countervailing proposition that as a concept, resistance may become paralysed by a strict adherence to such a formulaic approach to its study. The socially constructed nature of this concept will, therefore, form the core of my understanding of resistance, as it will be by moving away from the idea that resistance is something that is 'simply "out there", empirical data to be gathered and made available through value free enquiry'<sup>92</sup> that I hope to depict the vitally contingent nature of the central analytical tools (in this case, the concept of resistance) upon which we have come to depend.

While similar observations have already been made in relation to resistance and other key concepts such as violence with regards to their relationship with notions of power<sup>93</sup>; I hope to extend the potential reach of these observations by focusing

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<sup>90</sup> Rose Weitz, 'Women and Their Hair: Seeking Power through Resistance and Accommodation' (2001) 15(5) *Gender and Society* 667, 669

<sup>91</sup> David Couzens Hoy, *Critical Resistance: From Poststructuralism to Post-Critique* (The MIT Press 2005) 3

<sup>92</sup> David Knights and Theo Vurdubakis, 'Foucault, Power, Resistance and all That' in John M. Jermier, David Knights and Walter R. Nord (eds), *Resistance and Power in Organisations* (Routledge 1994) 167-169

<sup>93</sup> For example, Gillian Walker has characterised the concept of violence as a 'ruling practice', meaning that violence can no longer be used to simply describe a 'pre-



on how different theories of history writing have become implicated in our engagement with such concepts through a reflection on the developments that have been made within the sub-discipline of conceptual history. Or to put it another way, I aim to explore how different theories of history writing can be regarded as forms of resistance in their own right by looking at how historiography interacts with sites of contestation. To do this I will first reflect on the extent to which historiography can be linked to ideas of resistance. I will then deepen my exploration of this question by introducing the sub-question of how processes of history writing can become bound to our understanding of what it means to resist and what it is that is resisted. All of this will be done with the view of pointing towards a form of resistance that does not necessarily have to be tied to measurable acts, extending the rich body of literature that focuses on the less visible forms of resistance that are embedded in everyday life to accommodate engagements with history and its writing as important sites of activity.<sup>94</sup>

In addition to carving out a space for less visible forms of resistance, I also hope to advance an understanding of resistance that operates in the context of associations that are sustained by singular appeals to the past. By this I mean to say that I will attempt to develop an understanding of resistance that concerns itself with revealing the contestability of existing relations of power without attempting to adopt a position of exteriority. While others have pursued such an approach to resistance in relation to subtle oppositional practices such as 'foot dragging' and 'false compliance' in an attempt to reveal examples of 'how resistance may unfold under conditions where its traditional avenues are blocked or marginalised'<sup>95</sup> I will seek to take this further. I will examine how historiography can be used in situations where resistance may seem impossible by looking at how it can be used to reconstruct and reconfigure relationships. Unlike more positivistic forms of history

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existing phenomena'. Instead she suggests that violence is a concept that forms discourses and in doing so links the concept of violence to the exercise of power. For more on this see: Gillian Walker, 'The Conceptual Politics of Struggle: Wife Battering, the Women's Movement, and the State' (1990) 33 (Autumn) *Studies in Political Economy* 63, 81

<sup>94</sup> For an example of an exploration of everyday instances of resistance see: Judith Butler, *Gender Trouble: Feminism and the Subversion of Identity* (Routledge 2006)

<sup>95</sup> Peter Fleming and Graham Sewell, 'Looking for the Good Soldier, Svejk: Alternative Modalities of Resistance in the Contemporary Workplace' (2002) 36(4) *Sociology* 857, 859

writing that can be associated with the grand narrative form, the tradition of historiography I will be drawing on is not so much concerned with keeping the past in the past as it is concerned with forcing the past to re-appear so that it may live again in the present. It has been suggested that these more accommodating forms of historiography have a special relationship with memory as they draw on a less linear model of temporality, which is why memory and its role in developing alternative forms of historiography will be examined more closely in chapters three and five. For the purposes of this chapter, it will be enough to note that memory is now identified by some as 'an attempt to recuperate presence in history.'<sup>96</sup> The historian Gabrielle Spiegel has elaborated on this, stating that while history has traditionally been thought of as backwards facing in the sense that it 're-presents the dead', memory 're-members the corpse in order to revivify it.'<sup>97</sup> Spiegel also suggests that this can be thought of as 'a form of backlash against postmodernist/poststructuralist thought', displacing deconstruction as 'the *lingua franca* of cultural studies.'<sup>98</sup> This raises interesting questions as to the broader function of history writing, questions that will be pursued in the second half of this chapter in light of Koselleck's contributions to our understanding of the impact of multiple temporalities on what history can be used for. However, it will first be helpful to look at how resistance has been conceptualised in social science literatures, paying particular attention to the categories that have come to shape it in this context. After all, it will be through an acknowledgement of the limitations of focusing on material practices of resistance over other types of practices that renewed possibilities for resistance will emerge.

i. Defining and Confining Resistance: Social Science Explorations

When looking at how resistance has been deployed in many social science literatures it is possible to see how as a concept it has come to be read through the well entrenched categories of scale, location, organisation (also referred to in some

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<sup>96</sup> Gabrielle M. Spiegel, 'Memory and History: Liturgical Time and Historical Time' (2002) 41 *History and Theory* 149, 149

<sup>97</sup> Gabrielle M. Spiegel, 'Memory and History: Liturgical Time and Historical Time' (2002) 41 *History and Theory* 149, 162

<sup>98</sup> Gabrielle M. Spiegel, 'Memory and History: Liturgical Time and Historical Time' (2002) 41 *History and Theory* 149, 149

literatures as intent) and visibility. While these categories do in many ways overlap with one another, it is nevertheless possible to see particular categories, such as visibility, dominate a wide range of conceptualisations of resistance. The prominence of visibility as a central category through which to read resistance has had a significant impact on the types of practices that have been characterised as resistance, indicating how this category/dimension of resistance operates on both inclusive and exclusive levels. In the field of sociology for example, the focus on visible material practices has led many to associate resistance with social movements and contentious politics. Interest has however also extended to more 'symbolic behaviour' such as 'silence' and acts of 'breaking silence.'<sup>99</sup> Some scholars have even moved beyond looking at outwards practices by extending their attentions to states of being, thoughts and attitudes.<sup>100</sup> Some have even sought to connect the two by establishing links between the motivations that underpin the decision to resist and a consideration of the negative consequences of resisting with the view of revealing how resistant attitudes and practices can develop alongside attempts to act in accordance with personal ethical principles.<sup>101</sup> When looking at the range of practices that have been identified as acts of resistance it is possible to discern two main ways of defining resistance: one that focuses on the nature of the practice of resistance and another that focuses on resistance in terms of its targets. When it comes to definitions that focus on the nature of resistance as a practice we see the categories of scale and organisation perform an important role in identifying resistive practices. In contrast to this when we look at definitions that focus on the targets of resistance it is possible to see how questions of location and visibility are connected to questions of effectiveness, measurability and change and how this performs a highly determinative function in the identification of resistance. Although each type of definition directs itself towards a different set of indicators for distinguishing resistance from other activities, there are two categories that would appear to cut across each type of definition to form the central

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<sup>99</sup> Jocelyn A. Hollander and Rachel L. Einwohner, 'Conceptualising Resistance' (2004) 19(4) Sociological Forum 533, 536

<sup>100</sup> For an example of how resistance has been extended to include thought processes see: Catherine Kohler Riessman, 'Stigma and Everyday Resistance Practices: Childless Women in South India' (2000) 14(1) Gender and Society 111

<sup>101</sup> For an example of this see: Sandy K. Piderit, 'Rethinking Resistance and Recognising Ambivalence: A Multidimensional View of Attitudes Toward an Organisational Change' (2000) 25(4) Academy of Management Review 783

dimensions of resistance as it is often thought of in the social sciences. These are the categories of visibility and scale.

To start with, when it comes to scale much debate surrounds the level at which resistance takes place. Sociologists Hollander and Einwohner have shown how resistance can take place on either an individual level or a collective level and that it can occur locally or be a more widespread phenomenon.<sup>102</sup> Collective acts are more easily identified as they tend to include overt action, an example of which being acts of non-violent civil disobedience. The Raging Grannies, for example, are an organisation that originated in Canada that have since spread around the world. They engage in acts of civil disobedience directed against anything ranging from the Iraq war to the dumping of toxic waste. Their method of *grannyng* is described by Rose DeShaw of the Kingston Raging Grannies gaggle as including:

... dressing like innocent little old ladies so we can get close to our “target”, writing songs from old favourites that skewer modern wrongs, satirising evil-doing in public and getting everyone singing about it, watching a wrong back down and turn tail and run, sharing a history with other women who know who they are and what they’re about.<sup>103</sup>

DeShaw describes grannyng as ‘the least understood yet most powerful weapon we have’, identifying it as ‘the only thing that could have met the need.’<sup>104</sup> For example, their protests against the war in Iraq consisted of insisting that ‘if people must die in a war, then it may as well be the elderly.’<sup>105</sup> To do this they became involved in sit-ins where they used ‘street theatre to garner media attention [and] to raise awareness of issues relating to peace, the environment, and social

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<sup>102</sup> Jocelyn A. Hollander and Rachel L. Einwohner, 'Conceptualising Resistance' (2004) 19(4) Sociological Forum 533, 536

<sup>103</sup> Rose DeShaw, 'Raging Grannies Philosophy' <<http://raginggrannies.org/philosophy/>> accessed 7 July 2015

<sup>104</sup> Rose DeShaw, 'Raging Grannies Philosophy' <<http://raginggrannies.org/philosophy/>> accessed 7 July 2015

<sup>105</sup> Jarret S. Lovell, *Crimes of Dissent: Civil Disobedience, Criminal Justice and the Politics of Conscience* (New York University Press 2009) 1

justice.<sup>106</sup> During this time they made regular visits to military recruitment centres where they demanded that they be allowed to enlist. When they were rejected they would then refuse to leave.<sup>107</sup> Outward (material) collective practices of resistance such as these are arguably deliberately public as 'the visibility of dissent call[s] the public's attention to the existence of what is perceived to be a prevailing injustice, it also adds legitimacy to the activist's actions by distinguishing them from common crime.'<sup>108</sup> In appealing to 'broader social interest'<sup>109</sup> collective resistance is able to utilise publicity to secure and extend the success of its practices. These actions are therefore able to readily gain the status of resistance through not only their visible material nature but also by virtue of the fact that they involve a collectivity of people united by a common goal.

Resistance that takes place on an individual level is, however, more difficult to identify and legitimise, as while such instances of resistance can take a material form they are often less visible because of the reduced scale of their operation. For example, in a study on oppression and disability within other socio-political minority statuses, it was suggested that 'individuals belonging to multiple marginalised groups may need to forcefully employ strategies that help them resist incorporating negative messages about their social identities into their self-concepts.'<sup>110</sup> It is argued that without communicating their strategies with others that such individuals 'build personal resources that contribute to their well-being and help them contest injustice', resulting in a 'psychological form of self-liberation as individuals develop a critical view of their oppression and seek to transform that

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<sup>106</sup> Jarret S. Lovell, *Crimes of Dissent: Civil Disobedience, Criminal Justice and the Politics of Conscience* (New York University Press 2009) 89

<sup>107</sup> Jarret S. Lovell, *Crimes of Dissent: Civil Disobedience, Criminal Justice and the Politics of Conscience* (New York University Press 2009) 1

<sup>108</sup> Jarret S. Lovell, *Crimes of Dissent: Civil Disobedience, Criminal Justice and the Politics of Conscience* (New York University Press 2009) 182

<sup>109</sup> Jarret S. Lovell, *Crimes of Dissent: Civil Disobedience, Criminal Justice and the Politics of Conscience* (New York University Press 2009) 182

<sup>110</sup> Katherine E. McDonald, Christopher B. Keys and Fabricio E. Balcazar, 'Disability, race/ethnicity and gender: themes of cultural oppression, acts of individual resistance' (2007) 39(1-2) *American Journal of Community Psychology* 145, 148

reality.<sup>111</sup> It has been said that these individual acts of resistance to oppressive cultural narratives can be comprised of four types of actions. These include removing oneself from oppressive environments, reframing dominant cultural actions, transforming discouragement into motivation and replacing pejorative narratives with more positive personal narrative.<sup>112</sup> Practices such as these relate to the development of a personal resilience that feeds into a broader resistive attitude rather than an attempt to render visible a direct opposition to particular issues. They also don't require coordination between others that also elect to develop such a personal resilience, as these strategies are directed inward towards the agent of resistance rather than outward towards potential targets of resistance. While this can broaden the potential scope of resistance in a number of interesting ways it can nevertheless also act as a potential source of doubt if other categories are then used to temper the interpretation of more individualised acts. This is because if the categories of location or visibility are deemed to be of greater importance, smaller scale activities such as those outlined above may fail to achieve the required level of outcome. Activities and strategies that occur on a more individual and discrete level, therefore, present a challenge to approaches to resistance that rely on clear empirical data when analysing this practice.

A further potentially contentious way of extending the reach of resistance involves including both local and more widespread actions within our understanding of this concept. Widespread collective resistance requires a degree of coordination between the actors that are involved whereas more localised resistance need not necessarily involve any coordination at all. In widespread resistance, it is assumed that those engaged in resistance act together deliberately, as can be seen in organised protest activities. When it comes to the coordination between actors this can take place through many different mediums, with the proliferation of the use of social media platforms and other communicative technologies signalling a rapid

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<sup>111</sup> Katherine E. McDonald, Christopher B. Keys and Fabricio E. Balcazar, 'Disability, race/ethnicity and gender: themes of cultural oppression, acts of individual resistance' (2007) 39(1-2) *American Journal of Community Psychology* 145, 148

<sup>112</sup> Katherine E. McDonald, Christopher B. Keys and Fabricio E. Balcazar, 'Disability, race/ethnicity and gender: themes of cultural oppression, acts of individual resistance' (2007) 39(1-2) *American Journal of Community Psychology* 145, 156

shift in not only the speed but also the potential reach of collective resistance.<sup>113</sup> For example, it has been suggested that both YouTube and Twitter performed a crucial role in the growth of the Occupy movement, where individuals have been able to share not only eyewitness accounts of protests and more mainstream media but have also been able to socialise and connect with fellow activists around the globe.<sup>114</sup> In contrast, more localised resistance can be said to encompass less overt tactics, such as women's hair management strategies. Rose Weitz has explored how 'a woman can use her understanding of cultural ideologies surrounding women's hair to increase its effectiveness.'<sup>115</sup> She provides the examples of lesbians that wear their hair long because of how this enables them to pass as heterosexual and women that dye their hair particular colours to present themselves as possessing particular qualities such as competence and independence.<sup>116</sup> She identifies this as a means of not only rejecting subordination, but also as a means of 'challenging the ideologies that support that subordination.'<sup>117</sup> It is also possible to see how localised resistance can feed into more widespread resistance. An example of this can be seen in resistance to the privatisation of water and energy where both individuals and local civil society have become involved in resistance.<sup>118</sup> Regardless of whether resistance occurs on an individual or a collective level or whether it occurs locally or is more widespread, it is possible to see how scale feeds into the other categories through which we read resistance. Scale not only encourages us to think carefully about the organisation,

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<sup>113</sup> For a discussion on how social media has impacted on communication between activists in social movements see: John Krinsky and Nick Crossley, 'Social Movements and Social Networks: Introduction' (2014) 13(1) *Social Movement Studies* 1

<sup>114</sup> Kjerstin Thorson and others, 'YouTube, Twitter and the Occupy Movement: Connecting Content and Circulation Practices' (2013) 16(3) *Information, Communication and Society* 421

<sup>115</sup> Rose Weitz, 'Women and Their Hair: Seeking Power through Resistance and Accommodation' (2001) 15(5) *Gender and Society* 667, 674

<sup>116</sup> Rose Weitz, 'Women and Their Hair: Seeking Power through Resistance and Accommodation' (2001) 15(5) *Gender and Society* 667, 674

<sup>117</sup> Rose Weitz, 'Women and Their Hair: Seeking Power through Resistance and Accommodation' (2001) 15(5) *Gender and Society* 667, 670

<sup>118</sup> For an outline of this see: David Hall, Emanuele Lobina and Robin de la Motte, 'Public Resistance to Privatisation in Water and Energy' (2005) 15(3-4) *Development in Practice* 286

intent and visibility of resistance, it also prompts a consideration of what it is that resistance can or must be directed against. The wide reach of the category of scale, therefore, makes it important to bear in mind the interaction between the various categories through which we have come to think about resistance, as these interactions can impact dramatically on our understanding of this coveted concept.

When looking at definitions of resistance that focus on its targets it is possible to identify a broad range of locations where resistance can arise. These extend beyond individuals to include organisations, institutions and broader social structures.<sup>119</sup> Examples of more tangible and therefore more visible targets of resistance include the state, people in positions of power and specific institutions. It is also possible to identify forms of resistance that are directed against expertise and forms of specialist knowledge, a more visible example being patient resistance to health promotion and public health. In these situations, it has been argued that it is the 'normalising discourse of medicalised scientific expertise'<sup>120</sup> that is resisted by the development of counter discourses based on a different type of expertise. Such counter discourses have been described as a 'rhetorical strategy of resistance' because of the way that they incorporate the concept of expertise into the 'production of counter discourses'<sup>121</sup> rather than call for the outright rejection of specialist knowledge itself. However, things become less clear when resistance takes on a less visible or more ideological focus. For example, when looking at Weitz's example of women's hair management strategies as a form of resistance it is possible to recognise a form of resistance that operates on several levels. Weitz describes the adoption of hair management strategies as a resistance directed against not only subordination but also the ideologies that sustain it. Instead of focusing on the external surface issues this form of resistance seeks to tackle the core of the problem. I regard this as a potentially more insidious and therefore more powerful form of resistance, and while it may be less visible than collective overt resistance it is this type of more covert resistance that I shall focus on. To be more precise, I wish to extend the location of resistance to include

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<sup>119</sup> Jocelyn A. Hollander and Rachel L. Einwohner, 'Conceptualising Resistance' (2004) 19(4) *Sociological Forum* 533, 536

<sup>120</sup> Natalie Armstrong and Elizabeth Murphy, 'Conceptualising Resistance' (2011) 16(3) *Health* 314, 321

<sup>121</sup> Natalie Armstrong and Elizabeth Murphy, 'Conceptualising Resistance' (2011) 16(3) *Health* 314, 321



seemingly neutral universalising accounts and will do so by arguing that resistance is something that can be directed more generally at attempts to conceal or depoliticise struggles and issues of contention as well as the individuals, collectives and arrangements of institutions that make such attempts. In order to do this, I will, however, need to move away from material practices towards a form of resistance that cannot be measured directly in relation to what it is directed at. It will also require me to address the issue of visibility and whether or not resistance is something that ought to be measured by its outcomes.

For some, actions and practices must be effective in order to gain the status of resistance. However, what is meant by effective creates further problems as it introduces questions such as whether or not resistance must achieve positive change or whether it can also include actions and practices that have negative consequences. It also raises questions as to the exact goals of resistance and whether or not particular practices must be recognised as resistance. This renders the category of visibility particularly challenging as it introduces what could be regarded as a particularly normative dimension into resistance by encouraging us to make evaluative judgments about the efficacy of particular practices. It can force us to ask ourselves whether or not change has been achieved and whether or not this change is good or bad. Such judgments will largely be influenced by the specific goals that underpin the practice, with such goals often being associated with a desire to either secure<sup>122</sup> or prevent<sup>123</sup> change. However, if specific goals are not met we must then ask a further question that relates to not only whether or not failed attempts to either secure or prevent change can amount to resistance, but also whether practices that decline to define themselves in relation to measurable change can gain the status of resistance. The difficulties that are created by focusing on the outcomes of resistance feed into the more general challenge of determining whether or not practices must be recognised as resistance by those resisting and their targets. When it comes to overt material practices it is possible to see that both the actors and targets of resistance are able to readily recognise what is happening as resistance. However, when it comes to

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<sup>122</sup> An example of practices that attempt to secure change can be seen in Rose Weitz's exploration of women's hair management strategies.

<sup>123</sup> An example of practices that attempt to prevent change can be seen in: Sandy K. Piderit, 'Rethinking Resistance and Recognising Ambivalence: A Multidimensional View of Attitudes Toward an Organisational Change' (2000) 25(4) *Academy of Management Review* 783

more subtle practices this becomes difficult. Hollander and Einwohner use the terms 'covert resistance', 'unwitting resistance', 'target-defined resistance' and 'externally-defined resistance'<sup>124</sup> to describe practices where there are issues of intelligibility. In covert resistance, targets fail to recognise the resistance that is taking place, whereas in target-defined resistance it is perhaps only the targets themselves that recognise what is taking place as resistance.<sup>125</sup> Hollander and Einwohner provide the example of a wife's resistance to her abusive husband, suggesting that while observers would not necessarily regard her actions as resistance her husband would.<sup>126</sup> They then suggest that unwitting resistance can occur when an actor performs actions that are perceived by others (their targets) as being threatening despite a lack of intent on the part of the actor.<sup>127</sup> Similarities can be seen between unwitting resistance and Hollander and Einwohner's final subtle practice, externally-defined resistance, however when it comes to externally-defined resistance neither actor nor target are necessarily aware of any resistance taking place and it is instead third parties that characterise these actions as resistance.<sup>128</sup> Practices that fall within these less direct forms of resistance are contestable as they are difficult to measure. So if the category of visibility and outcome were allowed to become the dominant dimension through which we read resistance, we could see doubt being cast over the resistive potential of many more subtle practices/strategies of resistance.

In order to sidestep the potential limitations that emerge as a result of questions of visibility and concerns surrounding the targets of resistance some have sought to focus on the idea of intent instead. The decision to focus on the idea of intent (also referred to as organisation) is not however to say that this category is without its own challenges. Hollander and Einwohner refer to three ways of addressing the

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<sup>124</sup> Jocelyn A. Hollander and Rachel L. Einwohner, 'Conceptualising Resistance' (2004) 19(4) Sociological Forum 533, 545

<sup>125</sup> Jocelyn A. Hollander and Rachel L. Einwohner, 'Conceptualising Resistance' (2004) 19(4) Sociological Forum 533, 545

<sup>126</sup> Jocelyn A. Hollander and Rachel L. Einwohner, 'Conceptualising Resistance' (2004) 19(4) Sociological Forum 533, 545

<sup>127</sup> Jocelyn A. Hollander and Rachel L. Einwohner, 'Conceptualising Resistance' (2004) 19(4) Sociological Forum 533, 545

<sup>128</sup> Jocelyn A. Hollander and Rachel L. Einwohner, 'Conceptualising Resistance' (2004) 19(4) Sociological Forum 533, 545

issue of intent, the first being the idea that the actor must be aware that they are resisting and they must intend to do so.<sup>129</sup> They have even suggested that for some intent is 'a better indicator of resistance than outcome, because acts of resistance do not always achieve the desired effect.'<sup>130</sup> According to political scientist and anthropologist James C. Scott focusing on intention 'allows for both individual and collective acts of resistance'<sup>131</sup> which can be regarded as a benefit as it not only moves our understanding of resistance beyond collective movements to include more individualised activity, it also creates an alternative means of measuring resistance that is not tied to a particular outcome. Also unlike the category of visibility, intention does not 'exclude those forms of ideological resistance that challenge the dominant definition of the situation.'<sup>132</sup> The increased flexibility that is afforded to examinations of resistance by the category of intent manifests itself in a wide range of literatures. For example, while some have identified a danger in defining resistance too broadly, attempts to define resistance more narrowly can nevertheless be seen to benefit from more flexible understandings of resistance. For Weitz, focusing on the issues that underpin discriminatory practices enables her to extend resistance to include 'women's hair management strategies' as a means of triggering 'social change, and in the long run, to shift the balance of power between social groups'<sup>133</sup>, thus opening up the possibility for everyday acts gaining the status of resistance. A further example can be seen in empirically oriented studies on workers resistance to organisational change where three conceptualisations of resistance have been identified. These are resistance as a cognitive state, resistance as an emotional state and resistance as a form of

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<sup>129</sup> Jocelyn A. Hollander and Rachel L. Einwohner, 'Conceptualising Resistance' (2004) 19(4) Sociological Forum 533, 542

<sup>130</sup> Jocelyn A. Hollander and Rachel L. Einwohner, 'Conceptualising Resistance' (2004) 19(4) Sociological Forum 533, 542

<sup>131</sup> James C. Scott, *Weapons of the Weak: Everyday Forms of Peasant Resistance* (Yale University Press 1985) 290

<sup>132</sup> James C. Scott, *Weapons of the Weak: Everyday Forms of Peasant Resistance* (Yale University Press 1985) 290

<sup>133</sup> Rose Weitz, 'Women and Their Hair: Seeking Power through Resistance and Accommodation' (2001) 15(5) Gender and Society 667, 670

behaviour.<sup>134</sup> When it comes to behaviour as a form of resistance both action and inaction are thought to bear the potential to amount to resistance, with both forms of behaviour being intentional and directed against change.<sup>135</sup> When conceived of as an emotional state resistance in this area has been linked to aggression, with scholars that define resistance in this way focusing on 'the forces that they believe[d] produced frustration in employees and caused the undesirable behaviours.'<sup>136</sup> Cognitive resistance then relates to both behaviour and emotion as it is believed to comprise of 'negative thoughts'<sup>137</sup> that prompt some form of response. What these conceptualisations of resistance share is an assumption that resistance is comprised of oppositional activity and that such activity is easily recognisable as resistance (in the example of workers resistance compliance would indicate an absence of resistance). This can, however, be seen to be something of an oversimplification, as illustrated by the vast array of literature that examines more 'everyday' acts<sup>138</sup> that incorporate strategies of both compliance and opposition into their resistances.<sup>139</sup> So while notions of intent can be used to soften the demands of visibility, to insist that all resistance must be underpinned by clear intent that manifests itself in oppositional acts would be a mistake, especially in relation to more everyday activities.

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<sup>134</sup> Sandy K. Piderit, 'Rethinking Resistance and Recognising Ambivalence: A Multidimensional View of Attitudes Toward an Organisational Change' (2000) 25(4) *Academy of Management Review* 783, 785

<sup>135</sup> Sandy K. Piderit, 'Rethinking Resistance and Recognising Ambivalence: A Multidimensional View of Attitudes Toward an Organisational Change' (2000) 25(4) *Academy of Management Review* 783, 785

<sup>136</sup> Sandy K. Piderit, 'Rethinking Resistance and Recognising Ambivalence: A Multidimensional View of Attitudes Toward an Organisational Change' (2000) 25(4) *Academy of Management Review* 783, 785

<sup>137</sup> Sandy K. Piderit, 'Rethinking Resistance and Recognising Ambivalence: A Multidimensional View of Attitudes Toward an Organisational Change' (2000) 25(4) *Academy of Management Review* 783, 786

<sup>138</sup> Jocelyn A. Hollander and Rachel L. Einwohner, 'Conceptualising Resistance' (2004) 19(4) *Sociological Forum* 533, 539

<sup>139</sup> For an example of everyday practices of resistance see: James C. Scott, *Weapons of the Weak: Everyday Forms of Peasant Resistance* (Yale University Press 1985)

A second way of thinking about the idea of intent that Hollander and Einwohner engage with suggests that it is 'difficult, if not impossible' to assess the intent behind specific instances of resistance as this requires access to 'the actor's internal states.'<sup>140</sup> This can sometimes make it necessary to infer the presence of an intention to resist from the actions of the actor rather than from any direct statements they make themselves. For example, Scott suggests through his domination/subordination outline of resistance that compliance can sometimes be read as an indicator of resistance. He does this by introducing the idea of public transcripts and hidden transcripts. For him, public transcripts 'are a way of describing the open interaction between subordinates and those who dominate.'<sup>141</sup> These rarely depict the *full* story and instead only provide a limited account of power relations as they contain 'subordinate discourse in the presence of the dominant'<sup>142</sup>. Hidden transcripts on the other hand 'characterise the discourse that takes place "offstage", beyond direct observation by the powerholders.'<sup>143</sup> He provides an example drawn from accounts of slavery in the antebellum U.S. South where a black cook named Aggy watched silently as a white master beat her daughter for an alleged minor theft. After the master left she launched into a verbal rage, whilst still in the presence of a white governess with whom she had formed a friendship. During this outburst she drew on what Scott describes as 'a finely drawn and highly visual image of an apocalypse, a day of revenge and triumph, a world turned upside down using the cultural raw materials of the white man's religion.'<sup>144</sup> He identifies Aggy's deferential silence during the beating of her daughter as the public transcript of this event and her subsequent outburst in front of the governess as the hidden transcript.<sup>145</sup> He argues that the hidden transcript complicates our

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<sup>140</sup> Jocelyn A. Hollander and Rachel L. Einwohner, 'Conceptualising Resistance' (2004) 19(4) Sociological Forum 533, 542

<sup>141</sup> James C. Scott, *Domination and the Arts of Resistance: Hidden Transcripts* (Yale University Press 1990) 2

<sup>142</sup> James C. Scott, *Domination and the Arts of Resistance: Hidden Transcripts* (Yale University Press 1990) 4

<sup>143</sup> James C. Scott, *Domination and the Arts of Resistance: Hidden Transcripts* (Yale University Press 1990) 4

<sup>144</sup> James C. Scott, *Domination and the Arts of Resistance: Hidden Transcripts* (Yale University Press 1990) 6

<sup>145</sup> James C. Scott, *Domination and the Arts of Resistance: Hidden Transcripts* (Yale University Press 1990) 6

account of Aggy's behaviour, as while her initial outward silence reflects a state of submission, her use of 'the cultural raw materials of white man's religion' provides access to an otherwise obscured account of 'the offstage culture of the slave quarters and slave religion'<sup>146</sup>, which could perhaps be read as feeding into a form of resistance. For Scott, 'the more menacing the power, the thicker the mask'<sup>147</sup> meaning that it is not possible to assume the absence of resistance by simply looking at the most visible markings of a relationship. It is instead important to think about the hidden as well as the public transcript of any event, especially when the power between those involved differs so greatly.

These views on the category of intention enable us to read forms of tactical resistance into the everyday actions of discrete actors. To reveal them we simply probe the ways in which 'powerless persons accommodate to power while simultaneously protecting their interests and identities.'<sup>148</sup> It has however been suggested that these forms of resistance are problematic because of the way that interpreters of this type of resistance sometimes attribute 'greater agency and a more highly developed oppositional consciousness than is warranted by the evidence.'<sup>149</sup> An example of a practice whose status is brought into question by several factors which include a lack of visible intent to resist on the part of the actor can be seen in work surrounding local action that weakens sovereign authority at borders of sovereign states. A study on 'the creation and gradual securitisation of the 4,096-km border between India and Bangladesh'<sup>150</sup> looks at how locals cross state borders through unauthorised means. Geographer Reece Jones provides an account of a servant called Moushumi who travels across the border from Bangladesh to India via boat to visit her son. She could make use of official border

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<sup>146</sup> James C. Scott, *Domination and the Arts of Resistance: Hidden Transcripts* (Yale University Press 1990) 6

<sup>147</sup> James C. Scott, *Domination and the Arts of Resistance: Hidden Transcripts* (Yale University Press 1990) 3

<sup>148</sup> Patricia Ewick, 'Narrating Social Structures: Stories of Resistance to Legal Authority' (2003) 108(6) *The American Journal of Sociology* 1328, 1329

<sup>149</sup> Patricia Ewick, 'Narrating Social Structures: Stories of Resistance to Legal Authority' (2003) 108(6) *The American Journal of Sociology* 1328, 1329-1330

<sup>150</sup> Reece Jones, 'Spaces of Refusal: Rethinking Sovereign Power and Resistance at the Border' (2012) 102(3) *Annals of the Association of American Geographers* 685, 685

crossing points but instead elects other more convenient means. She doesn't necessarily do this with the view of resisting the securitisation of the border; instead, the motivation that underpins her actions relates to a desire to visit her son. Jones asks 'how should theorists of state sovereignty, transnationalism, and resistance conceptualise the experiences of Moushumi'<sup>151</sup> and others like her who cross state borders by unofficial means. He argues that neither the literature on sovereign power and the state of exception nor the literature on dominance and resistance in power relations are able to engage with this practice. Referring to the likes of Agamben, he suggests that there is little room for resistance in the literature on the state of exception.<sup>152</sup> He says that 'Moushumi's trip would not be resistance at all but rather an activity that is currently allowed and monitored.'<sup>153</sup> He then argues that in literature on dominance and resistance in power relations resistance is seen to be everywhere, drawing on the work of Scott and his examination of everyday resistance as an example. When thought of in these terms 'almost any type of noncompliance is resistance', making it possible to characterise Moushumi's actions as 'an example of resistance to the authority of the state.'<sup>154</sup> Jones attempts to reconcile these literatures by exposing how sovereign power 'is better conceptualised as multifaceted, partial, and conflicted.'<sup>155</sup> He also 'questions the dominance-resistance binary that defines all activities as being political'<sup>156</sup> in

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<sup>151</sup> Reece Jones, 'Spaces of Refusal: Rethinking Sovereign Power and Resistance at the Border' (2012) 102(3) *Annals of the Association of American Geographers* 685, 686

<sup>152</sup> Reece Jones, 'Spaces of Refusal: Rethinking Sovereign Power and Resistance at the Border' (2012) 102(3) *Annals of the Association of American Geographers* 685, 686

<sup>153</sup> Reece Jones, 'Spaces of Refusal: Rethinking Sovereign Power and Resistance at the Border' (2012) 102(3) *Annals of the Association of American Geographers* 685, 686

<sup>154</sup> Reece Jones, 'Spaces of Refusal: Rethinking Sovereign Power and Resistance at the Border' (2012) 102(3) *Annals of the Association of American Geographers* 685, 686-687

<sup>155</sup> Reece Jones, 'Spaces of Refusal: Rethinking Sovereign Power and Resistance at the Border' (2012) 102(3) *Annals of the Association of American Geographers* 685, 687

<sup>156</sup> Reece Jones, 'Spaces of Refusal: Rethinking Sovereign Power and Resistance at the Border' (2012) 102(3) *Annals of the Association of American Geographers* 685, 687

an attempt to explore alternative ways of understanding instances of noncompliance. He then puts forward the idea of 'spaces of refusal'<sup>157</sup> that can operate as an alternative to resistance. What is interesting here is how Jones signals a reluctance to attach the label of resistance to actions that are not consciously intended by their actors to be thought of as resistance, perhaps alluding to more general concerns surrounding the prevalence of resistance in modern scholarship.

In order to move beyond the problem of imputing an intention to resist when interpreting the practices of others Hollander and Einwohner have identified a third view on intention, where the actors intentions are not thought to be of central importance to the characterisation of an action as resistance.<sup>158</sup> To adopt this stance does however return us to the problem of identifying resistance, which can then force a return to the question of how to measure resistance. In identifying activities that concern themselves with disrupting universalising accounts as a form of resistance I will pursue the idea that it becomes possible to sidestep such questions by suggesting that it is enough for resistance to present itself as a more general challenge. By taking this view I intend to pursue the idea that resistance need not have any particular normative grounding or aim in mind, thus opening up the possibility for it to arise in a wider variety of different situations. So while some may argue that broad definitions of resistance are unhelpful I will seek to show how looser definitions not only enable us to see resistance in a multiplicity of both past and present practices, but how they also ensure the continued value of this concept for the future. Moreover if 'definitions are analytical tools and not an ends in themselves'<sup>159</sup> it will be important to keep in mind the work done by particular definitions in the context of specific instances of resistance, paying particular attention to the ways in which they either extend or limit the potential scope of this practice. The categories of scale, location, organisation and visibility cannot therefore be seen to reflect a reliable means through which to read practices of

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<sup>157</sup> Reece Jones, 'Spaces of Refusal: Rethinking Sovereign Power and Resistance at the Border' (2012) 102(3) *Annals of the Association of American Geographers* 685, 687

<sup>158</sup> Jocelyn A. Hollander and Rachel L. Einwohner, 'Conceptualising Resistance' (2004) 19(4) *Sociological Forum* 533, 543

<sup>159</sup> James C. Scott, *Weapons of the Weak: Everyday Forms of Peasant Resistance* (Yale University Press 1985) 290



resistance. More specifically, I would argue that when used as a framework for identifying and analysing resistance these categories exclude a vast range of potentially fruitful practices. As a consequence of this, I will recast these categories as a series of lenses through which to examine specific instances of resistance rather than single them out as a reliable means of identifying instances of resistance.

Broadening my approach to the identification of resistance by moving away from fixed categories will enable me to explore the broader implications of claims that 'resistance can be understood as a conscious attempt to shift... dynamics or openly challenge the givenness of situational power relations.'<sup>160</sup> Such claims are useful, as they enable me to focus on how different theories of history writing are able to undermine the stability of seemingly neutral accounts, which in turn enables them to feed into challenging notions of givenness and inevitability. History writing will therefore be cast as a means of reintroducing an element of conflict (as well as context) into more official singular accounts of events to reveal a vital element of contingency that exists within all narratives that are tasked with mediating historical events and processes. All of this will facilitate an exploration of resistance as something that can occur on a more conceptual level, where the focus is on the shifting nature of meaning and possibility rather than measurable outcomes tied to material change.<sup>161</sup>

ii. Koselleck and the Layers of Time: Extending the Scope of Resistance

When examining how engagements with history, or to be more precise engagements with and the development of different theories of history writing can be regarded as a form of resistance it is helpful to think of resistance as an ongoing process rather than something that is to be defined strictly according to its end

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<sup>160</sup> Patricia Ewick, 'Narrating Social Structures: Stories of Resistance to Legal Authority' (2003) 108(6) *The American Journal of Sociology* 1328,1331

<sup>161</sup> While I will not attempt to claim that this is an entirely unique way of conceptualising resistance, I will attempt to suggest that this is an approach to resistance that has often been overlooking in social science based legal scholarship. For more discussion on this see: Dennis K. Mumby, 'Theorising Resistance in Organisation Studies: A Dialectical Approach' (2005) 19(1) *Management Communication Quarterly* 19, 23

point. For example, in the context of resistance to globalisation, it is possible to see how scholars have looked to theory to expand their study of this phenomenon. Christine Chin and James Mittelman have noted that 'resistance movements are on the rise', but have stated that 'they cannot solely be understood as a political reaction to globalisation.'<sup>162</sup> Instead they suggest that 'in the teeth of globalising tendencies, resistance movements shape and are constitutive of social processes.'<sup>163</sup> For them, it is important to 'examine the subtexts of political and cultural life, the possibilities and potential for structural transformation.'<sup>164</sup> They, therefore, focus on the constitutive role of power in their attempt to reconceptualise resistance movements, drawing on the work of Antonio Gramsci, Karl Polanyi and James C. Scott when doing so. They examine Gramsci's concept of counter-hegemony, Polanyi's notion of counter-movements and Scott's idea of infrapolitics to show how both the 'conduct and meaning of resistance are culturally embedded.'<sup>165</sup> They conclude that while each theorist shows how 'resistance arises from and is constitutive of specific and whole ways of life'<sup>166</sup>, their understanding of the forms and dimensions of resistance differ greatly. They show how Gramsci focuses on state apparatuses as the main targets of resistance, with 'wars of movement' and 'wars of position'<sup>167</sup> being the main modes of resistance. While 'wars of movement' involve 'frontal assaults against the state', 'wars of position' relate to non-violent resistance that is 'designed to impede everyday functions of the state.'<sup>168</sup> Either way, both forms of resistance operate on an openly collective level. Their reading of Polanyi's conceptualisation of resistance can also be seen

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<sup>162</sup> Christine B. N. Chin and James H. Mittelman, 'Conceptualising Resistance to Globalisation' (1997) 2(1) *New Political Economy* 25, 26

<sup>163</sup> Christine B. N. Chin and James H. Mittelman, 'Conceptualising Resistance to Globalisation' (1997) 2(1) *New Political Economy* 25, 26

<sup>164</sup> Christine B. N. Chin and James H. Mittelman, 'Conceptualising Resistance to Globalisation' (1997) 2(1) *New Political Economy* 25, 26

<sup>165</sup> Christine B. N. Chin and James H. Mittelman, 'Conceptualising Resistance to Globalisation' (1997) 2(1) *New Political Economy* 25, 33

<sup>166</sup> Christine B. N. Chin and James H. Mittelman, 'Conceptualising Resistance to Globalisation' (1997) 2(1) *New Political Economy* 25, 33

<sup>167</sup> Christine B. N. Chin and James H. Mittelman, 'Conceptualising Resistance to Globalisation' (1997) 2(1) *New Political Economy* 25, 27

<sup>168</sup> Christine B. N. Chin and James H. Mittelman, 'Conceptualising Resistance to Globalisation' (1997) 2(1) *New Political Economy* 25, 27

to operate on a collective level as it takes the form of 'counter-movements aimed at self-protection'<sup>169</sup> that centre around 'a form of collective action... based on solidarity.'<sup>170</sup> However, the targets of Polanyi's resistance are market forces and their sources of legitimation.<sup>171</sup> In contrast to this, they suggest that Scott's conceptualisation of resistance addresses more individualised practices where the targets of resistance are ideologies/public transcripts (as discussed above). The form resistance takes in this instance is 'counter-discourse'<sup>172</sup>, where public transcripts are brought into conversation with hidden transcripts. Chin and Mittelman argue that these differences in 'levels of analysis, main targets and modes of resistance should not be reasoned by way of the intellectual proclivities of each theorist.'<sup>173</sup> Instead, they suggest that these 'conceptual tensions' reflect 'changing conditions of social life.'<sup>174</sup> They also state that 'as political and economic power becomes more diffuse and less institutionalised, so too will forms of resistance'<sup>175</sup>, concluding that 'the trialectic of Gramsci-Polanyi-Scott calls for conceptual frameworks that link different levels of analysis.'<sup>176</sup>

The philosopher Henry Caygill has extended the call for an understanding of resistance that allows for different levels of analysis by examining the development of this concept at different moments in time. He has identified resistance as 'one of the most important and enduring expressions of twentieth-century political

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<sup>169</sup> Christine B. N. Chin and James H. Mittelman, 'Conceptualising Resistance to Globalisation' (1997) 2(1) *New Political Economy* 25, 34

<sup>170</sup> Christine B. N. Chin and James H. Mittelman, 'Conceptualising Resistance to Globalisation' (1997) 2(1) *New Political Economy* 25, 29

<sup>171</sup> Christine B. N. Chin and James H. Mittelman, 'Conceptualising Resistance to Globalisation' (1997) 2(1) *New Political Economy* 25, 34

<sup>172</sup> Christine B. N. Chin and James H. Mittelman, 'Conceptualising Resistance to Globalisation' (1997) 2(1) *New Political Economy* 25, 34

<sup>173</sup> Christine B. N. Chin and James H. Mittelman, 'Conceptualising Resistance to Globalisation' (1997) 2(1) *New Political Economy* 25, 34

<sup>174</sup> Christine B. N. Chin and James H. Mittelman, 'Conceptualising Resistance to Globalisation' (1997) 2(1) *New Political Economy* 25, 34

<sup>175</sup> Christine B. N. Chin and James H. Mittelman, 'Conceptualising Resistance to Globalisation' (1997) 2(1) *New Political Economy* 25, 34

<sup>176</sup> Christine B. N. Chin and James H. Mittelman, 'Conceptualising Resistance to Globalisation' (1997) 2(1) *New Political Economy* 25, 36

imagination and action', but has also noted that 'resistance remains strangely unanalysed and indeed resistant to philosophical analysis.'<sup>177</sup> He states that 'resistance, it seems, is rooted in practice and articulated in tactical statements and justifications addressing specific historical contexts'<sup>178</sup>, however unlike some he does not regard this as a drawback. To the contrary, he claims that 'defining... resistance risks making it predictable, open to control and thus lowering its resistance.'<sup>179</sup> In order to develop this point, he provides an account of several different ways of thinking about resistance, looking closely at the circumstances out of which they have arisen. For example, when looking at the development of what he refers to as conscious resistance Caygill refers to Carl von Clausewitz's *On War* to show how the emergence of a horrifying new form of warfare presented fresh challenges to notions of resistance.<sup>180</sup> He observes how Clausewitz regarded resistance as 'a concept dedicated to preserving its own capacity or conditions of possibility'<sup>181</sup>, linking it to the suggestion that 'at issue in war is the capacity to resist.'<sup>182</sup> He then moves on to examine Marxist contributions to conscious resistance, looking at how resistance was translated into 'the logic of a conscious political project oriented to the future.'<sup>183</sup> He also examines the development of violent resistance as well as the emergence of resistant subjectivities and the contemporary capacity to resist. What becomes apparent in his analysis are not only the transformative results of resistance, but also the ways that these results/outcomes depend upon the transformative nature of the concept of resistance itself. In focusing on how resistance as a concept must defy attempts to pin it down, Caygill draws attention to the need to think carefully about how we draw on this concept in the present. The imposition of fixed categories that come to be thought of as the basic criteria for establishing resistance would, therefore, appear unwise if we think of resistance as something directed towards (re)opening up possibilities. Furthermore, I would suggest that by acknowledging the fluctuating

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<sup>177</sup> Henry Caygill, *On Resistance: A Philosophy of Defiance* (Bloomsbury 2015) 6

<sup>178</sup> Henry Caygill, *On Resistance: A Philosophy of Defiance* (Bloomsbury 2015) 6

<sup>179</sup> Henry Caygill, *On Resistance: A Philosophy of Defiance* (Bloomsbury 2015) 6

<sup>180</sup> Henry Caygill, *On Resistance: A Philosophy of Defiance* (Bloomsbury 2015) 15

<sup>181</sup> Henry Caygill, *On Resistance: A Philosophy of Defiance* (Bloomsbury 2015) 17

<sup>182</sup> Henry Caygill, *On Resistance: A Philosophy of Defiance* (Bloomsbury 2015) 16

<sup>183</sup> Henry Caygill, *On Resistance: A Philosophy of Defiance* (Bloomsbury 2015) 31

boundaries of this concept he also acknowledges a need to think about this concept historically.

Rather than advancing a new definition of resistance to replace those that are currently drawn upon within the social sciences, I would suggest that my characterisation of historiography as a form of resistance speaks to present concerns surrounding the deployment of historical knowledge. While debates surrounding theories of history writing and the broader implications of their application are nothing new; I would argue that what is perhaps interesting is the way that these debates are emerging in relation to an ever-widening range of disciplines. Our renewed interest in history as critically minded legal scholars would appear to signal a growing uneasiness about the ways in which we have allowed the past to loom over the present, something that becomes especially visible in the wake of our rejection of notions of absolute truth. When coupled with the claim that 'ours is the age of resistance'<sup>184</sup> it is possible to see how history and its writing bears the potential to be interpreted as an important site of activity. Alain Badiou has even claimed that 'we find ourselves in a *time of riots* wherein a rebirth of History, as opposed to the pure and simple repetition of the worst, is signalled and takes shape.'<sup>185</sup> In order to identify historiography as a form of resistance, I would extend observations such as these to show how it is historical knowledge when thought of as the product of distinct forms of historiography, that can become a locus of or at least a source of resistance.<sup>186</sup> The resistance that I see in engagements with historiography could, therefore, be characterised as an engagement with opposing regimes of truth that concern themselves with developing 'new practices of representation.'<sup>187</sup>

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<sup>184</sup> Costas Douzinas, *Philosophy and Resistance in the Crisis: Greece and the Future of Europe* (Polity 2013) 9

<sup>185</sup> Alain Badiou, *The Rebirth of History: Times of Riots and Uprisings* (Verso 2012) 5

<sup>186</sup> For example, Tracey Skelton has suggested that when power and knowledge intersect an assumption about truth emerges. As a consequences of this, knowledge can be used to control the behaviour of others and to legitimate practices that do this. For more on this see: Tracey Skelton, 'Jamaican Yardies on British Television: Dominant Representations, Spaces for Resistance?' in Joanne P. Sharp and others (ed), *Entanglements of Power: Geographies of Domination/Resistance* (Routledge 2000) 182

<sup>187</sup> Tracey Skelton, 'Jamaican Yardies on British Television: Dominant Representations, Spaces for Resistance?' in Joanne P. Sharp and others (ed),

To do this it is useful to turn to the methodological reflections of Reinhart Koselleck, as it is through his contributions to the sub-discipline of conceptual history that we are able to see how concepts can come to be regarded as powerful value-laden tools in political discourse. Koselleck claimed that 'ever since society has been swept into industrial movement, political semantics has provided an interpretive key to its related concepts without which, today, the phenomena of the past cannot be conceived.'<sup>188</sup> For him 'a concept must remain ambiguous in order to be a concept at all'<sup>189</sup> as the meaning of a concept is derived from its semantic field and the temporal assumptions that are built into them (as discussed earlier). In order to understand a concept, we must, therefore, look at not only the context in which it is being used but also ask if it possesses a particular temporal dimension. This can be seen in his claim that:

Political and social concepts become the navigational instruments of the changing movement of history. They do not only indicate or record given facts. They themselves become factors in the formation of consciousness and the control of behaviour.<sup>190</sup>

By identifying political and social concepts as navigational instruments, Koselleck was able to point towards how an understanding of the significance of how 'changes in temporal experience'<sup>191</sup> can be used to broaden our engagement with

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*Entanglements of Power: Geographies of Domination/Resistance* (Routledge 2000) 182, 187

<sup>188</sup> Reinhart Koselleck, 'Begriffsgeschichte and Social History', *Futures Past: On the Semantics of Historical Time* (Keith Tribe (tr), Columbia University Press 2004) 75, 80

<sup>189</sup> Reinhart Koselleck, 'Begriffsgeschichte and Social History', *Futures Past: On the Semantics of Historical Time* (Keith Tribe (tr), Columbia University Press 2004) 75, 85

<sup>190</sup> Reinhart Koselleck, 'Concepts of Historical Time and Social History' in Mieke Bal and Hent de Vries (eds), *The Practice of Conceptual History: Timing History and Spacing Concepts* (Adelheis Baker (tr), Stanford University Press 2002) 115, 129

<sup>191</sup> Reinhart Koselleck, 'Concepts of Historical Time and Social History' in Mieke Bal and Hent de Vries (eds), *The Practice of Conceptual History: Timing History*

concepts more generally. His engagement with Henry Adams's law of acceleration enabled him to explore what he believed to be the inherent instability of the meaning of concepts by introducing several temporal variables into our understanding of concepts. These variables relate to tense, extension and intensity. Koselleck noted how Adams developed a theory of movement that was able to address the issues of progress and history by 'questioning the structure of historical time.'<sup>192</sup> Adams showed how 'standards were continually altered', claiming that 'the acceleration of the future constantly foreshortened resort to the past', concluding that 'one could no longer teach how to behave, but at the most, how to react.'<sup>193</sup> According to Koselleck, 'time itself could now be interpreted as something new, since the future brought with it something else, sooner than had ever seemed possible' as 'the temporal dimensions of past, present, and future were now folded into each other in qualitatively varying ways.'<sup>194</sup> This new understanding of time resulted in the temporalisation of history, which in turn saw 'time itself [become] a title of legitimation open to occupation from all sides.'<sup>195</sup> For Koselleck this meant that 'specific legitimising concepts would no longer be possible without temporal perspective', creating an opportunity to 'not only transform older constitutional concepts'<sup>196</sup> but also develop new ones.

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*and Spacing Concepts* (Adelheis Baker (tr), Stanford University Press 2002) 115, 121

<sup>192</sup> Reinhart Koselleck, 'Historia Magistra Vitae: The Disolution of the Topos into the Perspective of a Modernised Historical Process', *Futures Past: On the Semantics of Historical Time* (Keith Tribe (tr), Columbia University Press 2004) 26, 42

<sup>193</sup> Reinhart Koselleck, 'Historia Magistra Vitae: The Disolution of the Topos into the Perspective of a Modernised Historical Process', *Futures Past: On the Semantics of Historical Time* (Keith Tribe (tr), Columbia University Press 2004) 26, 42

<sup>194</sup> Reinhart Koselleck, "'Neuzeit': Remarks on the Semantics of Modern Concepts of Movement', *Futures Past: On the Semantics of Historical Time* (Keith Tribe (tr), Columbia University Press 2004) 222, 242

<sup>195</sup> Reinhart Koselleck, "'Neuzeit': Remarks on the Semantics of Modern Concepts of Movement', *Futures Past: On the Semantics of Historical Time* (Keith Tribe (tr), Columbia University Press 2004) 222, 248

<sup>196</sup> Reinhart Koselleck, "'Neuzeit': Remarks on the Semantics of Modern Concepts of Movement', *Futures Past: On the Semantics of Historical Time* (Keith Tribe (tr), Columbia University Press 2004) 222, 248-249

Gabriel Motzkin has suggested that it is because of this that we can now look at how a concept can be transformed into a 'program for action.'<sup>197</sup> Motzkin focuses on Koselleck's identification of the concept of republicanism, looking at how it can be regarded as being future-oriented rather than backward looking. He reflects on how Koselleck argued that since the 18<sup>th</sup> century, political and social concepts have possessed 'a temporal internal structure' that tells us that 'the weight of experience and the weight of expectation have shifted in favour of the latter.'<sup>198</sup> This shift in our relationship with experience and expectation means that since the Enlightenment instead of grounding expectations of the future in previous experiences we now focus our expectations on a different future. Koselleck used the example of Kant, stating that for him the concept of republic was an 'historical objective that could be deduced from practical reason', which is why he began to use the new expression 'republicanism' to identify it as 'a principle of historical movement.'<sup>199</sup> In doing so he was able to dissociate it from past understandings of the two main forms of rule (the Republic and despotism), alluding to a future separate from the past. The point that I wish to take from this is that concepts are more than words that we use to describe something. Instead, they are implicated in the events and processes that we seek to understand. It is with this in mind that I wish to further my understanding of resistance, showing how an increased concern with theories of history writing and their broader consequences feed into our understanding of resistance, expanding its borders to include the development of alternative theories of history writing. Or to put it another way, in what is to follow I hope to show how resistance is a concept that adapts to meet the needs of those that engage with it,

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<sup>197</sup> Gabriel Motzkin, 'On Koselleck's Intuition of Time in History' in Hartmut Lehmann and Melvin Richter (eds), *The Meaning of Historical Terms and Concepts: New Studies on Begriffsgeschichte* (German Historical Institute Washington D.C. Occasional Paper No. 15 1996)

<sup>198</sup> Reinhart Koselleck, 'Concepts of Historical Time and Social History' in Mieke Bal and Hent de Vries (eds), *The Practice of Conceptual History: Timing History and Spacing Concepts* (Adelheis Baker tr, Stanford University Press 2002) 115, 128

<sup>199</sup> Reinhart Koselleck, 'Concepts of Historical Time and Social History' in Mieke Bal and Hent de Vries (eds), *The Practice of Conceptual History: Timing History and Spacing Concepts* (Adelheis Baker tr, Stanford University Press 2002) 115, 128



and that it is because of this that it is possible to develop historiography as a distinct form of resistance in its own right.

While historiography may not be a form of resistance that is intelligible within current social science based frameworks for understanding this concept, this is not to say that historiography cannot function as a form of resistance within the social sciences. Challenges surrounding process of representation arise frequently in the context of historically oriented social science based projects, something that I would argue makes it possible to identify a role for different theories of history writing in extending the scope of such projects. For example, the relationship between historical representation and the entrenchment of particular power structures can be seen to manifest itself in even the most innocuous representations of past events, creating a need to remain alert to potentially dangerous narrowings of history that emerge in a wide range of scholarship. The need to remain alert to unconscious narrowings of history has perhaps been best explored by philosopher Martin Heidegger, where it is suggested that in some circumstances historical representation results in the 'shutting down of history'<sup>200</sup>, where static historical accounts emerge despite the fact that history is something that is still taking place. This danger can be seen to manifest itself in relation to deployments of historical accounts in social science based studies, where history is often assigned the task of setting up a problem rather than being regarded as forming part of the problem to be addressed. In order to move away from uses of history that run the risk of shutting it down it is useful to draw on Koselleck's theory of multiple temporalities, as by showing how history cannot be fixed in an unreachable past, he drew attention to the dangers of assigning it a purely contextualising role. In developing his theory of multiple temporalities Koselleck drew on the categories of experience and expectation, exploring the relationship between the space of experience and the horizon of expectation to show how the increased disjunction between these two categories has resulted in a very different understanding of time. In his doctoral thesis *Critique and Crisis* along with his later essays on the mutation of historical experience, Koselleck drew attention to how modernity can be characterised by an increased interest in the future, something which has ultimately transformed our relationship with our past. More specifically, he noted that by the second half of the 18<sup>th</sup> century 'time is no longer simply the

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<sup>200</sup> Martin Heidegger, 'What is a Thing?' (W. B. Jr Barton and Vera Deutsch trs, University Press of America 1967) 43

medium in which all histories takes place; it gains a historical quality. Consequently, history no longer occurs in, but through time. Time becomes a dynamic and historical force in its own right.<sup>201</sup>

The categories of experience and expectation formed the core of Koselleck's investigation into the temporalisation of history because of their ability to embody both the past and the future, exposing how the tension between the two generates an understanding of historical time that is based on a relation of contingency.<sup>202</sup> He argued that 'experience is present past' and that expectation 'is the future made present.'<sup>203</sup> Experience can therefore be seen to be comprised of events that can be remembered, both consciously and unconsciously. In contrast to this expectation directs itself towards the non-experienced, drawing on hopes as well as fears. While both of these concepts are described by Koselleck as being present-centred, he nevertheless emphasised that they are not to be thought of as 'symmetrical complementary concepts which might, for instance, as in a mirror image, mutually relate to past and future.'<sup>204</sup> In doing so he wanted to show how 'the presence of the past is distinct from the presence of the future.'<sup>205</sup> By emphasising the asymmetry between experience and expectation Koselleck was able to show how experience of the past can be thought of spatially as being comprised of several layers of earlier times that are simultaneously present. This means that experience cannot create continuity in what he referred to as 'an

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<sup>201</sup> Reinhart Koselleck, "'Neuzeit': Remarks on the Semantics of Modern Concepts of Movement', *Futures Past: On the Semantics of Historical Time* (Keith Tribe tr, Columbia University Press 2004) 222, 236

<sup>202</sup> Reinhart Koselleck, "'Space of Experience" and "Horizon of Expectation": Two Historical Categories', *Futures Past: On the Semantics of Historical Time* (Keith Tribe (tr), Columbia University Press 2004) 255, 258

<sup>203</sup> Reinhart Koselleck, "'Space of Experience" and "Horizon of Expectation": Two Historical Categories', *Futures Past: On the Semantics of Historical Time* (Keith Tribe (tr), Columbia University Press 2004) 255, 259

<sup>204</sup> Reinhart Koselleck, "'Space of Experience" and "Horizon of Expectation": Two Historical Categories', *Futures Past: On the Semantics of Historical Time* (Keith Tribe (tr), Columbia University Press 2004) 255, 260

<sup>205</sup> Reinhart Koselleck, "'Space of Experience" and "Horizon of Expectation": Two Historical Categories', *Futures Past: On the Semantics of Historical Time* (Keith Tribe (tr), Columbia University Press 2004) 255, 260

additive preparation of the past.<sup>206</sup> Instead, experiences can change as a result of not only 'faulty memories'<sup>207</sup> but also as a result of new experiences and the perspectives they bring with them. Expectation on the other hand is described using the idea of horizon to show how the future cannot yet be experienced. The disjunction that Koselleck establishes between experience and expectation creates an interesting divide between the historical future and the historical past. It also shows us that when the horizon of expectation is penetrated, a new experience is created. The generative character of the tension that exists between experience and expectation can, therefore, be used to modify how we think about the relationship between past, present and future, which can, in turn, be extended to shed light on the broader implications of seeking to ground the legitimacy of a power structure or a particular way of understanding the world around us in a fixed past.

When applied to the concept of resistance and the identification of historiography as a form of resistance it is helpful to look more closely at how Koselleck understood how the relationship between experience and expectation can be used to avoid the closing down of history as a fruitful site of activity. His insights on the utility of suspending context as a moment of intelligibility are especially helpful because by developing a strain of conceptual history where 'the synchronic analysis of the past is supplemented diachronically'<sup>208</sup>, he established the importance of looking for ruptures in meaning rather than assuming the existence of stable meanings that extend their reach through time. In doing so he emphasised that context alone cannot provide the key to understanding; instead, it only forms one level of historical analysis by revealing the potential ways in which language can be seen to condition our experiences. Insights such as these all point towards a form of historiography that is not so much concerned with processes of legitimation as it is with revealing a sense of alterity embedded within history itself.

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<sup>206</sup> Reinhart Koselleck, "'Space of Experience' and 'Horizon of Expectation': Two Historical Categories', *Futures Past: On the Semantics of Historical Time* (Keith Tribe (tr), Columbia University Press 2004) 255, 260

<sup>207</sup> Reinhart Koselleck, "'Space of Experience' and 'Horizon of Expectation': Two Historical Categories', *Futures Past: On the Semantics of Historical Time* (Keith Tribe (tr), Columbia University Press 2004) 255, 262

<sup>208</sup> Reinhart Koselleck, 'Begriffsgeschichte and Social History' , *Futures Past: On the Semantics of Historical Time* (Keith Tribe tr, Columbia University Press 2004) 75, 82

They also point towards a form of historiography that encourages those that study historical texts to think carefully about the hidden exchanges that take place between the author of the text and the event they are representing. For example, it is interesting to look at how Koselleck applied these methodological insights to the unfreezing of Albrecht Altdorfer's depiction of the Battle of Issus. Here Koselleck showed how it is possible to set into motion the historical event(s) embedded within the painting by adopting both synchronic and diachronic methods of analysis. Instead of simply regarding the painting as an attempt to depict an important battle, Koselleck focused on drawing attention to Altdorfer's deliberate use of anachronism, both in relation to his attempt to depict the 'number of combatants, the dead and those taken prisoner'<sup>209</sup> and in his choice of dress for the combatants. This enabled him to show how Altdorfer was not just depicting the Battle of Issue, but also the failed siege of Vienna that had taken place in the year in which he was painting. He even noted that:

...the event that Altdorfer captured was for him at once historical and contemporary. Alexander and Maximilian, for whom Altdorfer had prepared drawings, merge in an exemplary manner; the space of historical experience enjoys the profundity of generational unity.<sup>210</sup>

By making these observations Koselleck was able to show how the present and the past were enclosed within what he referred to as a 'common historical plane.'<sup>211</sup> This plane is however only perceptible to those that come to the painting after the temporalisation of history, as it is only after this that we are able to see how time is being arranged in processes of historical representation. So if as Heidegger suggests to question historically is to ask what is still happening even if it seems to

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<sup>209</sup> Reinhart Koselleck, 'Modernity and the Planes of Historicity', *Futures Past: On the Semantics of Historical Time* (Keith Tribe (tr), Columbia University Press 2004) 9, 10

<sup>210</sup> Reinhart Koselleck, 'Modernity and the Planes of Historicity', *Futures Past: On the Semantics of Historical Time* (Keith Tribe (tr), Columbia University Press 2004) 9, 10

<sup>211</sup> Reinhart Koselleck, 'Modernity and the Planes of Historicity', *Futures Past: On the Semantics of Historical Time* (Keith Tribe (tr), Columbia University Press 2004) 9, 10

be passed<sup>212</sup>, it is possible to see Koselleck's reading of Altdorfer's painting as a particularly interesting use of contextualisation. In drawing attention to the 'contemporaneity of the non-contemporaneous'<sup>213</sup> he revealed how the past was being put to work in the service of the present, exposing a deeper level of meaning relating to the history of the West more generally. I would suggest that it is precisely this type of historiographical practice that can be regarded as a form of resistance that directs itself against the stifling and often violent effects of universalising discourses that rely on historical knowledge for their force. This is because by incorporating both synchronic and diachronic modes of analysis into our engagements with history and its writing, it is possible to look behind the products of particular methodological commitments to reveal the conflicts that continue beneath their surface. Koselleck's theory of history, therefore, enables us to identify historiography as something that is able to function as a form of resistance that operates on a more conceptual level.

### iii. Concluding Remarks

The deficits that I have identified with purely material understandings of resistance do not result from any particular defect in material practices of resistance; instead, I have located them in the rigidity of the categories through which we often try to interpret this practice. I have shown how while categories such as scale, location, organisation/intent and visibility may create something that resembles a helpful grid of intelligibility through which to distinguish instances of resistance from other practices, this grid is very narrowly framed. I have also shown how categories such as visibility and scale force to the fore the uncomfortable and often unacknowledged normative judgments that underpin many popular understandings of resistance. It is for these reasons that I conclude that when thinking of historiography as a form of resistance it becomes necessary to move away from material practices of resistance towards a more fluid understanding of this concept (although this should be construed as a rejection of material practices).

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<sup>212</sup> Martin Heidegger, 'What is a Thing?' (W. B. Jr Barton and Vera Deutsch trs, University Press of America 1967) 43

<sup>213</sup> Reinhart Koselleck, 'Begriffsgeschichte and Social History', *Futures Past: On the Semantics of Historical Time* (Keith Tribe (tr), Columbia University Press 2004) 75, 90

In order to do this I will look more closely at German historian Reinhart Koselleck's contributions to conceptual history, paying particular attention to the roles he assigns to conflictuality and contextuality in his methodological writings. I will cast his version of conceptual history as a resistance to universalising discourses as they appear in relation to the grand narrative form and will argue that our increasing turn to history can be said to reflect a conscious awareness of the problems surrounding ideas of truth, power and temporality. I will also argue that such concerns have generated a need for forms of historiography that not only accommodate but also promote such concerns, and that such a form of historiography can be found in conceptual history. I will then extend my discussion to the claim that 'memory has become the discourse that replaces history', looking at how 'memory motivates historical activity' and how 'historical research utilises memory.'<sup>214</sup> All of this will be done with the broader aim of exploring the extent to which it is possible to establish historiography as a form of resistance that emerges at specific moments in time in response to the violence of universalising discourses. In the chapters that will now follow, I will therefore attempt to establish the utility of moving away from fixed categories by identifying opportunities where historiography may be able to function as a form of resistance that is able to gain access to less visible conflicts.

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<sup>214</sup> Charles S. Maier, 'A Surfeit of Memory? Reflections on History, Melancholy and Denial' (1993) 5(2) *History and Memory* 136, 142

## Chapter 2

# Confronting the Challenges of the Past in the Present: Exploring Questions of National Identity, Tradition and Legitimacy

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*Begriffsgeschichte reminds us- even when it becomes involved with ideologies- that in politics, a word and their usage are more important than any other weapon.*

Reinhart Koselleck<sup>215</sup>

*... we are counter-revolutionaries: we are inventing the course of history in order to cover up the past.*

Vilém Flusser<sup>216</sup>

*We will never cease our critique of those persons who distort the past, rewrite it, falsify it, who exaggerate the importance of one event and fail to mention some other; such a critique is proper.*

Milan Kundera<sup>217</sup>

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History often forms the backbone of many different types of endeavour, whether it be to contextualise a pressing problem that is to be addressed or to entrench a particular belief or way of viewing the world around us. It is in this sense that history often becomes a tool concerned with carving out a discrete area of research or discussion, providing those that draw on its influence a solid foundation from which to speak. While a valuable repository of knowledge may arise when history is used in this way, the seemingly unproblematic clarity that is thought to be gained from knowledge of the past can often come at the expense of notions of contingency

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<sup>215</sup> Reinhart Koselleck, 'Historical Criteria and the Modern Concept of Revolution', *Futures Past: On the Semantics of Historical Time* (Keith Tribe tr, Columbia University Press 2004) 57

<sup>216</sup> Vilém Flusser, *Post-History* (Rodrigo Maltez Novaes tr, Univocal 2013) 5

<sup>217</sup> Milan Kundera, *Identity* (Linda Asher tr, Faber and Faber 1999) 123

and flexibility. As suggested in my introduction and the previous chapter, when we neglect to account for the ways in which recourse to past events can come to shape not only the orientation of a project but also its scope and potential outcomes, unintended limitations can surface. Such limitations can be seen most clearly in projects that use history to bolster claims about the present as well as more general projects that are underpinned by the Enlightenment ideals of progress and rationality. In such projects conditions of possibility/moments of becoming as well as questions surrounding how things could be otherwise become less important, and in some instances are ignored entirely.<sup>218</sup> There is instead a tendency for narratives of an evolutionary nature to take hold, where the presumed origins of the issue at hand are traced backwards to facilitate an authoritative intervention at the level of the event/specific phenomena being discussed. In such cases, a reliance (albeit an often tacit one) on grand narratives emerges.<sup>219</sup> The assumptions that are built into grand narratives are then incorporated into the project at hand, resulting in the masking of potentially crucial definitional and normative avenues of scrutiny. In this chapter I will explore the broader consequences of deferring questions pertaining to conditions of possibility/moments of becoming, drawing on discourses surrounding issues of national identity, tradition and legitimacy. In doing so I will argue that while dangers associated with the grand narrative form have been widely recognised within the academy, resulting in an ever growing scepticism with regards to their reliability and desirability in contemporary research, the grand narrative form nevertheless persists. As a consequence of this, the grand narrative form will be cast as a central limiting factor in historically oriented critical scholarship, signalling a need to return

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<sup>218</sup> When referring to conditions of possibility I allude to Foucault's extension of Kant's conceptualisation of conditions of possibility through his development of the *episteme*, which denotes 'the total set of relations that unite, at a given period, the discursive practices that give rise to epistemological figures, sciences, and possibly formalised systems; the way in which, in each of these discursive formations, the transitions to epistemologisation, scientificity, and formalisation are situated and operate... it is the totality of relations that can be discovered, for a given period, between the sciences when one analyses them at the level of discursive regularities' see: Michel Foucault, *Archaeology of Knowledge* (A. M. Sheridan Smith tr, Routledge 2008) 211. However this is not to say that it is only Foucault's genealogical approach to history writing that concerns itself with conditions of possibility.

<sup>219</sup> When referring to the grand narrative form I draw on Lyotard's conceptualisation of metanarratives/the grand narrative as an appeal to universal truths and values through the construction of overarching narratives of legitimation.



our gaze to the role such narratives perform in providing our projects with scope and direction. In making this observation I aim to advance the grand narrative form as a potential target of resistance, identifying the deployment of forms of historiography that seek to establish authoritative accounts of the past as being bound to particularly oppressive understandings of the nature and function of history and its writing. Furthermore, it will be suggested that such oppressive understandings of history can emerge in relation to even the most innovative of projects, making it possible to identify a need for continuous methodological/theoretical reflection.

The bracketing off of questions of historiography that takes place within the academy will be presented as an indicator of a need to develop a form of resistance that is able to operate within the confines of historically oriented projects, and in doing so will link historiography to ideas of resistance. It is because of this that it is within the grand narrative itself I will identify an opportunity for resistance to emerge by reflecting on how instead of provoking further debate, such narratives often have a silencing effect. I will argue that rather than providing a contribution to an ongoing debate or acknowledging the possibility of diversity, grand narratives (however innocently deployed) instead supply an explanatory *master* narrative that bears the potential to bring a sense closure or finality to the issue being discussed. I will suggest that closure is achieved by adding strength to a particular claim, but that in order to do this a degree of selectivity is first required, as some details/perspectives must be excluded or marginalised in order to secure the integrity of others. I will argue that this selectivity inevitably involves adopting a particular method or theory of history writing, one that denies the presence of concurrent or alternative histories in favour of monolithic accounts of an apparently distant past. Even if unconsciously made, I argue that the decision to adopt a theory of history writing that incorporates such a linear understanding of temporality into its operation can be seen to serve as a restriction on the potential reach of even the most critically oriented project. I will, therefore, conclude that is important to remain alert to the potential ways in which historical accounts are consciously or unconsciously being put to work, even if on the surface they appear to only function as a straightforward contextualising device.

In order to render the task of interrogating the propensity for resistance to emerge in relation to the grand narrative form more manageable I will focus my attentions on how such narratives interact with the concepts of national identity, tradition and

legitimacy. I have selected these concepts to assist me in this endeavour because when examined together they furnish us with a unique opportunity to examine how processes of history writing interact with not only broader narratives pertaining to state formation, but also processes of resistance. This can be seen in how strong national identities often rely on processes of history writing for their legitimacy, a legitimacy that is often derived from a sense of tradition. As a result of such interactions between tradition and legitimacy, freshly minted notions of national identity are shielded from potential challenges, as the historical narratives used to furnish them with the legitimacy they need to survive tends to take the form of the grand narrative, where the possibility for alternative understandings of the past is denied. The exchanges that take place between national identity, tradition and legitimacy can, therefore, be seen to elicit an examination of the strategic functions of history writing where notions of national identity act as a meeting point for history and historiography. In chapters four and five this observation will be extended, allowing me to reach beyond the act of acknowledging what is excluded from dominant universalising historical accounts to look at how alternative ways of engaging with history and its writing emerge at particular moments in time. This will be done with the view of setting into motion some of the static representations of past events that are used to shape very particular views of the present. As a consequence of this my understanding of historiography as a form of resistance will concern itself with acknowledging the ways in which things could always be otherwise, distinguishing itself from a view of resistance as something directed at replacing one historical account with a seemingly more inclusive one. For now however, it is enough to observe an interaction between national identity, tradition and legitimacy and how this interaction can be seen to create (or at the very least sustain) a possible site of resistance.

i. National Identity, Tradition and Legitimacy: Questioning the Role of the Grand Narrative Form

In order to provide focus to my search for a form of resistance that may arise within the context of exchanges between national identity, tradition and legitimacy I will concentrate my attentions on the overarching question of to what extent historiography can be linked to ideas of resistance. To do this it will be helpful to posit two further sub-questions, the first of which being in what ways can claims of national identity, tradition and legitimacy shape an encounter between historiography and resistance. The second sub-question that will be explored is to

what extent our view of the relationship between past, present and future can be seen to create renewed possibilities for resistance. In this section I will attempt to address the former question, I will then move on to address the latter question in the remaining sections of this chapter. To start with the first question, when reflecting on the extent to which claims of national identity, tradition and legitimacy can be seen to shape an encounter between historiography and resistance it is useful to bear in mind the organisational functions that are performed by these concepts. By this I mean to say that it is possible to see both direct and indirect appeals to history being made in the discourses that surround claims to national identity, tradition and legitimacy, where accounts of the past act as important sources of authority. As a consequence of this, appeals to the past provide us with an opportunity to reflect on the contestable nature of history writing by reminding us of what is at stake when we make historical claims.

For example, when looking at regime changes it is possible to see how history writing becomes an important locus of activity for those seeking to establish themselves in power. Alon Confino, a scholar of German memory and national culture, has examined this in the context of Nazi Germany where the idea of origins was used to secure the legitimacy of the Third Reich.<sup>220</sup> He suggests that 'origins is a metaphor of being in time that implies legitimacy, roots, and authenticity' and that by 'exterminating the Jews, the Nazis eliminated the shackles of a past tradition.'<sup>221</sup> This meant that in order to succeed the Nazis had to sever Germany's ties to Jewish morality and culture. Confino argues that in attacking Jewish history and culture the Nazis were seeking out a 'legitimacy that comes with roots.'<sup>222</sup> He even goes so far as to suggest that the Holocaust, which was developed as a way of breaking free from past traditions, was facilitated by the Nazi 'memorycide project'<sup>223</sup> which comprised of dismantling Jewish history and culture in a very public and violent way. In 'erasing Jews and Judaism from the present' the Nazis

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<sup>220</sup> Alon Confino, *A World Without Jews: The Nazi Imagination from Persecution to Genocide* (Yale University Press 2014)

<sup>221</sup> Alon Confino, *A World Without Jews: The Nazi Imagination from Persecution to Genocide* (Yale University Press 2014) 14

<sup>222</sup> Alon Confino, *A World Without Jews: The Nazi Imagination from Persecution to Genocide* (Yale University Press 2014) 15

<sup>223</sup> Alon Confino, *A World Without Jews: The Nazi Imagination from Persecution to Genocide* (Yale University Press 2014) 240

simultaneously denied Jews 'a right to a past and a future.'<sup>224</sup> The implications of using historical accounts to negate possible futures will be explored further in chapter five, for now it is enough to note that when individuals or groups attempt to manoeuvre themselves into positions of power or supremacy they often task themselves with removing anything that draws attention to their relative rootlessness. In the context of Nazi Germany, this quite literally involved writing the Jews out of German history. However it also important to note that the force of history writing flows both ways, as can be seen in that while Nazi revisionism acted as a force of annihilation directed at bringing Jewish history to an end, it is nevertheless possible to observe how the Jewish preoccupation with writing during this time can be regarded as an attempt to leave a 'trace'<sup>225</sup> that would remain even after their potential physical eradication. It is with this in mind that I argue that the establishment and subsequent entrenchment of identity-based power structures can be linked to very particular understandings of the nature and function of historical representation, generating important points of reflection when it comes to national identity's habitual reliance on static modes of historical representation.

In general terms, identity is a concept with a long and varied history, with a great deal of debate surrounding how it interacts with notions of sameness and difference. While some have focused on how it is possible for sameness and identity to coexist<sup>226</sup> others have focused on the temporal aspects of this concept, looking at how identity is rooted in consciousness/memory.<sup>227</sup> In relation to objects, there is even a perceived need for a stable 'persistence through time', with the emergence of 'criteria of identity'<sup>228</sup> being of central importance when trying to trace the persistence of an object through time. In contemporary contexts, growing literatures on identity have emerged in relation to issues surrounding self-identity

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<sup>224</sup> Alon Confino, *A World Without Jews: The Nazi Imagination from Persecution to Genocide* (Yale University Press 2014) 101

<sup>225</sup> Alon Confino, *A World Without Jews: The Nazi Imagination from Persecution to Genocide* (Yale University Press 2014) 200

<sup>226</sup> Plato, 'Parmenides' in John M. Cooper (ed), *Plato: Complete Works* (Mary Louise Gill and Paul Ryan (trs), Hackett Publishing 1997) 359

<sup>227</sup> John Locke, *An Essay Concerning Human Understanding* (Hackett Publishing Co 1996) 133-149

<sup>228</sup> Eli Hirsch, *The Concept of Identity* (Oxford University Press 1992) 3-4

and identity-based conflict, the significance of which only grows in intensity when extended to questions of national identity. Discussions surrounding the potential tension between more individualised notions of identity and forms of collective identity have arisen in a variety of fields including philosophy, sociology and literary studies.<sup>229</sup> Within each of these fields identity is presented in different ways, drawing on different traditions of thought for different purposes. For some identity is taken to denote a sense of 'individuality or personality' while for others it is used to signify something more collective, an 'identity position' that 'signals group affiliation.'<sup>230</sup> Regardless of the sense of identity that is advanced, a tension between competing identities can be seen to manifest itself. This tension can arise externally between different individual or collective identities, but more interestingly it can also be seen to arise internally between the rival affiliations a person possesses. It is because of this tension that issues of national identity often take on a dangerous dimension when thought of in relation to our personal sense of individuality or our sense of belonging to a collectivity, as it can act as not only a uniquely uniting force but also a 'powerful... divider.'<sup>231</sup>

In the context of the tension that exists externally between different collective identities rigid understandings of identity are often used to manufacture a sense of difference, imposing seemingly natural divides between people who in other circumstances may, in fact, be able to relate to one another. The sense of difference that is manufactured can then generate conflict between different groupings, locking them into a relation of opposition. If we extend this sense of inherent difference to national identities we can see how nationalism relies upon naturalising such divisions. The dangers of manufactured differences are then magnified by historically oriented grand narratives that serve to further strengthen claims of difference. Historian John R. Gillis has observed that 'identities and memories are not things that we think *about*, but things we think *with*' and has argued that because of this 'they have no existence beyond our politics, our social

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<sup>229</sup> Caroline Walker Bynum, *Metamorphosis and Identity* (Zone Books 2001) 163

<sup>230</sup> Caroline Walker Bynum, *Metamorphosis and Identity* (Zone Books 2001) 163

<sup>231</sup> Adrian Poole, 'Identity of Meaning' in Giselle Walker and Elisabeth Leedham-Green (eds), *Identity* (Cambridge University Press 2010) 9, 13

relations, and our histories.'<sup>232</sup> He also claims that 'we must take responsibility for their uses and abuses, recognising that every assertion of identity involves a choice that affects not just ourselves but others'<sup>233</sup>, a sentiment that ought to be borne in mind when we think about the interaction between historiography, national identity and the creation/extension/manipulation of tradition and legitimacy.

A well known example of a problematically singular view of identity can be found in the work of Samuel P. Huntington. In his famous (and equally contentious) work *The Clash of Civilisations and the Remaking of World Order*, Huntington claimed that when thinking about identity in the singular we can often find ourselves forced to present ourselves as belonging to a particular dominant group. For him the decision to ally with a dominant grouping is inevitable<sup>234</sup> as 'global politics began to be reconfigured along cultural lines'<sup>235</sup> after the end of the Cold War, creating a dramatic shift in the lines along which conflict will be drawn. Instead of conflict occurring between social classes or other economically defined groups, Huntington argued that conflict will occur 'between peoples belonging to different cultural entities.'<sup>236</sup> Under this understanding of identity, individuals must, therefore, allow one affiliation to dominate all others to create a sense of sameness between the members of their civilisation. This singular understanding of identity then adds a sense of clarity, making it possible to visibly distinguish different peoples and their interests. Huntington's decision to claim that 'human history is the history of civilisations' and that it is 'impossible to think of the development of humanity in any other terms'<sup>237</sup> is not however without its detractors. In framing history in terms of successive civilisations Huntington minimised the importance of diversity and

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<sup>232</sup> John R. Gillis, 'Introduction' in John R. Gillis ed, *Commemorations: The Politics of National Identity* (Princeton University Press 1994) 5

<sup>233</sup> John R. Gillis, 'Introduction' in John R. Gillis ed, *Commemorations: The Politics of National Identity* (Princeton University Press 1994) 5

<sup>234</sup> Samuel P. Huntington, *The Clash of Civilisations and the Remaking of World Order* (The Free Press 2002)

<sup>235</sup> Samuel P. Huntington, *The Clash of Civilisations and the Remaking of World Order* (The Free Press 2002) 19

<sup>236</sup> Samuel P. Huntington, *The Clash of Civilisations and the Remaking of World Order* (The Free Press 2002) 28

<sup>237</sup> Samuel P. Huntington, *The Clash of Civilisations and the Remaking of World Order* (The Free Press 2002) 40

implied an almost linear model of history. In adopting a more linear model of history writing he presented a somewhat flattened view of the world where individuals are grouped into civilisations that are habitually positioned in opposition to one another. Huntington's decision to think about identity in this way feeds into concerns later raised by Gillis, where the difficulties associated with treating identity as a natural object are made clear to us. However unlike Gillis, Huntington did not regard treating identity as "fact" as a limitation on our understanding of the finer nuances of this concept, as while he did concede that people possess various 'levels of identity', he also claimed that everyone that belongs to a particular civilisation shares 'common objective elements' such as 'language, history, religion, customs, [and] institutions.'<sup>238</sup>

The difficulty with thinking of identity in the way that Huntington does lies in the way that it presupposes the existence of identifiable 'common objective elements'<sup>239</sup> that can be used to bind people together without causing any internal tensions, an assumption that has since been heavily criticised by those engaged in analysing contemporary conflicts. Popular criticisms of Huntington's clash of civilisations thesis primarily allude to a tendency to oversimplify matters, with one reviewer of his work stating that his 'taste for generalisation, his gift for striking formulations, his knack for provocation and, one must say, his lack of political common sense and responsibility, lead him time and again to commit the very sins of excessive simplification that he has so well castigated in others.'<sup>240</sup> It has also been suggested that his use of generalisations has generated 'serious intellectual misunderstandings' and 'moral and political misdirections'<sup>241</sup>, resulting in an unworkable (and often unpalatable) way of analysing modern conflicts. Other critics of Huntington's thesis have drawn attention to an absence of strong quantitative evidence; identifying factors of conflict that go unaccounted for in his broad-brush

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<sup>238</sup> Samuel P. Huntington, *The Clash of Civilisations and the Remaking of World Order* (The Free Press 2002) 43

<sup>239</sup> Samuel P. Huntington, *The Clash of Civilisations and the Remaking of World Order* (The Free Press 2002) 43

<sup>240</sup> Pierre Hassner, 'Review: Morally Objectionable, Politically Dangerous: Huntington's Clash of Civilisations' (1996/1997) 46 *The National Interest* 63, 63

<sup>241</sup> Pierre Hassner, 'Review: Morally Objectionable, Politically Dangerous: Huntington's Clash of Civilisations' (1996/1997) 46 *The National Interest* 63, 63

form of analysis.<sup>242</sup> It has even been suggested that 'Huntington has misunderstood the process of cultural change and value-formation' by overlooking developments in anthropology where the distinction between 'cultural tradition and ideology'<sup>243</sup> has been eroded and replaced with more refined modes of analysis.

While Huntington has responded to critics of his tendency to generalise via an engagement with Thomas Kuhn's work on paradigms by arguing that 'a paradigm is disproved only by the creation of an alternative paradigm that accounts for more crucial facts in equally simple or simpler terms'<sup>244</sup>, suggesting that criticisms of his approach to conflict are lacking in strength because of their failure to advance a more enticing paradigm through which to analyse conflict, it is nevertheless possible to remain troubled by his view of world history. The suggestion that his clash of civilisation thesis either 'accords with reality as people see it or it comes close enough so that people who do not accept it have to attach it'<sup>245</sup> fails to address many of the problematic assumptions that he makes when constructing his paradigm. For example, it has been suggested that his 'sedimented-essences version of "civilisation" or "culture" ignores the specific historical processes and particular power relations that have given rise to the recent phenomenon of radical religious expression.'<sup>246</sup> I would take this criticism further by arguing that many of the assumptions that underpin Huntington's clash of civilisations paradigm betray a commitment to a very particular kind of historiography, one that discounts change and minimises diversity in favour of a belief in continuity and overarching master/grand narratives. Furthermore, his presumption of common uniting

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<sup>242</sup> For examples of this see: Pippa Norris and Ronald Inglehart, 'Islamic Culture and Democracy: Testing the "Clash of Civilisations" Thesis' (2002) 1(3-4) *Comparative Sociology* 235, Jonathan Fox, 'Ethnic Minorities and the Clash of Civilisations: A Quantitative Analysis of Huntington's Thesis' (2002) 32(3) *British Journal of Political Science* 415 and Lisa Wedeen, 'Beyond the Crusades: Why Huntington, and Bin Ladin, are Wrong (2003) 10(2) *Middle East Policy* 54

<sup>243</sup> Richard E. Rubenstein and Jarle Crocker, 'Challenging Huntington' (1994) 96 *Foreign Policy* 113, 118

<sup>244</sup> Samuel P. Huntington, 'Response: If Not Civilisations, What?' (1993) 72(5) *Foreign Affairs* 186, 187

<sup>245</sup> Samuel P. Huntington, 'Response: If Not Civilisations, What?' (1993) 72(5) *Foreign Affairs* 186, 187

<sup>246</sup> Lisa Wedeen, 'Beyond the Crusades: Why Huntington, and Bin Ladin, are Wrong (2003) 10(2) *Middle East Policy* 54



elements also feeds into a broader confidence in the stability of meaning over time and bears the potential to de-politicise history writing in a way that establishes it as a powerful tool for establishing a sense of uniformity. Huntington would appear to have relied upon a theory of history writing that adheres to a very linear understanding of temporality, where past, present and future exist in a sequential continuum. Such forms of historiography are problematic because of the way that they discourage a closer scrutiny of the static nature of historical representation and how this can result in a masking of the selectivity involved in history's construction (and indeed re-construction) over time.

A further more visible example of how an adherence to forms of historiography that conceal the choices that are made in processes of historical representation can result in potentially oppressive uses of history can be seen in relation to Palestinian and Israeli national identity. It has been suggested that the construction and subsequent strengthening of Israeli national identity has tended to come at the expense of Palestinian identity, as is illustrated by the spread of what has come to be referred to as *roots tourism*. Roots tourism involves visitors from both within Israel and abroad travelling to sites that have been identified as physical markers of both ancient Jewish history and more recent Zionist history. This form of tourism is concerned with emphasising and preserving a longstanding connection between the Jewish people and the state of Israel, exposing Israel as a state with not only a rich past but also a strong future. However housed within these sites of interest are the physical remains of Palestinian cultural heritage, remains that have either been destroyed or allowed to fall into ruin by the Israeli authorities that manage them.<sup>247</sup> Conscious attempts have been made to minimise the physical visibility of these challenging archaeological remainders because of the ways in which their presence bears the potential to draw attention to the fragility of the carefully crafted Israeli national identity.<sup>248</sup> So instead of acknowledging the divergent and sometimes overlapping connections that Palestinians and Israeli Jews have with particular sites within Israel, those responsible for preserving Israeli heritage have sought to suppress the memory of the other by either ignoring them or subsuming

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<sup>247</sup> For a more detailed account of this refer to: Noga Kadman, 'Roots Tourism-Whose Roots? The Marginalisation of Palestinian Heritage Sites in Official Israeli Tourism Sites' (2010) 29(1) *Teoros* 55

<sup>248</sup> For a fuller discussion on this refer to: Noga Kadman, *Erased from Space and Consciousness: Israel and the Depopulated Palestinian Villages of 1948* (Indiana University Press 2015) 27

them within a distinctively Israeli narrative. While it has been noted that ‘following wars, the winning nation [often] wages war against the architecture and structures of the defeated people’<sup>249</sup>, the extent to which the destruction of sites of Palestinian heritage has been deployed as a tactic for establishing a strong Israeli national identity is quite remarkable. For example, the destruction of Palestinian villages and sites of cultural significance has been executed with the view of not only ‘preventing the physical return’ of Palestinians but also with the aim of erasing ‘the memories, history and identity connected to the architecture and the place.’<sup>250</sup> In this context, the challenge posed by the other and their history would seem to have triggered a somewhat authoritarian approach to history, where the possibility of alternative histories is characterised as a direct threat to national identity.

This repressive approach to history writing has also manifested itself at the level of the treatment of more movable Palestinian antiquities, as can be seen in the regulatory mechanisms that surround their removal and sale. Legal frameworks surrounding the trade in Palestinian antiquities can be traced through the Ottoman Empire and the British Mandate, but it was the developments made through the enactment of the Israeli *Antiquities Law 1978* that can be seen to most visibly further attempts to diminish Palestinian identity by attacking its past. This piece of legislation developed against the backdrop of what has been described as the transformation of archaeology into ‘a national hobby and tool for enhancing social solidarity’<sup>251</sup>, expanding the possibility for the removal of archaeological material from Palestine. The attempt to root Israel ‘in the tangible remains of the past’<sup>252</sup> can even be seen to have extended to the treatment of printed matter and intellectual exchanges. For example, some scholars of cultural genocide have argued that the appropriation of Palestinian books housed in private libraries that were abandoned

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<sup>249</sup> Noga Kadman, 'Roots Tourism- Whose Roots? The Marginalisation of Palestinian Heritage Sites in Official Israeli Tourism Sites' (2010) 29(1) *Teoros* 55, 56

<sup>250</sup> Noga Kadman, 'Roots Tourism- Whose Roots? The Marginalisation of Palestinian Heritage Sites in Official Israeli Tourism Sites' (2010) 29(1) *Teoros* 55, 56

<sup>251</sup> Morag M. Kersel, 'The Trade in Palestinian Antiquities' (2008) 33 *Jerusalem Quarterly* 21, 29

<sup>252</sup> Morag M. Kersel, 'The Trade in Palestinian Antiquities' (2008) 33 *Jerusalem Quarterly* 21, 29

after the 1948 war/Nakba amounts to a form of 'cultural theft and destruction' that 'threatens Palestinian identity at its core.'<sup>253</sup> It has been suggested that the *Absentee Property Law 1950* 'actively served the Zionist interests' by enabling Palestinian property to 'become part of Israel's conception of itself.'<sup>254</sup> This claim is linked to the proposition that 'the coloniser's identity exists only in relation to the colonised', with the appropriation of abandoned books representing an appropriation of 'the burgeoning intellectual culture of Palestine and the Arab world in general, and Jerusalem in particular, in the 1940s.'<sup>255</sup> While many of the books have been catalogued (and in some cases put into public circulation) no attempt has been made to return them to their original owners, something that stands in stark opposition to the approach that has been adopted when dealing with property that was looted from Jewish homes under the Nazis.<sup>256</sup> This perplexing reluctance to return property of cultural significance seized under the *Absentee Property Law 1950* is perhaps rooted in a broader concern that 'the very acknowledgement of Palestinian identity would necessarily delegitimise Israeli identity'<sup>257</sup>, thus feeding into Huntington's binary thesis of clashes of civilisation.

By reducing the impact of the written cultural artefacts of the other whilst also simultaneously promoting a return to antiquity and an idealised view of a very Jewish past via the linking of archaeology to a sense of patriotism, it is possible to identify a highly selective engagement with history.<sup>258</sup> Arguably, this engagement reflects an uncomfortable ongoing historical project that Israel finds itself trapped

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<sup>253</sup> Hannah Mermelstein, 'Overdue Books: Returning Palestine's "Abandoned Property" of 1948' (2011) 47 *Jerusalem Quarterly* 46, 47

<sup>254</sup> Hannah Mermelstein, 'Overdue Books: Returning Palestine's "Abandoned Property" of 1948' (2011) 47 *Jerusalem Quarterly* 46, 49

<sup>255</sup> Hannah Mermelstein, 'Overdue Books: Returning Palestine's "Abandoned Property" of 1948' (2011) 47 *Jerusalem Quarterly* 46, 49

<sup>256</sup> Hannah Mermelstein, 'Overdue Books: Returning Palestine's "Abandoned Property" of 1948' (2011) 47 *Jerusalem Quarterly* 46, 54

<sup>257</sup> Hannah Mermelstein, 'Overdue Books: Returning Palestine's "Abandoned Property" of 1948' (2011) 47 *Jerusalem Quarterly* 46, 54

<sup>258</sup> For more discussion on this see: Yael Zerubavel, 'The Historic, the Legendary, and the Incredible: Invented Tradition and Collective Memory in Israel' in John R Gillis ed, *Commemorations: The Politics of National Identity* (Princeton University Press 1994) 105-123

within. As while there are many that subscribe to this way of addressing the conflicting yet intertwined histories of Israel and Palestine, there are also many that would prefer to move away from repressive approaches to Israeli national identity. For example, Zochrot is an Israeli NGO that seeks to raise awareness of the Nakba amongst the Jewish public by reconceptualising the Return 'as the imperative redress of the Nakba and a chance for a better life for all the country's inhabitants.'<sup>259</sup> In doing so they reject 'the colonial conception of its [Israel's] existence in the region and the colonial practices it entails.'<sup>260</sup> Unfortunately, this desire for peaceful co-existence stands at odds with attempts to carve out a national identity through an adherence to a belief in history as a purely legitimating force. By embracing a highly revisionist mode of history writing the authors of Israel's past are in some ways also authoring a potential future that places Israeli national identity in constant opposition to Palestinian national identity. In this sense, Zochrot can be regarded as a manifestation of the type of internal conflict that can arise in relation to identity, where not everyone that is placed within a particular grouping ascribes to its values and beliefs. The relationship between national identity, power and historiography can, therefore, take a challenging turn when emphasis is placed on exclusion and the perceived need for a single universalising narrative in relation to issues of national identity.<sup>261</sup>

Internal tensions between rival affiliations and divergent beliefs can also generate more general tensions that reach beyond engagements with the other. Difficulties arise in relation to not only mediating between competing affiliations but also in relation to the construction of identifying labels themselves. For example, it has been suggested that 'the difference between claiming identity for one's own group and naming an "other" is often the difference between self-assertion, on the one hand, and denigrating stereotype, on the other hand.'<sup>262</sup> The difficulties of selecting labels and attaching them to not only ourselves but also others along with the

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<sup>259</sup> Zochrot Organisation, 'Who We Are' (2014) <<http://zochrot.org/en/content/17>> accessed 2nd September 2015

<sup>260</sup> Zochrot Organisation, 'Who We Are' (2014) <<http://zochrot.org/en/content/17>> accessed 2nd September 2015

<sup>261</sup> For further discussion on the uses and abuses of history in the construction of national identity see: Terrie Epstein, *Interpreting National History: Race, Identity, and Pedagogy in Classrooms and Communities* (Routledge 2009)

<sup>262</sup> Caroline Walker Bynum, *Metamorphosis and Identity* (Zone Books 2001) 164

decision of who it is that attaches such labels raises a number of challenging questions. Labels can in themselves be thought of as sites of great internal contestation, with the individuals that use them as shorthand expressions of their identity often assigning their own criteria to determine their fulfilment.<sup>263</sup> It has also been noted that there are some that question whether such labels are 'biologically determined' or 'culturally constructed'<sup>264</sup>, thus prompting further questions surrounding the potential malleability of many identity labels. For some, it is important that identity groupings remain flexible, as while identity can be regarded as a concept that possesses a binding quality (in the sense that it denotes deterministic qualities) it is nevertheless also a concept that embodies a sense of movement. This movement derives from the shifting nature of identity, as is reflected in our varied interactions with others as well as the variety of different groups to which we often feel we belong to at any one time.<sup>265</sup> The way that we mediate between our competing affiliations and the resulting hierarchies we create also alter over time to reflect our changing circumstances. It would, therefore, seem unwise to try to lock identity down into a fixed position, as doing so risks creating uncomfortable divides. So while specific identity groupings often act to clearly distinguish us from others, they are nevertheless multifaceted in terms of the qualities, ideas and beliefs that they seem to embody. Using identity (and even national identity) as a means of justifying or explaining away the suppression of concurrent histories is therefore difficult to sustain, suggesting that if we are to develop more flexible understandings of identity we first need to revisit the forms of historiography that are drawn upon during processes of national identity formation.

The importance of flexibility in identity has been explored further by philosopher and economist Amartya Sen who has argued that narrow categories impose unnecessary and unhelpful divisions. He is deeply critical of what he refers to as 'solitarist' approaches to identity such as those espoused by Huntington and claims

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<sup>263</sup> For a discussion of the type of internal debates that can arise within particular identity labels see: Owen M. Fiss, 'What is Feminism?' (1994) 26 Arizona State Law Journal 413

<sup>264</sup> Caroline Walker Bynum, *Metamorphosis and Identity* (Zone Books 2001) 164

<sup>265</sup> Giselle Walker and Elisabeth Leedham-Green, 'Introduction' in Giselle Walker and Elisabeth Leedham-Green (eds), *Identity* (Cambridge University Press 2010) 1, 1

that such an approach to identity ‘can be a good way of misunderstanding nearly everyone in the world.’<sup>266</sup> Instead of allowing a particular affiliation such as nationality or religion to dominate our sense of self and our place in the world he suggests that we should embrace the ‘responsibilities of choice and reasoning.’<sup>267</sup> He argues that only ‘violence is promoted by the cultivation of a sense of inevitability about some allegedly unique- often belligerent- identity’<sup>268</sup> and that if we want to avoid violence we must recognise the presence of choice in relation to questions of identity. Like Huntington, Sen states that it is the presumption of the ability to categorise people according to their culture or religion that is the source of much contemporary conflict.<sup>269</sup> However, unlike Huntington, Sen does not believe in the ability to successfully categorise people in this way. Instead, he tries to draw attention to the ‘plurality of our affiliations’<sup>270</sup> and the choices that we are able to make and remake. In doing so he hopes to re-open potential avenues of resistance to identity-based violence that are closed down when identity is thought of in the singular. He provides the example of religious based violence, suggesting that instead of challenging this through the ‘strengthening of civil society’ it could be possible to instead deploy ‘different religious leaders of apparently “moderate” persuasion who are charged with vanquishing the extremists in an intrareligious battle.’<sup>271</sup> For him, the scope for resistance that is created by more flexible approaches to identity is located in the ‘assertion of human commonality’<sup>272</sup> rather than notions of difference. This is because thinking about identity in the singular

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<sup>266</sup> Amartya Sen, *Identity and Violence: The Illusion of Destiny* (Penguin Books 2007) xii

<sup>267</sup> Amartya Sen, *Identity and Violence: The Illusion of Destiny* (Penguin Books 2007) xiii

<sup>268</sup> Amartya Sen, *Identity and Violence: The Illusion of Destiny* (Penguin Books 2007) xiii

<sup>269</sup> Amartya Sen, *Identity and Violence: The Illusion of Destiny* (Penguin Books 2007) xv

<sup>270</sup> Amartya Sen, *Identity and Violence: The Illusion of Destiny* (Penguin Books 2007) xiv

<sup>271</sup> Amartya Sen, *Identity and Violence: The Illusion of Destiny* (Penguin Books 2007) xvi

<sup>272</sup> Amartya Sen, *Identity and Violence: The Illusion of Destiny* (Penguin Books 2007) 7

makes the world 'much more flammable', where 'the illusion of destiny extracts a remarkably heavy price.'<sup>273</sup>

Similar sentiments have been expressed by sociologist Rogers Brubaker, who has argued that the frequent use of strict groupings to form what he describes as the 'basic constituents of social life, chief protagonists of social conflicts, and fundamental units of social analysis'<sup>274</sup> is deeply problematic. He claims that our tendency to rely on such categories is 'impoverished', 'analytically disabling' and 'politically constricting'<sup>275</sup>, and while this is something that has come to be acknowledged by a growing number of people working within a variety of traditions, identity-based groupings nevertheless continue to form the starting point of many academic endeavours. In order to avoid the limitations of identity Brubaker suggests that associations such as 'ethnicity, race and nation' should be examined as 'practical categories, cultural idioms, cognitive schemas, discursive frames, organisational routines, institutional forms, political projects, and cognitive events.'<sup>276</sup> This would then encourage us to study such associations as 'political, social, cultural, and psychological processes'<sup>277</sup>, which would, in turn, discourage us from relying on singular and homogenised understandings of identity. Like Brubaker, I would agree that it is important to remember that identity is something that is performed. However, in order to emphasise how identity also acts as a way of seeing, I would suggest that rather than discarding identity as a concept of limited analytical potential, that it is helpful to focus on what underpins notions of national identity and provides them with their force. Shifting our focus in this way then makes it possible to pursue the proposition that 'identity does not, and cannot, make people do anything' instead 'it is, rather, people who make and do identity,

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<sup>273</sup> Amartya Sen, *Identity and Violence: The Illusion of Destiny* (Penguin Books 2007) 16-17

<sup>274</sup> Rogers Brubaker, 'Neither Individualism nor "Groupism": A Reply to Craig Calhoun' (2003) 3(4) *Ethnicities* 553, 553

<sup>275</sup> Rogers Brubaker, 'Neither Individualism nor "Groupism": A Reply to Craig Calhoun' (2003) 3(4) *Ethnicities* 553, 554

<sup>276</sup> Rogers Brubaker, 'Neither Individualism nor "Groupism": A Reply to Craig Calhoun' (2003) 3(4) *Ethnicities* 553, 555

<sup>277</sup> Rogers Brubaker, 'Neither Individualism nor "Groupism": A Reply to Craig Calhoun' (2003) 3(4) *Ethnicities* 553, 555

for their own reasons and purposes'<sup>278</sup>, something that becomes all the more interesting when we think about how identity (especially national identity) has become a key discursive category within the social sciences.<sup>279</sup> So instead of exploring the limitations of the concept of identity/national identity I will focus my attention on what has been referred to as 'the ongoing and open-ended processes of "identification"'<sup>280</sup> via a consideration of its interactions with historiography.

In order to examine the nature of the relationship between the concept of national identity and historiography, it is helpful to reflect on how this relationship is in many ways characterised by its interactions with the concepts of tradition and legitimacy. Such an examination is useful as it furnishes us with an opportunity to challenge the sometimes lofty historically rooted claims of contemporary identity-based conflict to expose their more modern and interest driven antecedents. Instead of acting as a straightforward legitimating force, history and its writing can then be revealed as something capable of performing a more disruptive function. Or to put it another way, I would argue that the explosive force of history writing has the potential to be redirected to stand in opposition to attempts to construct singular identities at the expense of not only competing internal affiliations, but also external identity groups. So while it is widely recognised that 'history has fashioned both the society in which we live, and the knowledge which that society uses and by which it defines itself'<sup>281</sup>, this is not to say that this history and the societies it produces are fixed. Instead, if we wish to challenge dominant narratives and the often violent consequences of the broader universalising discourses they contribute towards, we could perhaps start by revisiting how we are writing our history as well as the history of others through a reconsideration of the interaction between notions of national identity, tradition and legitimacy. This is because the exchanges that occur between these concepts manifest themselves most clearly when we look at how historical discourses not only contribute towards the development of distinct national identities, but also they perform a role in securing the power structures that these identities are constructed around. For example, it has been argued that strict

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<sup>278</sup> Richard Jenkins, *Social Identity* (Routledge 2008) 9

<sup>279</sup> For an example of such analysis see: Mark Harrison, *Legitimacy, Meaning, and Knowledge in the Making of Taiwanese Identity* (Palgrave Macmillan 2006)

<sup>280</sup> Richard Jenkins, *Social Identity* (Routledge 2008) 9

<sup>281</sup> Ian Ward, *Introduction to Critical Legal Theory* (Routledge-Cavendish 2004) 139



monolithic theories of nationhood have a masking effect when it comes to issues of power and influence.<sup>282</sup> Mark Harrison has suggested that ‘the argument that a national identity is an automatic effect of certain historical, and especially technological developments downplays specific political considerations.’<sup>283</sup> These considerations range from reflections on ‘in whose interests the nation is being imagined’ to ‘what other collective imaginings are being marginalised by it.’<sup>284</sup> He then extends this sentiment to propose that adopting a ‘positivist theory of nationhood also tends to link national identity to modernity’, where it is assumed that national identity is the result of ‘historical processes that necessarily locate their development in a historical trajectory.’<sup>285</sup> I would argue that this is not, however, to say that historically grounded explorations of national identity must necessarily result in the masking of power and influence. Instead, I would suggest that the positivist theories of nationhood identified by Harrison are indicative of a reliance on a very particular theory of history writing, where singular understandings of the past are promoted at the expense of the recognition of how such histories are predicated upon a series of unacknowledged choices.

ii. Rehabilitating Tradition: Confronting Pre-Figuration and the Grand Narrative Form

While singular theories of history writing may lend themselves well to attempts to secure a sense of legitimacy (especially in relation to issues of national identity), such modes of historical writing would appear to stand at odds with the ever-growing literatures that surround not only post-Enlightenment contributions to historiography, but also more general debates concerning the construction of discourses and the impact of representational practices on claims to truth. However despite this, through its interactions with process of history writing, I would argue

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<sup>282</sup> Mark Harrison, *Legitimacy, Meaning, and Knowledge in the Making of Taiwanese Identity* (Palgrave Macmillan 2006) 27

<sup>283</sup> Mark Harrison, *Legitimacy, Meaning, and Knowledge in the Making of Taiwanese Identity* (Palgrave Macmillan 2006) 27-28

<sup>284</sup> Mark Harrison, *Legitimacy, Meaning, and Knowledge in the Making of Taiwanese Identity* (Palgrave Macmillan 2006) 27-28

<sup>285</sup> Mark Harrison, *Legitimacy, Meaning, and Knowledge in the Making of Taiwanese Identity* (Palgrave Macmillan 2006) 28

that appeals to national identity continue to draw much of their legitimacy from static representational practices. This is problematic as while all forms of historiography ultimately serve to generate static representations of events, there are nevertheless some forms of historiography that do so without allowing for the possibility of unfreezing the representation at a later date. By this I mean to say that there are some forms of historiography that adopt an understanding of temporality that prevents subsequent interlocutors from grasping the conditions under which a historical account has been produced. The difficulty with this can be seen in Heidegger's claim that:

...every report of the past, that is of the preliminaries to the question about the thing, is concerned with something that is static. This kind of historical reporting (*historischen Berichts*) is an explicit shutting down of history, whereas it is, after all, a happening. We question historically if we ask what is still happening even if it seems to be past. We ask what is still happening and whether we remain equal to this happening so that it can really develop.<sup>286</sup>

It is in this sense that it becomes necessary to search for forms of historiography that bear the propensity to unfreeze static representations of the past through an engagement with more fluid understandings of temporality, something that I believe could feed into a broader practice of resistance in the face of our habitual reliance on the grand narrative form. Heidegger's suggestion that 'what appears to us as though past, i.e., simply as a happening that is no longer going on, can be quiescence'<sup>287</sup> is therefore interesting as it suggests that it is possible to reawaken and unfreeze things that seem to have past. To say that 'this quiescence of happening is not the absence of history, but a basic form of its presence' is to say that 'what is merely past does not exhaust what has been.'<sup>288</sup> Engagements with history and different theories of history writing that direct themselves towards the

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<sup>286</sup> Martin Heidegger, *What is a Thing?* (W. B. Jr Barton and Vera Deutsch trs, University Press of America 1967) 43

<sup>287</sup> Martin Heidegger, *What is a Thing?* (W. B. Jr Barton and Vera Deutsch trs, University Press of America 1967) 44

<sup>288</sup> Martin Heidegger, *What is a Thing?* (W. B. Jr Barton and Vera Deutsch trs, University Press of America 1967) 44

study of breaks as well as potential continuities, therefore, have the potential to act as a means of challenging or perhaps even resisting attempts to shut down history. They can do this by re-politicising accounts of the past that are deployed in narratives of national identity, legitimacy and tradition to uncover not only the conflict that took place before and during their formation, but also the conflict that continues to take place beneath their surface.

In my introduction, I referred to the observations of historian Barbara Weinstein and her claim that the grand narrative has received a second wind in the context of postcolonial studies. I would argue that such claims create a need to revive Jean-François Lyotard's doubts concerning the force (and role) of the grand narrative form, as while in 1979 Lyotard may have observed an increasing level of distrust with regards to attempts to advance dominant perspectives that conceal the power that sustains them<sup>289</sup>, the presence of the aforementioned example would suggest that this distrust has not necessarily prevented us from falling back on this familiar device. In his seminal work, *The Postmodern Condition*, Lyotard argued that the emergence of postmodernism resulted in a widespread rejection of modernist approaches to philosophy and science by characterising the metanarratives they relied upon as narratives that serve to 'co-opt individuals into suppressive social practices that give more power to the already powerful.'<sup>290</sup> In doing so he claimed that regardless of their mode of unification, grand narratives have by and large lost their credibility and can no longer be relied upon to provide definitive understandings of anything.<sup>291</sup> To make this point more fully he claimed that the with the advent of postmodernism we also saw the materialisation of opportunities to cast doubt on the overarching narratives used to shape us. He referred to these opportunities as 'tensors', events that create a space for the emergence of

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<sup>289</sup> Jean-Francois Lyotard, *The Postmodern Condition: A Report on Knowledge* (Geoff Bennington and Brian Massumi trs, Manchester University Press 1984) 60

<sup>290</sup> Derina R. Holtzhausen and Rosina Voto, 'Resistance From the Margins: The Postmodern Public Relations Practitioner as Organisational Activist' (2002) 14(1) *Journal of Public Relations Research* 57, 66

<sup>291</sup> Jean-Francois Lyotard, *The Postmodern Condition: A Report on Knowledge* (Geoff Bennington and Brian Massumi trs, Manchester University Press 1984) 37

'opposing voices.'<sup>292</sup> According to him such events 'cannot be resolved because of [the presence of]... strongly held differences in opinion'<sup>293</sup>, thus creating an opportunity for dissensus to emerge in opposition to grand narratives/metanarratives. Through the concepts of consensus and dissensus, Lyotard advanced an argument where consensus and grand narratives/metanarratives are associated with injustice. He did this by linking consensus to the furtherance of the interests of the powerful by suggesting that it is the powerful that determine what amounts to consensus.<sup>294</sup> More recent interlocutors of Lyotard have suggested that for him it was 'our institutionalised idioms, our verification procedures, our mechanisms for adjudicating truth' that are responsible for 'pre-establishing the realities whose truth we then assert.'<sup>295</sup> So instead of focusing on consensus, he marked a need to emphasise the role of dissensus as it represents 'an act of becoming' rather than 'an act of being.'<sup>296</sup>

Attempts to focus on acts of becoming rather than acts of being have however since been stymied by our mounting ambivalence regarding how we should treat potentially formative influences in light of our acknowledgement of their dangerous and often repressive functions. I would suggest that one way of working around such ambivalence that would promote a reflection on the forms of history writing that we rely on to support our claims could involve a re-engagement with the concept of tradition. As while many (including Lyotard) are keen to express a distrust of factors that can be seen to prefigure and predetermine what can take place, allowing a sense of deep misgiving with regards to the function and

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<sup>292</sup> Derina R. Holtzhausen and Rosina Voto, 'Resistance From the Margins: The Postmodern Public Relations Practitioner as Organisational Activist' (2002) 14(1) *Journal of Public Relations Research* 57, 63

<sup>293</sup> Derina R. Holtzhausen and Rosina Voto, 'Resistance From the Margins: The Postmodern Public Relations Practitioner as Organisational Activist' (2002) 14(1) *Journal of Public Relations Research* 57, 74

<sup>294</sup> Jean-Francois Lyotard, *The Postmodern Condition: A Report on Knowledge* (Geoff Bennington and Brian Massumi trs, Manchester University Press 1984) 60-61

<sup>295</sup> Pierre Schlag, 'Pre-Figuration and Evaluation' (1992) 80(4) *California Law Review* 965, 966

<sup>296</sup> Derina R. Holtzhausen and Rosina Voto, 'Resistance From the Margins: The Postmodern Public Relations Practitioner as Organisational Activist' (2002) 14(1) *Journal of Public Relations Research* 57, 63

character of language, as well as the mechanisms that emerge around it to dominate their thoughts, the concept of tradition need not be a source of such anxieties. Instead of rejecting that which subconsciously shapes us in an attempt to move away from notions of determinism (and in doing so unwittingly incorporating equally dangerous assumptions into our work), we could perhaps attempt to reassess the terms according to which these things operate. Such an alternative approach can be found in the hermeneutics of Hans-Georg Gadamer and other key contributors to philosophical hermeneutics. This is because in hermeneutics we find a means of navigating between past and present experience whilst maintaining a sense of both respect and suspicion of the apparent neutrality of texts.

According to Friedrich Schleiermacher, hermeneutics 'rests on the fact of the non-understanding of discourse' and includes everyday 'misunderstanding in the mother tongue.'<sup>297</sup> Within the hermeneutical tradition, such misunderstandings are thought to be inevitable which is why it is argued that when approaching a text it is always necessary to put 'oneself in possession of all the conditions of understanding'<sup>298</sup>, even if its meaning appears to be self-evident. As a result of this, theorists such as Schleiermacher have identified interpretation as a process that must be broken down into stages whenever we attempt to gain an understanding of the thoughts of others, as can be seen when he stated that:

As every utterance has a dual relationship, to the totality of language and to the whole thought of its originator then all understanding also consists of the two moments, of understanding the utterance as derived from language, and as a fact in the thinker.<sup>299</sup>

Here we see Schleiermacher engage with the recurrent problem of the hermeneutic circle where it is stated that in order to understand the whole of a text

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<sup>297</sup> Friedrich Schleiermacher, *Hermeneutics and Criticism* (Andrew Bowie tr, Cambridge University Press 1998) 227

<sup>298</sup> Friedrich Schleiermacher, *Hermeneutics and Criticism* (Andrew Bowie tr, Cambridge University Press 1998) 227

<sup>299</sup> Friedrich Schleiermacher, *Hermeneutics and Criticism* (Andrew Bowie tr, Cambridge University Press 1998) 8

we must first understand its parts, but that in order to understand the parts of a text we must first understand the whole that they form. This impasse can be broken, as indicated above, through a consideration of both the exact language used and the individual using them.<sup>300</sup> It is in this sense that the task of understanding utterances is divided between two distinct yet interconnected processes: the grammatical and the psychological.<sup>301</sup> According to Schleiermacher the grammatical aspect of interpretation requires a shared knowledge of the speaker/writer's language. However, it must be acknowledged that words are used in different ways by different speakers, which means that the contents of a text must be considered in its determined context (i.e. the author's place in history, as well as their education and occupation could all be relevant).<sup>302</sup> Here there is a focus on the linguistic elements of a text. On the other hand, the psychological aspect of interpretation involves a consideration of the mind that lies behind the text and how this mind modifies language.<sup>303</sup> This is thought to complement grammatical interpretation by trying to understand how the author has sought to present their ideas. Attempts can then be made to uncover the author's motivations and the decisions they made when producing a text. The focus here, therefore lies in the individuality of the author, and it is in the movement between these two aspects of interpretation that we are able to gain understanding. For Schleiermacher our ability to understand therefore rested on our 'talent for language and... [our] talent for knowledge of individual people.'<sup>304</sup>

While Schleiermacher's hermeneutics of reconstruction is not without its problems (as can be seen in his belief in being able to fully reconstruct the experiences and thoughts of another), his identification of the need to show an awareness of shifting meaning has proved very useful in developing ways of mediating between past and

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<sup>300</sup> Friedrich Schleiermacher, *Hermeneutics and Criticism* (Andrew Bowie tr, Cambridge University Press 1998) 24

<sup>301</sup> Friedrich Schleiermacher, *Hermeneutics and Criticism* (Andrew Bowie tr, Cambridge University Press 1998) 9

<sup>302</sup> Friedrich Schleiermacher, *Hermeneutics and Criticism* (Andrew Bowie tr, Cambridge University Press 1998) 232

<sup>303</sup> Friedrich Schleiermacher, *Hermeneutics and Criticism* (Andrew Bowie tr, Cambridge University Press 1998) 9

<sup>304</sup> Friedrich Schleiermacher, *Hermeneutics and Criticism* (Andrew Bowie tr, Cambridge University Press 1998) 11

present utterances. Wilhelm Dilthey took Schleiermacher's views on the process of interpretation further, applying them to the human sciences more generally. He did so in response to the positivist methodologies of the natural sciences, attempting to emulate the objective status of scientific knowledge whilst also remaining alert to the different demands that are made of human/historical knowledge.<sup>305</sup> He distinguished between the natural and human sciences by stating that while the former is concerned with explanation the latter is concerned with understanding. It was as a result of this distinction that he justified a need to develop a distinct methodology for the human sciences, one that was capable of reflecting the differences between understanding and explanation. To do this he drew on the work of Schleiermacher, advocating the attempt to reconstruct the experiences of an author in an attempt to understand them better than they understood themselves.<sup>306</sup> However, unlike Schleiermacher Dilthey sought to ground this reconstruction process in empirical observations. He achieved this by advancing two interconnected parts of understanding: the material and the formal. Material understanding represented the re-experiencing of a text and the strive towards an understanding of the author's mind; however this re-experiencing was dependent on the process of formal understanding which is to be obtained through close observation, that is through 'the understanding of expressions.'<sup>307</sup> The observations of the social scientist were not however to be regarded in the same way as the observations of the natural scientist, as the 'sounds he [the social scientist] hears and the sights he sees are not really the subject-matter of his investigation.'<sup>308</sup> It is only when the social scientist steps back and identifies what they have observed as the expression/observable signs of that which they study that they are able to begin to understand. Dilthey's framing of the need for contextualised understanding is interesting, as while he attempted to place the human sciences on a scientific footing to show their worth in comparison to knowledge obtained from the natural sciences, he also attempted to maintain the

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<sup>305</sup> H.P. Rickman, 'The Reaction Against Positivism and Dilthey's Concept of Understanding' (1960) 11(4) *The British Journal of Sociology* 307, 307

<sup>306</sup> Richard E. Palmer, *Hermeneutics: Interpretation Theory in Schleiermacher, Dilthey, Heidegger and Gadamer* (Northwestern University Press 1969) 123

<sup>307</sup> H.P. Rickman, 'The Reaction Against Positivism and Dilthey's Concept of Understanding' (1960) 11(4) *The British Journal of Sociology* 307, 310

<sup>308</sup> H.P. Rickman, 'The Reaction Against Positivism and Dilthey's Concept of Understanding' (1960) 11(4) *The British Journal of Sociology* 307, 310

integrity of the central concerns of the human sciences by drawing sharp distinctions between exact objects of study and the effects/manifestations through which we can study them. In doing so Dilthey restated the idea of a tension existing between the words and thoughts of others, a tension that forces a break in understanding by undermining the presumably straightforward influence of past meaning on present meaning.

Dilthey applied such insights regarding the need to exercise caution when attempting to mediate between past and present meaning in his historical work where he developed an early form of intellectual history. In doing so he demonstrated a keen awareness of the formative impact of experience on understanding, as is reflected in his claim that art is the 'purest expression of life' as it is 'rooted in the lived experience of the riddles of life: the why and the how of birth and death, joy and sorrow, love and hate, the power and the frailty of man.'<sup>309</sup> When attempting to gain an insight into the character of those he studied, Dilthey undertook an examination of the philosophic, cultural, social and political environments in which they were situated.<sup>310</sup> For example, in his Schleiermacher biography he tracked not only the intellectual but also the personal development of his subject of interest, identifying the intellectual and religious movements in which Schleiermacher's ideas were situated.<sup>311</sup> For Dilthey, a scrutiny of the poetry of the time was just as pivotal to his work on Schleiermacher as a consideration of Schleiermacher's work itself. He even claimed that:

The world of our poets was the inner world of the sensitive, contemplative man. It was not meant to represent a view of life and the world which already commanded the nation's enthusiasm; on the contrary such a view had to be created to overthrow the narrow circle of outdated and now intolerable ideas; the vital urge of a strong, spiritual nation sought an escape

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<sup>309</sup> Friedrich Schleiermacher, *Hermeneutics and Criticism* (Andrew Bowie tr, Cambridge University Press 1998) 122

<sup>310</sup> Wilhelm Dilthey, 'The Schleiermacher Biography: Vol. XIII/I pp. Xxxv-xiv' in H.P. Rickman (ed), *Dilthey: Selected Writings* (Cambridge University Press 1979) 35

<sup>311</sup> Wilhelm Dilthey, 'The Schleiermacher Biography: Vol. XIII/I pp. Xxxv-xiv' in H.P. Rickman (ed), *Dilthey: Selected Writings* (Cambridge University Press 1979) 39



in which the outer, political, apparently immutable external conditions obstructed. The narrow traditions of custom, society and the view of life and the world had to be broken by poetry in order that something new could be created.<sup>312</sup>

Here, poetry is assigned a particularly significant role as it is identified as a means of liberating the inner world (i.e. revealing non-dominant ideals and beliefs that challenged popular external images and understandings). The status and function of official records is therefore reduced as they are unable to 'reveal everything the historian needs'; instead it becomes necessary to incorporate the study of personal documents such as diaries and letters to uncover the 'older context of thought.'<sup>313</sup> This also represents a privileging of experience (and its changeability) over official singular accounts.

Through the integration of hermeneutical concerns with his historical projects Dilthey was able to advance a type of history concerned with the study of past thoughts and ideas in their appropriate contexts. His acknowledgement of the idea that 'every experience, and every historical event, is increasingly liable to change'<sup>314</sup> created a distinct focus in his work, so while he is often associated with the traditions of empiricism and positivism because of his continuation of Schleiermacher's commitment to reconstruction, it is important to remember that he was not part of the British strains of these traditions. In fact, he argued against the idea that we are 'determined by the succession of... [our] ideas and concepts' in such a way as would make it possible to 'infer every later stage of human intellectual life from a previous one.'<sup>315</sup> Instead he sought to show how 'it is the whole man with his imagination, emotions and follies who is involved in any

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<sup>312</sup> Wilhelm Dilthey, 'The Schleiermacher Biography: Vol. XIII/I pp. Xxxv-xiv' in H.P. Rickman (ed), *Dilthey: Selected Writings* (Cambridge University Press 1979) 40

<sup>313</sup> Wilhelm Dilthey, 'The Schleiermacher Biography: Vol. XIII/I pp. Xxxv-xiv' in H.P. Rickman (ed), *Dilthey: Selected Writings* (Cambridge University Press 1979) 44

<sup>314</sup> Wilhelm Dilthey, 'The Great Poetry of the Imagination' in H.P. Rickman (ed), *Dilthey: Selected Writings* (Cambridge University Press 1979) 82

<sup>315</sup> Wilhelm Dilthey, 'The Great Poetry of the Imagination' in H.P. Rickman (ed), *Dilthey: Selected Writings* (Cambridge University Press 1979) 84

intellectual change.<sup>316</sup> It is also important to note how he argued that ‘we understand the past only through the present, that is, only so much as the past as is congenial to our present.’<sup>317</sup> This is because while Dilthey did advance a belief in the ability to reconstruct the thoughts of others, he nevertheless remained mindful of the fragments that the historian works with when attempting such reconstructions as well as the inevitable interaction that will occur between the historian and these fragments. If a drawback is to be found in his work, it perhaps lies in his ultimate belief that through a thorough examination of the context in which a text is produced an historian is able to transform a partisan text into *actual* (truthful) history. This belief can be traced to this claim that the role of the historian is to ‘test the relation of the given material to the past, and to assert what this relation between material and event is’<sup>318</sup>, suggesting that after doing this they are then able to understand the past as it really happened.

This view of the role of the historian in mediating between the past and the present has been furthered through more recent developments in the field of intellectual history, where attempts have been made to break away from the presumed prefigurative effects of the past on the present whilst also remaining alert to their continued relevance. However, as a discipline intellectual history has been practised in many forms, with some adopting an internal view of ideas and others an external view.<sup>319</sup> Those that adopt an internal view construe ideas as objects of study that can be identified independently of those that interact with them whereas those that adopt an external view examine ideas in relation to their users. Adherents of the *great text tradition* adopt the former view and attempt to read the most influential texts of a given period in the hope of shedding light on what they believe to be the fundamental ideas/concepts expressed within them. In doing so

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<sup>316</sup> Wilhelm Dilthey, ‘The Great Poetry of the Imagination’ in H.P. Rickman (ed), *Dilthey: Selected Writings* (Cambridge University Press 1979) 84

<sup>317</sup> Wilhem Dilthey, ‘On Understanding and Hermeneutics: Student Lecture Notes (1867-68)’ in *Wilhelm Dilthey Selected Works Volume IV: Hermeneutics and the Study of History* (Rudolf A. Makkreel tr, Princeton University Press 2010) 233

<sup>318</sup> Wilhem Dilthey, ‘On Understanding and Hermeneutics: Student Lecture Notes (1867-68)’ in *Wilhelm Dilthey Selected Works Volume IV: Hermeneutics and the Study of History* (Rudolf A. Makkreel tr, Princeton University Press 2010) 234

<sup>319</sup> Dominick LaCapra, ‘Rethinking Intellectual History and Reading Texts’ (1980) 19(3) *History and Theory* 245, 245

they believe that they will be able to forge a productive and instructive dialogue between the past and present. Followers of this approach are presented as believing that classic texts contain within them a 'dateless wisdom' and it is from this that they draw their 'perennial relevance.'<sup>320</sup> A well-known example of the drawbacks of studying ideas in this way can be seen in the work of Arthur Lovejoy and his use of *unit ideas*. According to Lovejoy, there are key concepts that recur throughout history, with the task of the historian being the identification of how they have been brought together. Here, ideas are characterised as 'commodities'<sup>321</sup> that are brought into dialogue with one another to generate alternative accounts of events. In an attempt to further develop this point Lovejoy provides the example of reading Milton's *Paradise Lost* with the view of uncovering the 'movement of his [Milton's] mind as he composed.'<sup>322</sup> Lovejoy argued that none of the ideas contained within *Paradise Lost* were entirely original to Milton, stating that instead, they received a 'special twist or colouring'<sup>323</sup> from their interaction with Milton's mind. In saying this Lovejoy alluded to the continued presence of certain ideas, stating that what is innovative in Milton's work is his ordering of these ideas as it is through their appropriation that he makes them partly his own. It has been argued that intellectual histories of this variety place greater emphasis on the identification of key unit ideas than they do on how these ideas are put to work. A consequence of this is to assume that unit ideas possess a stable and continuous meaning of their own that can be identified without recourse to those that engage with them. In this sense, the past is cast as having a direct formative impact on the present by establishing a framework through which understanding is to take place. The distance that is created between those that use ideas and the ideas themselves results in the marginalisation of authorial intentions and an unawareness of the different ways in which the same concept has been used by different speakers at different moments in time. It is because of this that intellectual historian Quentin Skinner has asserted that history of this sort has the capacity to become nothing

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<sup>320</sup> Quentin Skinner, *Visions of Politics: Volume I Regarding Method* (Cambridge University Press 2002) 57

<sup>321</sup> A.O. Lovejoy, *Essays in the History of Ideas* (The Johns Hopkins Press 1948) 3

<sup>322</sup> A.O. Lovejoy, *Essays in the History of Ideas* (The Johns Hopkins Press 1948) 3

<sup>323</sup> A.O. Lovejoy, *Essays in the History of Ideas* (The Johns Hopkins Press 1948) 3

but a 'pack of tricks we play on the dead'.<sup>324</sup> Moreover, it is perhaps as a result of Lovejoy's unit ideas that many regard intellectual history as a somewhat conservative (and therefore unpalatable) approach to the study of the past, something that also sees a similar level of disdain attached to philosophical hermeneutics as an effective means of mediating between the past and present.

In order to avoid assigning universal meaning to particular ideas and concepts and the scorn of those conscious of Lyotard's observations with regards to the impact of postmodernism, it is possible to move on to a more nuanced approach to moving between past and present meaning. For example, Quentin Skinner has argued that 'we should study not the meaning of words, but their use', with the significance of an idea being derived from its 'uses'<sup>325</sup> in argument rather than its presumed stability of meaning through time. According to Skinner, it becomes necessary to not only identify the arguments contained within texts themselves but also identify what the arguments are doing.<sup>326</sup> To do this it becomes important to move beyond an isolated consideration of the text itself towards a closer scrutiny of how ideas and concepts are shaped/re-shaped by the author in order to advance a particular argument. In order to develop this approach to intellectual history, Skinner borrows from the work of J.L. Austin on 'performative utterances'<sup>327</sup> where it is argued that 'to say something *is* to do something.'<sup>328</sup> By adopting this attitude when reading texts Skinner draws attention to the broader environments in which texts are inevitably situated. He is therefore extremely critical of the idea that historians must simply seek to uncover what a text says, asserting that:

The Perpetual danger, in our attempts to enlarge our historical understanding, is thus that our expectations about what someone must be saying or doing will themselves determine that we

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<sup>324</sup> Quentin Skinner, *Visions of Politics: Volume I Regarding Method* (Cambridge University Press 2002) 65

<sup>325</sup> Quentin Skinner, 'Meaning and Understanding in the History of Ideas' (1969) 8(1) *History and Theory* 3, 37

<sup>326</sup> For a discussion on the ability of words to constitute a form of 'social behaviour' see: Quentin Skinner, 'On Performing and Explaining Linguistic Actions' (1971) 21(82) *The Philosophy Quarterly* 1

<sup>327</sup> J.L. Austin, *How to do Things With Words* (Oxford University Press 1975) 6

<sup>328</sup> J.L. Austin, *How to do Things With Words* (Oxford University Press 1975) 94

understand the agent to be doing something which he would not- or even could not- himself have accepted as an account of what he *was* doing.<sup>329</sup>

Skinner states that instead of focusing on classic texts themselves an intellectual historian ought to acquaint themselves with the 'broader traditions and frameworks of thought'<sup>330</sup> that the author engages with. It is because of this that he promotes the study of 'discontinuities' rather than 'continuities'<sup>331</sup>, with discontinuities being presented as being of greater value as they afford us an opportunity to 'reappraise some of our current assumptions and beliefs.'<sup>332</sup> Here we see an alternative value being assigned to the past. Instead of drawing upon the past as a repository of lessons or as an inescapable formative force on the present, Skinner represents the past as a 'repository of values we no longer endorse, of questions we no longer ask.'<sup>333</sup>

The space that is created by Skinner's inverted understanding of the past as a repository of questions we no longer ask is one of re-evaluation and displacement. It generates an opportunity to render visible alternative versions of the past by showing the changeability of ideas and their use in history. As a consequence of this, other intellectual historians such as J.G.A. Pocock have identified historiography as a distinctly 'political phenomenon.'<sup>334</sup> Pocock has even gone so far as to claim that:

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<sup>329</sup> Quentin Skinner, *Visions of Politics: Volume I Regarding Method* (Cambridge University Press 2002) 59

<sup>330</sup> Quentin Skinner, *Liberty Before Liberalism* (Cambridge University Press 2010) 101

<sup>331</sup> Quentin Skinner, *Liberty Before Liberalism* (Cambridge University Press 2010) 111

<sup>332</sup> Quentin Skinner, *Liberty Before Liberalism* (Cambridge University Press 2010) 112

<sup>333</sup> Quentin Skinner, *Liberty Before Liberalism* (Cambridge University Press 2010) 117

<sup>334</sup> J.G.A. Pocock, 'The Politics of Historiography' (2005) 78(199) *Historical Research* 1, 3

We reach a point where there is a temptation to maximise the truth that the historiography we are examining will always be in some measure fiction: it will consist of statements made with intentions other than the establishment of truth, by agents whose motives can be discovered.<sup>335</sup>

The past then becomes something that has ‘happened’ as well as something that is ‘still going on’<sup>336</sup>, just as Heidegger suggested when commenting on how we think of historical representation. This forges a direct link between processes of history writing and politics, identifying the writing of history as an essentially political/contestable activity. It also identifies the writing of history as something implicated in struggles for power, as can be seen in Pocock’s statement that ‘what explains the past legitimates the present and moderates the impact of the past upon it.’<sup>337</sup> While all of this would appear to feed into Lyotard’s concerns about the pre-established realities that can seem to emanate from the past, I would suggest that there is also the potential for resistance to arise as a result of these observations. After all, as has been noted by Foucault ‘where there is power, there is also resistance.’<sup>338</sup>

In order to resist the potentially determinative qualities of the past as they are expressed through the grand narrative form it is worth reflecting on how the concept of tradition has been utilised in both the fields of hermeneutics and intellectual history. This is because instead of regarding tradition as something concerned with the smooth transmission of beliefs, customs and practices from one generation to the next as it was in the early modern world, it is possible to see how tradition has been construed along more fluid lines. Rather than identifying tradition as a legitimate source of authority and the basis of knowledge claims, tradition has

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<sup>335</sup> J.G.A. Pocock, ‘The Politics of Historiography’ (2005) 78(199) *Historical Research* 1, 6

<sup>336</sup> J.G.A. Pocock, ‘The Politics of Historiography’ (2005) 78(199) *Historical Research* 1, 9

<sup>337</sup> J.G.A. Pocock, ‘The Politics of Historiography’ (2005) 78(199) *Historical Research* 1, 9

<sup>338</sup> Michel Foucault, *The Will to Knowledge: The History of Sexuality Volume 1* (Robert Hurley tr, Penguin Books 1998) 95

come to be regarded as something that can also be associated with constant movement. So far from entailing an uncritical adherence to customary beliefs, tradition has come to be associated with processes of constant adaptation and flux. It has even been suggested that the concept of tradition can be thought to have two meanings and usages, one ontological and the other methodological. On an ontological level tradition has been connected to the act of passing things down by generations, whereas on a methodological level it has been connected to invented culture.<sup>339</sup> Ontological tradition has therefore been thought to emphasise a belief in continuity whereas methodological tradition has been connected to rupture and change.<sup>340</sup> Hangsheng Zheng has argued that 'tradition is the past that is preserved in modern people's memories, words, and actions, so it is the past functioning in today's world.'<sup>341</sup> As a result of this tradition is involved in preservation, maintaining a close link to the past whilst not necessarily being synonymous with it. In addition to this tradition has come to be seen as a condition of the possibility of thought itself, furnishing us with a dynamic mode of mediating between the past and present.<sup>342</sup> However despite these developments, since Lyotard's intervention tradition has continued to be approached with trepidation. For example, Jürgen Habermas has suggested that tradition is 'merely the systematically distorted expression of communication under unacknowledged conditions of violence.'<sup>343</sup> In reaching this conclusion Habermas and other critics of tradition have adopted an understanding of this concept that was advanced during the Enlightenment, where tradition was placed in opposition to reason and condemned to be regarded as a distortion of knowledge. This has led to many critically minded scholars being suspicious of the use of this concept, with some choosing to avoid it entirely. I would argue that rather than enabling us to break free from processes of pre-figuration,

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<sup>339</sup> Hangsheng Zheng, 'On Modernity's Changes to "Tradition": A Sociological Perspective' (2012) 51(4) *History and Theory* 105, 106

<sup>340</sup> Hangsheng Zheng, 'On Modernity's Changes to "Tradition": A Sociological Perspective' (2012) 51(4) *History and Theory* 105, 106-107

<sup>341</sup> Hangsheng Zheng, 'On Modernity's Changes to "Tradition": A Sociological Perspective' (2012) 51(4) *History and Theory* 105, 107

<sup>342</sup> For an example of this see: Hans-Georg Gadamer, *Truth and Method* (Joel Weinsheimer and Donald G. Marshall trs, Continuum 2012)

<sup>343</sup> Paul Ricoeur, 'Hermeneutics and the Critique of Ideology' in Gayle L. Ormiston and Alan D. Schrift (eds), *The Hermeneutic Tradition: From Ast to Ricoeur* (John B. Thompson (tr), State University of New York Press 1990) 298, 299

absences of discussions concerning the role of tradition in critical scholarship have in fact facilitated the survival of the grand narrative form. By this I mean to suggest that by adopting a purely negative understanding of tradition, those that elect to shun this concept have discarded a crucial tool for unearthing the impact that the past has on the present. In doing so they ignore a wealth of insights that could prove extremely useful in the formation of ways of writing history that minimise the violence that is done to the other in the construction of static representations of the past.

In order to recapture the insights offered by tradition, it is useful to turn to the work of Hans-Georg Gadamer, as it was in his seminal work *Truth and Method* that the concepts of tradition and prejudice were rehabilitated to reveal tradition as something that is not only created, but as something that is still creating. In order to do this, he restored 'the ambivalence that the Latin word *praejudicium* had in the juridical tradition prior to the Enlightenment.'<sup>344</sup> In doing so he sought to address the challenges surrounding doing justice to the historicity of understanding, focusing on what he regarded to be the 'ontologically positive significance' of Heidegger's hermeneutic circle.<sup>345</sup> He argued that 'all correct interpretation must be on guard against arbitrary fancies and the limitations imposed by imperceptible habits of thought.'<sup>346</sup> In doing so he drew attention to the proposition that 'a person who is trying to understand a text is always projecting.'<sup>347</sup> Like Heidegger, Gadamer believed that the hermeneutic circle operates by allowing the interpreter to make projections onto the text that they are seeking to understand. While these projections are shaped by the interpreters expectations, they are nevertheless constantly revised as meaning emerges. It is in this sense that 'every revision of the fore-projection is capable of projecting before itself a new projection of

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<sup>344</sup> Paul Ricoeur, 'Hermeneutics and the Critique of Ideology' in Gayle L. Ormiston and Alan D. Schrift (eds), *The Hermeneutic Tradition: From Ast to Ricoeur* (John B. Thompson (tr), State University of New York Press 1990) 298, 301

<sup>345</sup> Hans-Georg Gadamer, *Truth and Method* (Joel Weinsheimer and Donald G. Marshall trs, Continuum 2004) 268-269

<sup>346</sup> Hans-Georg Gadamer, *Truth and Method* (Joel Weinsheimer and Donald G. Marshall trs, Continuum 2004) 269

<sup>347</sup> Hans-Georg Gadamer, *Truth and Method* (Joel Weinsheimer and Donald G. Marshall trs, Continuum 2004) 269



meaning.<sup>348</sup> Gadamer claimed that 'this constant process of new projection constitutes the movement of understanding and interpretation' and encouraged interpreters to 'examine the legitimacy- i.e., the origin and validity- of the fore-meanings dwelling within'<sup>349</sup> them. It is because of this movement that he believed that 'meaning cannot be understood in an arbitrary way.'<sup>350</sup> So while the likes of Lyotard and Habermas may have been genuinely troubled by the influence of factors involved in 'pre-establishing the realities whose truth we assert'<sup>351</sup>, Gadamer can be seen to advance a way of challenging the level of influence that these factors are able to assert over processes of interpretation.

For understanding to emerge, Gadamer demanded a level of openness between a reader and their text of choice, as while the interpreter need not try to cast off all of their fore-meanings and personal ideas, they do need to remain open to the meaning of the text itself. Gadamer suggested that this openness 'always includes our situating the other meaning in relation to the whole of our own meanings or ourselves in relation to it.'<sup>352</sup> This allowed him to claim that 'meanings represent a fluid multiplicity of possibilities'<sup>353</sup>, however this is not to say that everything is possible. Rather it is to identify his hermeneutical project as being concerned with promoting a sensitivity to the alterity of a text.<sup>354</sup> To do this an interpreter needs to be aware of their own personal biases and how they shape their interactions with texts. One way of achieving such an awareness can be seen in prejudices and how they form important fore-structures of understanding that are of central importance

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<sup>348</sup> Hans-Georg Gadamer, *Truth and Method* (Joel Weinsheimer and Donald G. Marshall trs, Continuum 2004) 269

<sup>349</sup> Hans-Georg Gadamer, *Truth and Method* (Joel Weinsheimer and Donald G. Marshall trs, Continuum 2004) 269-270

<sup>350</sup> Hans-Georg Gadamer, *Truth and Method* (Joel Weinsheimer and Donald G. Marshall trs, Continuum 2004) 271

<sup>351</sup> Pierre Schlag, 'Pre-Figuration and Evaluation' (1992) 80(4) *California Law Review* 965, 966

<sup>352</sup> Hans-Georg Gadamer, *Truth and Method* (Joel Weinsheimer and Donald G. Marshall trs, Continuum 2004) 271

<sup>353</sup> Hans-Georg Gadamer, *Truth and Method* (Joel Weinsheimer and Donald G. Marshall trs, Continuum 2004) 271

<sup>354</sup> Hans-Georg Gadamer, *Truth and Method* (Joel Weinsheimer and Donald G. Marshall trs, Continuum 2004) 271

to processes of interpretation. As mentioned previously, Gadamer sought to move away from the Enlightenment conception of prejudice as it was not until this time that prejudice gained its negative connotations. He provided a definition of prejudice that identified it as a 'means of judgment that is rendered before all the elements that determine a situation have been fully examined'<sup>355</sup>, linking it to the German legal use of prejudice to denote a provisional verdict. While potentially negative consequences can occur as a result of this, Gadamer argued that such consequences depend upon 'the positive validity, the value of the provisional decision as a prejudgment, like that of any precedent.'<sup>356</sup> So while prejudice can have both a negative as well as a positive impact, it is not necessarily something to be associated with false judgment as it was during the Enlightenment.<sup>357</sup> Instead, Gadamer linked the rationalist rejection of prejudice along with the denial of the presence of prejudices within scientific knowledge with the rule of Cartesian doubt, stating that it is difficult to reconcile this approach with the examination of how historical knowledge shapes our historical consciousness.<sup>358</sup> His decision to pursue prejudice as a concept capable of facilitating historical understanding, therefore, marks a clear break with claims to objectivity and the violence that often results from them.

Gadamer's rehabilitation of prejudice also forms part of his broader project of developing a historical hermeneutics where we are able to 'do justice to man's finite, historical mode of being.'<sup>359</sup> Within this project the question that remains for Gadamer is not whether prejudices have a role to perform in understanding, but how we are to distinguish legitimate prejudices from unhelpful ones that should be discarded. In order to do this, he turned to romanticism and the concept of tradition, observing that:

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<sup>355</sup> Hans-Georg Gadamer, *Truth and Method* (Joel Weinsheimer and Donald G. Marshall trs, Continuum 2004) 273

<sup>356</sup> Hans-Georg Gadamer, *Truth and Method* (Joel Weinsheimer and Donald G. Marshall trs, Continuum 2004) 273

<sup>357</sup> Hans-Georg Gadamer, *Truth and Method* (Joel Weinsheimer and Donald G. Marshall trs, Continuum 2004) 273

<sup>358</sup> Hans-Georg Gadamer, *Truth and Method* (Joel Weinsheimer and Donald G. Marshall trs, Continuum 2004) 273

<sup>359</sup> Hans-Georg Gadamer, *Truth and Method* (Joel Weinsheimer and Donald G. Marshall trs, Continuum 2004) 278

That which has been sanctioned by tradition and custom has an authority that is nameless, and our finite historical being is marked by the fact that the authority of what has been handed down to us- and not just what is clearly grounded- always has power over our attitudes and behaviour.<sup>360</sup>

He credited romanticism with establishing that tradition 'has a justification that lies beyond rational grounding' and that it performs a significant role in determining our 'institutions and attitudes.'<sup>361</sup> However, he then reached beyond this understanding of tradition to accommodate a notion of reason by refuting the presumed presence of an 'unconditional antithesis between tradition and reason.'<sup>362</sup> He regarded the 'romantic faith in the "growth of tradition", before which all reason must remain silent'<sup>363</sup> as being just as prejudiced as the Enlightenment view of tradition. Instead, he asserted that in tradition 'there is always an element of freedom and of history itself. Even the most genuine and pure tradition does not persist because of the inertia of what once existed.'<sup>364</sup> This is a point of great significance when seeking to emancipate the concept of tradition from ideas of repressive pre-figuration, as it enabled Gadamer to suggest that tradition is something that 'needs to be affirmed, embraced, [and] cultivated', meaning that traditions must be 'preserved'<sup>365</sup> or performed if they are to carry any weight. For Gadamer the preservation of traditions occurs not only in periods of stasis but also in all historical change, he even went as far as to suggest that 'far more of the old is preserved in the supposed transformation of everything than anyone knows, and it combines with the new to

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<sup>360</sup> Hans-Georg Gadamer, *Truth and Method* (Joel Weinsheimer and Donald G. Marshall trs, Continuum 2004) 281

<sup>361</sup> Hans-Georg Gadamer, *Truth and Method* (Joel Weinsheimer and Donald G. Marshall trs, Continuum 2004) 282

<sup>362</sup> Hans-Georg Gadamer, *Truth and Method* (Joel Weinsheimer and Donald G. Marshall trs, Continuum 2004) 282

<sup>363</sup> Hans-Georg Gadamer, *Truth and Method* (Joel Weinsheimer and Donald G. Marshall trs, Continuum 2004) 282

<sup>364</sup> Hans-Georg Gadamer, *Truth and Method* (Joel Weinsheimer and Donald G. Marshall trs, Continuum 2004) 282

<sup>365</sup> Hans-Georg Gadamer, *Truth and Method* (Joel Weinsheimer and Donald G. Marshall trs, Continuum 2004) 282

create a new value.<sup>366</sup> So far from seeking to free ourselves from tradition, we should instead remember that 'we are always situated within traditions, and [that] this is no objectifying process.'<sup>367</sup> This creates what Gadamer referred to as a 'natural relation to the past'<sup>368</sup>, one that ought to prompt us to 'recognise the element of tradition in historical research and inquire into its hermeneutic productivity.'<sup>369</sup> Tradition is, therefore a concept that is best construed flexibly when thought of in relation to our current distrust of truth and universalising discourses. After all, as Gadamer said 'it is the tyranny of hidden prejudices that makes us deaf to what speaks to us in tradition.'<sup>370</sup>

These sentiments can even be seen in the work of Eric Hobsbawm, an historian that I have already shown to demonstrate a problematic belief in the didactic potential in the past. Hobsbawm observed the invented nature of tradition as something that could be studied carefully, identifying three overlapping types of invented tradition. Firstly there are 'those establishing or symbolising social cohesion or the membership of groups, real or artificial communities', then there are 'those establishing or legitimising institutions, status or relations of authority.'<sup>371</sup> Finally, there are traditions 'whose main purpose was socialisation, the inculcation of beliefs, value systems and conventions of behaviour.'<sup>372</sup> When looked at in this light, the formative power of tradition is undeniable. It is for this reason that

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<sup>366</sup> Hans-Georg Gadamer, *Truth and Method* (Joel Weinsheimer and Donald G. Marshall trs, Continuum 2004) 283

<sup>367</sup> Hans-Georg Gadamer, *Truth and Method* (Joel Weinsheimer and Donald G. Marshall trs, Continuum 2004) 283

<sup>368</sup> Hans-Georg Gadamer, *Truth and Method* (Joel Weinsheimer and Donald G. Marshall trs, Continuum 2004) 283

<sup>369</sup> Hans-Georg Gadamer, *Truth and Method* (Joel Weinsheimer and Donald G. Marshall trs, Continuum 2004) 284

<sup>370</sup> Hans-Georg Gadamer, *Truth and Method* (Joel Weinsheimer and Donald G. Marshall trs, Continuum 2004) 272

<sup>371</sup> Eric Hobsbawm, 'Introduction: Inventing Traditions' in Eric Hobsbawm and Terence Ranger (eds), *The Invention of Tradition* (Cambridge University Press 2012) 1, 9

<sup>372</sup> Eric Hobsbawm, 'Introduction: Inventing Traditions' in Eric Hobsbawm and Terence Ranger (eds), *The Invention of Tradition* (Cambridge University Press 2012) 1, 9

Hobsbawm believed that it would be beneficial for historians to study the invention of tradition, arguing that invented traditions 'are important symptoms and therefore indicators of problems which might not otherwise be recognised, and developments which are otherwise difficult to identify and to date.'<sup>373</sup> For him 'the study of invented traditions cannot be separated from the wider study of the history of society.'<sup>374</sup> He also suggested that traditions 'throw considerable light on the human relation to the past, and therefore on the historian's own subject and craft', becoming 'the actual symbol of struggle.'<sup>375</sup> While I will not pursue Hobsbawm's broader historical project (for reasons that have already been discussed), observations such as these are nevertheless worthy of note. The link that Hobsbawm forges between tradition, legitimacy and the historian's craft is similar to the one that I wish to establish between historiography and resistance. The point at which I wish to extend these observations relates to how theories of history writing can be used to not only reveal the discrete flows of power that are created and sustained through appeals to tradition, but also to re-shape them.

iii. Invented Traditions: Navigating the Nexus between Historiography and Resistance

When considering the broader significance of the malleability of tradition in relation to resisting the grand narrative form it is helpful to look at an example of where the concepts of national identity, tradition and legitimacy intersect to conceal the invented origins of particular understandings of power and cultural dynamics. For instance when returning to the example of Israeli national identity it is possible to see how a national tradition 'punctuated by repeated wars' which 'serve as both

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<sup>373</sup> Eric Hobsbawm, 'Introduction: Inventing Traditions' in Eric Hobsbawm and Terence Ranger (eds), *The Invention of Tradition* (Cambridge University Press 2012) 1, 12

<sup>374</sup> Eric Hobsbawm, 'Introduction: Inventing Traditions' in Eric Hobsbawm and Terence Ranger (eds), *The Invention of Tradition* (Cambridge University Press 2012) 1, 12

<sup>375</sup> Eric Hobsbawm, 'Introduction: Inventing Traditions' in Eric Hobsbawm and Terence Ranger (eds), *The Invention of Tradition* (Cambridge University Press 2012) 1, 12

individual and collective temporal markers<sup>376</sup> has emerged to furnish the state of Israel with a vital sense of legitimacy. Historian Yael Zerubavel has even suggested that 'historical events that had ended in death and defeat' have been 'transformed in Israeli culture into heroic symbols' and that such changes in collective memory have been facilitated by specific 'commemorative strategies.'<sup>377</sup> She establishes the study of history writing and memory as important activities that can be used to draw attention to the significant changes in national culture and tradition that are often papered over by larger universalising narratives. In doing so she acknowledges the 'deliberate suppression of memory that any commemorative narrative involves.'<sup>378</sup> Zerubavel also raises a number of interesting issues in relation to identity, tradition, history and memory when she states that:

I continue to be fascinated by our fundamental need to create meaningful narratives, ignore inconsistencies, silence some stories, and elaborate others; by our enormous capacity to forget and live on, and remember and live on, and take this dual process for granted; by our inexhaustible efforts to continuously reconstruct our memory of the past between words and silences, images and void.<sup>379</sup>

In noting the 'highly selective attitude'<sup>380</sup> to history and tradition that has been adopted in the Israeli context, Zerubavel alludes to the role they can perform more generally in generating and solidifying particular understandings of the world around us. Recognising how the 'meaning of the past is constructed, and how it is

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<sup>376</sup> Yael Zerubavel, *Recovering Roots: Collective Memory and the Making of Israeli National Tradition* (University of Chicago Press 1997) xiv

<sup>377</sup> Yael Zerubavel, *Recovering Roots: Collective Memory and the Making of Israeli National Tradition* (University of Chicago Press 1997) xiv

<sup>378</sup> Yael Zerubavel, *Recovering Roots: Collective Memory and the Making of Israeli National Tradition* (University of Chicago Press 1997) xv

<sup>379</sup> Yael Zerubavel, *Recovering Roots: Collective Memory and the Making of Israeli National Tradition* (University of Chicago Press 1997) xvi

<sup>380</sup> Yael Zerubavel, *Recovering Roots: Collective Memory and the Making of Israeli National Tradition* (University of Chicago Press 1997) 3

modified over time'<sup>381</sup> can therefore perform an interruptive function in relation to universalising narratives of national identity and culture. More specifically, I would suggest that history writing in the form of the grand narrative (such as that which often emerges in relation to claims of national identity and culture) can be resisted through a recognition of the conditions under which history writing takes place. History writing therefore has a pivotal role to perform in processes of disruption, as it is possible to suggest that through a Gadamerian understanding of tradition we are able to appreciate how traditions must be performed to retain their force, and how history writing is directly involved in this performance.

The significance of public commemoration (in both writing and practice) in relation to the continuance of tradition should not then be underestimated, nor should the absence of commemorative acts be underestimated. In the Israeli context, the public performance of national identity and national traditions feeds into the maintenance of the legitimacy of the state of Israel itself. It also secures the presence of a universalising discourse that is directed at denying those excluded from it an opportunity to fully resist. So while material practices of resistance may, in fact, emerge in relation to the violence that this creates, violence met with further violence will not necessarily create a space for those that either exist outside of the Israeli national story or those that are unwillingly co-opted into it. Instead, this is perhaps an example of a power structure that can be resisted through an engagement with historiography. This engagement could take the form of further academic reflections such as those of Zerubavel, or they could even take the form of the development of an entirely new way of approaching history writing.<sup>382</sup> What is interesting here is the way that seemingly inescapable power (of a traditionally repressive nature) can be resisted through less direct means that focus on looking at the movement within historiography, tradition and identity rather than their presumed stability over time.

When taken together and examined in relation to theories of history writing the concepts of national identity, tradition and legitimacy can, therefore, be seen to

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<sup>381</sup> Yael Zerubavel, *Recovering Roots: Collective Memory and the Making of Israeli National Tradition* (University of Chicago Press 1997) 3

<sup>382</sup> For an interesting example of such emerging practices see: David A. McDonald, *My Voice is My Weapon: Music, Nationalism, and the Poetics of Palestinian Resistance* (Duke University Press 2013)

function as a particularly illuminating means of exploring the relationship between historiography and resistance. One that not only captures, orients, determines and controls behaviours and discourse, but one that also enables historiography to emerge as a form of resistance to the grand narratives upon which we continue to rely.

iv. Koselleck's Theory of Multiple Temporalities: Extending the Scope of Resistance

In order to make the most of observations such as those outlined above I will now turn to how modifying our views on the relationship between past, present and future can create renewed possibilities for resistance through a consideration of the role of temporality in the writing of history. Temporality is an important issue in historiography for many reasons, the one that I will focus on relates to how more fluid understandings of temporality can be used to bracket-off questions of meaning by suspending context as a moment of intelligibility. An example of a form of historiography that does this is conceptual history, where the likes of Reinhart Koselleck have shown how our understanding of the relationship between past, present and future can be used to defer final judgment of the exact meaning of a text. By deferring issues of meaning, it is possible to develop forms of history writing with a potentially disruptive core, where processes of interpretation can be used to set into motion seemingly static representations of past events by drawing on the productive tension that emerges out of interactions between experience and expectation. This unfreezing of historical accounts facilitates not only a re-examination of the event being depicted, but also a reflection on how particular theories of history writing can be regarded as being representative of a discourse of their own period. Different theories of history writing can then be seen as a reflection of the position their users adopt in relation to the past, revealing ideological commitments and unacknowledged prejudices that would otherwise go unnoticed. The role of incorporating both synchronic and diachronic modes of analysis (as introduced in my previous chapter) in unfreezing static representations of the past is of crucial importance here, as by drawing on two modes of analysis it is possible to show how the past and present are enclosed within a common historical plane.

In order to demonstrate how thinking of history and its writing along these lines can become a mode of resistance directed against grand narratives and the



universalising discourses that they sustain it is helpful to deepen our engagement with Koselleck to include a reflection on his rejection of periodisation in favour of a re-evaluation of the relationship between the temporal categories of past, present and future. While critics of Koselleck have accused him of developing a rigid theory of periodisation, others have noted a clear attempt to defy periodisation by developing a multilayered notion of temporality.<sup>383</sup> Helge Jordheim has for example argued that rather than supporting 'reductive versions of temporality'<sup>384</sup>, Koselleck can be seen to have developed three dichotomies to highlight the drawbacks of committing to linear notions of time. These dichotomies are between 'natural and historical, extralinguistic and intralinguistic, and diachronic and synchronic time.'<sup>385</sup> In observing these dichotomies, Jordheim concludes that 'Koselleck developed his theory of multiple temporalities, organised in the form of temporal layers that have different origins and duration and move at different speeds, as an alternative to the linear and empty time of periodisation.'<sup>386</sup> As a consequence of this Jordheim argues that Koselleck drew attention to the futility of periodisation itself, revealing a 'highly flexible and dynamic theory of competing and conflicting temporal experiences that are at work in all human communication and action.'<sup>387</sup> In order to build on this I would suggest that by identifying the 18<sup>th</sup> century as the site of the temporalisation of history itself and claiming that as a result of this 'time is no longer simply the medium in which all histories take place', Koselleck was able to argue that time became 'a dynamic and historical force in its own right.'<sup>388</sup> Such an

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<sup>383</sup> For examples of criticisms of Koselleck's work see: Kathleen Davis, *Periodisation and Sovereignty: How Ideas of Feudalism and Secularisation Govern the Politics of Time* (University of Pennsylvania Press 2008) 87-95 and Peter Osborne, *The Politics of Time: Modernity and the Avant-Garde* (Verso 1995) 9-14

<sup>384</sup> Kathleen Davis, *Periodisation and Sovereignty: How Ideas of Feudalism and Secularisation Govern the Politics of Time* (University of Pennsylvania Press 2008) 87

<sup>385</sup> Helge Jordheim, 'Against Periodisation: Koselleck's Theory of Multiple Temporalities' (2012) 51(2) *History and Theory* 151, 151

<sup>386</sup> Helge Jordheim, 'Against Periodisation: Koselleck's Theory of Multiple Temporalities' (2012) 51(2) *History and Theory* 151, 170

<sup>387</sup> Helge Jordheim, 'Against Periodisation: Koselleck's Theory of Multiple Temporalities' (2012) 51(2) *History and Theory* 151, 171

<sup>388</sup> Reinhart Koselleck, "'Neuzeit": Remarks on the Semantics of Modern concepts of Movement' in *Futures Past: On the Semantics of Historical Time* (Keith Tribe tr, Columbia University Press 2004) 222, 237

acknowledgement then makes it possible to see how because of the temporalisation of history 'events lost their secure character, whereby they had been established and reproduced annalistically', making it possible for 'an event to alter identity according to its shifting status in the progress of history.'<sup>389</sup> For Koselleck this meant that history 'altered according to the given present, and with growing distance the nature of the past also altered.'<sup>390</sup> For me this indicates a need to remember that history is not simply a tool concerned with processes of contextualisation and legitimation, but is a product of historiography and the discourses of the period in which it is rendered static.

In recognising the temporalisation of history as an important starting point for forms of historiography that are capable of being regarded as modes of resistance to the grand narrative, I recapitulate the importance of recognising how all historical accounts are situated within (and indeed contribute towards the creation and maintenance of) a broader field of relations. Moreover, in acknowledging the complexity that underpins processes of history writing I would suggest that it is possible to cast a shadow over attempts within the social sciences to use history as a straightforward tool for establishing a sense of validity and legitimacy. Instead I would argue that it possible to use Koselleck's theory of history to reveal how 'background narratives are constructed, not discovered' and that because of this 'they carry theoretical and perspectival commitments which raise significant problems for, and can invalidate, the use of history as a laboratory for social science.'<sup>391</sup> I would also suggest that Koselleck's contributions to conceptual history can be used to actively promote histories that embrace the study of conditions of possibility, revealing this activity as a means of undermining claims to universality and neutrality. This is possible as Koselleck's approach to history did not involve an attempt to recover past meaning in the strict sense. Instead he sought to uncover what have since been referred to as 'conceptual structures and

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<sup>389</sup> Reinhart Koselleck, "Neuzeit": Remarks on the Semantics of Modern concepts of Movement' in *Futures Past: On the Semantics of Historical Time* (Keith Tribe tr, Columbia University Press 2004) 222, 240

<sup>390</sup> Reinhart Koselleck, "Neuzeit": Remarks on the Semantics of Modern concepts of Movement' in *Futures Past: On the Semantics of Historical Time* (Keith Tribe tr, Columbia University Press 2004) 222, 240

<sup>391</sup> Ian S. Lustick, 'History, Historiography, and Political Science: Multiple Historical Records and the Problem of Selection Bias' (1996) 90(3) *American Political Science Review* 605, 613

their relationship to other conceptual structures' with the view of revealing how context 'does not itself provide the key to understanding.'<sup>392</sup>

Koselleck's call for a theory of possible history can be seen as an attempt to make sources 'speak,'<sup>393</sup> to set into motion not only the events that are being depicted but also the events that prompted their depiction. Koselleck was able to initiate such a project by emphasising the importance of perspective and temporality in processes of history writing, thereby forcing those that write history to acknowledge that while the task of the historian may be to 'make true statements', it is nevertheless important to 'take account of the relativity of these statements.'<sup>394</sup> The dilemma that surfaces as a result of the need to simultaneously provide truthful statements about the past whilst also exercising an awareness of their relativity can be seen to reflect the spread of the idea that 'every historical statement is bound to a particular standpoint'<sup>395</sup>, something that suggests that 'all historical knowledge is locationally determined and hence relative.'<sup>396</sup> The importance Koselleck assigned to perspective and temporality enabled him to develop a form of historiography that concerned itself with movement and establishing positional commitments as important preconditions of historical knowledge, assigning contextuality a pivotal role in a mode of historiography that refuses to be bound by

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<sup>392</sup> Jason Edwards, 'The Ideological Interpellation of Individuals as Combatants: An Encounter Between Reinhart Koselleck and Michel Foucault' (2007) 12(1) *Journal of Political Ideologies* 49, 52

<sup>393</sup> Reinhart Koselleck, 'Perspective and Temporality: A Contribution to the Historiographical Exposure of the Historical World' in *Futures Past: On the Semantics of Historical Time* (Keith Tribe tr, Columbia University Press 2004) 128, 151

<sup>394</sup> Reinhart Koselleck, 'Perspective and Temporality: A Contribution to the Historiographical Exposure of the Historical World' in *Futures Past: On the Semantics of Historical Time* (Keith Tribe tr, Columbia University Press 2004) 128, 128

<sup>395</sup> Reinhart Koselleck, 'Perspective and Temporality: A Contribution to the Historiographical Exposure of the Historical World' in *Futures Past: On the Semantics of Historical Time* (Keith Tribe tr, Columbia University Press 2004) 128, 128

<sup>396</sup> Reinhart Koselleck, 'Perspective and Temporality: A Contribution to the Historiographical Exposure of the Historical World' in *Futures Past: On the Semantics of Historical Time* (Keith Tribe tr, Columbia University Press 2004) 128, 129

context. This can be seen to reflect an engagement with Johann Martin Chladenius's views on the role of eyewitnesses in the writing of history and the convergence of *Geschichten* and *Historie*, which in turn resulted in him arguing that 'the temporal arrangement of history depends on the position one occupies within history.'<sup>397</sup> For Koselleck the past was no longer easily separated from the present and the future was not yet knowable. Instead of existing in a continuum the past, present and future appeared to be stacked on top of one another, creating layers of time that each served a particular ends. For the purposes of my argument, I would suggest that this has drastic implications when it comes to attempts to use a seemingly distant past as a source of legitimacy in the present. This is because if the past is something that is still happening, it is not possible to say that its representation holds any more sway over the present than other claims.

#### v. Concluding Remarks

In making observation such as those explored in this chapter, Koselleck incorporated the suggestion that 'a history, once it has passed, remains irrevocably the same; but the prospects enjoyed by historians are kaleidoscopic in their variety and standpoints'<sup>398</sup> into his version of conceptual history. While insights such as these now seem obvious in the aftermath of a widespread rejection of grand narratives in favour of small narratives and microhistory, I would argue that these insights could be revisited and reapplied to uses of history in explicitly critical projects.<sup>399</sup> As while the follies of the grand narrative form are readily available to discredit works that can be regarded as being neglectful of the concerns of the present, there would appear to be a reluctance to apply such criticisms to works

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<sup>397</sup> Reinhart Koselleck, 'Perspective and Temporality: A Contribution to the Historiographical Exposure of the Historical World' in *Futures Past: On the Semantics of Historical Time* (Keith Tribe tr, Columbia University Press 2004) 128, 135

<sup>398</sup> Reinhart Koselleck, 'Perspective and Temporality: A Contribution to the Historiographical Exposure of the Historical World' in *Futures Past: On the Semantics of Historical Time* (Keith Tribe tr, Columbia University Press 2004) 128, 135

<sup>399</sup> For an interesting discussion on the emergence of microhistory see: Sigurður Gylfi Magnússon, *What is Microhistory? Theory and Practice* (Routledge 2013)

that take on a more activist role by seeking to challenge inequity and re-orient relationships.

Mindful of the ways in which ‘the three dimensions of time seemed to have fallen apart’<sup>400</sup> as a result of the acceleration of time, Koselleck identified a need to rethink the ways in which we define the relation of past, present and future. In the chapters that follow the relation between past, present and future will be explored in relation to how law can be seen to interact with these temporal categories. I will examine how through a linear understanding of past, present and future law has drawn on historical accounts for its story of legitimation. I will then move on to examine how law can be seen to attempt to contain the circulation of the past by usurping the function of history. This will be done with the view of exploring in what ways, if any, a historical understanding of law can be implicated in the relationship between historiography and resistance.

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<sup>400</sup> Reinhart Koselleck, ‘Perspective and Temporality: A Contribution to the Historiographical Exposure of the Historical World’ in *Futures Past: On the Semantics of Historical Time* (Keith Tribe tr, Columbia University Press 2004) 128, 145

## Part II

# Introduction

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*There are different levels of experience and of what can be experienced; of memory and what can be remembered; ultimately of what has been forgotten or has never been passed down. According to the questions posed by the day these may be recalled, or reworked. The nature of the prevailing linguistic or non-linguistic factors decides the form and reproduction of past history. This preliminary selectivity makes it impossible for an account of a past incident to register comprehensively what once was, or what once occurred. Stated more generally, language and history depend on each other but never coincide.*

Reinhart Koselleck<sup>401</sup>

*What is called collective memory is not a remembering but a stipulating: that this is important, and this is the story about how it happened, with the pictures that lock the story in our minds.*

Susan Sontag<sup>402</sup>

*"We are all writers!" For everyone is pained by the thought of disappearance, unheard and unseen, into an indifferent universe, and because of that everyone wants, while there is still time, to turn himself into a universe of words.*

Milan Kundera<sup>403</sup>

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In the first part of my thesis I focused on mapping the relationship between historiography and resistance. To do this I drew on existing literatures emanating from the social sciences, observing how emphasis has often been placed on material practices. I then sought to extend these literatures by exploring the extent to which less material practices can come to be thought of as resistance. In doing so I undertook an examination of the categories through which resistance has come to be read, drawing attention to the ways in which fixed categories such as scale and visibility can narrow the scope of resistance by imposing restrictive frameworks of interpretation. I concluded that by moving away from attempts to

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<sup>401</sup> Reinhart Koselleck, ' "Neuzeit": Remarks on the Semantics of Modern Concepts of Movement' in *Futures Past: On the Semantics of Historical Time* (Keith Tribe tr, Columbia University Press 2004) 222, 222

<sup>402</sup> Susan Sontag, *Regarding the Pain of Others* (Penguin 2004) 76-77

<sup>403</sup> Milan Kundera, *The Book of Laughter and Forgetting* (Aaron Asher tr, Faber and Faber 1996) 147

define resistance according to its outcomes it is possible to characterise less overt practices, such as engaging with alternative theories of history writing, as potential instances of resistance in their own right. In doing so I highlighted the destabilising elements of processes of history writing, identifying historiography as a potential form of resistance to attempts to establish universalised accounts of the past. In the chapters that follow I will extend these observations by reflecting on the extent to which law can be implicated in either facilitating or restricting the emergence of historiography as a form of resistance. To do this I will pose the following questions:

- In what ways, if any, can a historical understanding of law be implicated in the relationship between historiography and resistance?
  - What is the relationship between a historiography of law and a historiography of national identity? Can they be thought to be constitutive of a historiography of resistance?
  - Can memory be thought of a site in which law and historiography as resistance can meet?

To address these questions I will focus on the relationship between law's writing and its historiography, placing emphasis on the idea of temporality. More specifically I will examine how law's commitment to linear temporality has informed its uses of historical accounts, something that I will ultimately argue has culminated in a series of attempts to structure our engagements with the temporal categories of past, present and future according to the logic of the grand narrative form. The concepts of national identity, tradition and legitimacy will continue to guide my analysis of the processes of history writing. As a consequence of this, my arguments will be framed in terms of law's involvement in the creation and maintenance of strong national identities, especially those that are rooted in narratives that make explicit appeals to static notions of tradition to secure their legitimacy. This will require me to reflect on how temporality is understood in the context of national identity formation, which will in turn require me to confront law's relationship with temporality more generally.

In addition to acknowledging the ways in which law utilises specific understandings of temporality in relation to issues of legitimacy and national identity, I will also re-emphasise the need to confront the broader consequences that are attached to

processes of history writing more generally, advocating a return to thinking about the *types* of history that we as legal scholars work with. Earlier observations relating to a tendency within critically oriented scholarship to focus on the immediately positive outcomes of (re)writing history will resurface in the context of law's ongoing relationship with the grand narrative form, revealing how narratives of national identity and the legitimacy they gain from appeals to tradition relate to law's historiography.<sup>404</sup> By this I mean to say that I will reiterate the need to think carefully about what it means to give voice to previously ignored or suppressed perspectives. In doing so I will draw attention to the dangers of allowing one grand narrative to be replaced with a seemingly more inclusive one, suggesting that we must think carefully about not only the content of alternative histories but also their form. While such an insistence on the importance of methodological reflection may on the surface appear to be somewhat tedious, especially in light of the rich and highly thought provoking literatures that have made use of history in this way, I will nevertheless focus on how well intentioned (yet short-sighted) uses of history have resulted in the perpetuation of the grand narrative form. Or to put it another way I will use the next three chapters to expose law's ongoing commitment to linear understandings of temporality, suggesting that if law is to become implicated in historiography's relationship with resistance it must first revisit its understanding of temporality.

i. Law's Times: Re-Visiting Law's Relationship with Temporality

In the next chapter (chapter three) I will provide an outline of some of the literatures that have emerged in relation to explorations of law's relationship with temporality, and will start by looking at more positivistic approaches to the study of this relationship where it is possible to identify attempts to sustain a linear understanding of time. I will then move on to examine the benefits of thinking of law as a tradition, and in doing so introduce a less linear understanding of temporality that promotes a more historical understanding of law. I will also explore how attempts have been made to incorporate less linear understandings of temporality into a rethinking of law's relationship with processes of history writing. By

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<sup>404</sup> For example, in my introduction to Part I of this thesis I referred to Barbara Weinstein and her observations relating to the challenges posed by the spread of 'world history' and the ways in which this has resulted in a reliance on grand narratives to construct a field of enquiry.



separating out the literatures on law and temporality in this way I aim to reveal how law's relationship with temporality can be explored on many levels, arguing that while there has indeed been a resurgence of literatures in this area in recent years, these literatures do not necessarily seek to address the relationship between law and temporality in relation to issues of history and its writing. The insights gained from transformations in our understanding of the ways in which law interacts with temporality will be examined further in chapters four and five where I will examine the broader consequences of adopting a particular understanding of temporality, focusing on how narrow approaches to temporality can be seen to provoke resistance. In doing so I will allude to the possibility of reshaping law's relationship with resistance by suggesting that a more fluid understanding of temporality (such as that which would emerge if we were to regard law as a tradition) may facilitate resistance to the grand narrative form via law itself.

ii. Writing History, Writing Memory: The Growing Importance of Memory Studies

The challenges that emerge out of law's preoccupation with linear conceptions of temporality will be explored in greater depth in chapters four and five where I will frame my discussions of law's relationship with temporality using the concepts of national identity, tradition and legitimacy (as raised in Part I of my thesis). To do this I will extend my observations on the function performed by history writing in the formation of national identity to show how law becomes involved in regulating this role. In doing so I will introduce memory as a way of widening perceptions of what can amount to history writing, showing how it can be used to incorporate marginalised and suppressed voices into discourses on national identity without necessarily displacing the dominant voice that they seek to challenge. I have identified two examples to illustrate these points, the first of which relates to the Ancient Constitution and the second being post-Franco Spain. In chapter four I will draw on the historiography of the Ancient Constitution as read through the work of J.G.A. Pocock, focusing on how through its commitment to linear understandings of temporality law came to be regarded as frozen tradition. In this chapter I will discuss how scholars of the 17<sup>th</sup> century reduced the scope for resistance to emerge by rooting the legitimacy of the common law in a tradition that originated from time out of mind. In chapter five I will then turn my attentions to post-Franco Spain, focusing on how Spain's unorthodox transition to democracy provides us with a unique opportunity to revisit the role of law and processes of history writing in relation to issues of national identity. In doing so I will examine how law's

attempts to regulate engagements with the past via the strict control of processes of history writing have been challenged, identifying memory as a potential meeting place for law, historiography and resistance. In identifying the grand narrative form as a target/source of resistance chapters three, four and five will be used to show how law's relationship with linear understandings of temporality continue to provoke responses, that when expressed through alternative processes of recalling and recording history may amount to resistance.

## Chapter 3

# Law and Temporality: Unfreezing the Law

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*Expectations that one may be entertaining can be suspended, but experiences one has had are being collected. The space of experience and horizon of expectation cannot therefore be related to one another in a static way. They constitute a temporal difference within the here and now, by joining together the past and the future in an asymmetric manner. All this means that we have found a characteristic of historical time which at the same time demonstrates its variability.*

Reinhart Koselleck<sup>405</sup>

*... we do not conceive of what tradition says as something other, something alien. It is always part of us, a model exemplar, a kind of cognizance that our later historical judgment would hardly regard as a kind of knowledge but as the most ingenious affinity with tradition.*

Hans-Georg Gadamer<sup>406</sup>

*The mapping of a discipline is both an historical and a theoretical project. When the discipline in question is law and so itself quintessentially disciplinary and disciplining, a reality conferring enterprise, then the project is more complex still.*

Peter Goodrich<sup>407</sup>

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David Couzens Hoy has suggested that the present can only present itself in relation to the past and future, rendering attempts to separate the temporal categories of past, present and future an exercise in futility.<sup>408</sup> When thought of in relation to law the temporal categories of past, present and future can be seen to

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<sup>405</sup> Reinhart Koselleck, 'Concepts of Historical Time and Social History' in *The Practice of Conceptual History: Timing History, Spacing Concepts* (Adelheis Baker tr, Stanford University Press 2002) 115, 127

<sup>406</sup> Hans-Georg Gadamer, *Truth and Method* (Joel Weinsheimer and Donald G. Marshall tr, Continuum 2012) 283

<sup>407</sup> Peter Goodrich, 'Intellection and Indiscipline' (2009) 36(4) *Journal of Law and Society* 460, 460

<sup>408</sup> For discussions on this see: David Couzens Hoy, *The Times of Our Lives: A Critical History of Temporality* (MIT Press 2012).

create a sense of focus, directing our attention towards either the past or the future. This has, however tended to generate a very linear/flattened understanding of temporality, something that stands at odds with the insights provided by Hoy. In spite of this, there is nevertheless scope within law for a less limited understanding of temporality to emerge, something that is perhaps best illustrated by the relationship between law and precedent. For many, legal practice can be characterised through reference to its use of analogical reasoning as it is through this form of reasoning that law is able to constitute a linear understanding of temporality.<sup>409</sup> Fourth-century Islamic legal scholar Taqi al-Din Ibn Taymiyya has been identified as a core proponent of the legal practice of reasoning by cases and analogy, with some suggesting that medieval Islamic law operated through the assimilation of new cases 'to one or more previous cases' that 'served as precedents.'<sup>410</sup> Here 'the mechanism of assimilation is analogy', but the analogy 'must be guided by a cause that is common to the new case as well as the earlier cases.'<sup>411</sup> This means that analogical reasoning in law takes on a more complex dimension than it does in other settings, as it must be 'guided by rules of evidence and relevance' that are able to determine 'the common cause, the effect of the

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<sup>409</sup> Although, it is important to note that this is by no means the only way of thinking about the form of reasoning adopted by law. For example, both Ronald Dworkin and H.L.A Hart have advanced very different approaches to the modes of reasoning seen in law. For more on this see: Ronald Dworkin, *Law's Empire* (Harvard University Press 1986) and H.L.A. Hart, *The Concept of Law* (Clarendon Press 1997).

<sup>410</sup> John F. Sowa and Arunk Majumdar, 'Analogical Reasoning' in Wilfred Lex, Aldo de Moor and Bernhard Ganter, *Conceptual Structures of Knowledge Creation and Communication: 11<sup>th</sup> International Conference on Conceptual Structures, ICCS 2003, Dresden* (Springer 2003) 16, 19

<sup>411</sup> John F. Sowa and Arunk Majumdar, 'Analogical Reasoning' in Wilfred Lex, Aldo de Moor and Bernhard Ganter, *Conceptual Structures of Knowledge Creation and Communication: 11<sup>th</sup> International Conference on Conceptual Structures, ICCS 2003, Dresden* (Springer 2003) 16, 19

mitigating circumstances, and the judgment.<sup>412</sup> Wael B. Hallaq has commented on the nature of the use of analogical reasoning in law, noting how in medieval Islamic law this form of reasoning was comprised of four elements. These elements related to: ‘the original case, the assimilated case, the cause, and the judgment.’<sup>413</sup> Hallaq has also shown how Ibn Taymiyya used the proposition that *grape-wine is prohibited* to explore the scope of this form of reasoning. In this instance, the original case is represented by grape-wine and its judgment relates to its prohibition. The cause of the prohibition can be rooted in the intoxicating nature of grape-wine, with date-wine presenting itself as a ‘novel case whose legal status is yet to be determined’<sup>414</sup> through a processes of assimilation. During this process, it is established that as with grape-wine, date-wine results in intoxication. The fact that intoxication is present in both the case of grape-wine and the case of date-wine then makes it possible to ‘transfer the judgment, namely prohibition’<sup>415</sup> to date-wine. Other interlocutors of Ibn Taymiyya have suggested that ‘by using analogy directly, legal reasoning dispenses with the intermediate theory [derived from a process of deduction] and goes straight from cases to conclusion.’<sup>416</sup> As a consequence of this, ‘the known aspects of the new case are compared with the

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<sup>412</sup> John F. Sowa and Arunk Majumdar, ‘Analogical Reasoning’ in Wilfred Lex, Aldo de Moor and Bernhard Ganter, *Conceptual Structures of Knowledge Creation and Communication: 11<sup>th</sup> International Conference on Conceptual Structures, ICCS 2003, Dresden* (Springer 2003) 16, 19

<sup>413</sup> Wael B. Hallaq, *Ibn Taymiyya Against the Greek Logicians* (Oxford University Press 1997) xxxvi

<sup>414</sup> Wael B. Hallaq, *Ibn Taymiyya Against the Greek Logicians* (Oxford University Press 1997) xxxvi

<sup>415</sup> Wael B. Hallaq, *Ibn Taymiyya Against the Greek Logicians* (Oxford University Press 1997) xxxvi

<sup>416</sup> John F. Sowa and Arunk Majumdar, ‘Analogical Reasoning’ in Wilfred Lex, Aldo de Moor and Bernhard Ganter, *Conceptual Structures of Knowledge Creation and Communication: 11<sup>th</sup> International Conference on Conceptual Structures, ICCS 2003, Dresden* (Springer 2003) 16, 19

corresponding aspects of the older cases'<sup>417</sup>, culminating in the delivery of judgment.

In a western common law context, analogical reasoning is said to have four core overlapping features. These relate to: 'principled consistency; a focus on particulars; incompletely theorised judgements; and principles operating at a low or intermediate level of abstraction.'<sup>418</sup> Cass R. Sunstein has observed how these features act as both sources of strength and sources of weakness when examining how law utilises analogical reasoning. To start with, he has observed how this form of reasoning requires us, as both scholars and practitioners, to secure a sense of consistency by producing a harmonising principle that is able to unite what can be described as 'seemingly disparate outcomes.'<sup>419</sup> Secondly, Sunstein has noted how 'ideas are developed from the details, rather than imposed on them from above.'<sup>420</sup> This means that by drawing on this form of reasoning, law adopts a bottom-up approach.<sup>421</sup> However despite this, he also notes how even when we focus on the particulars we still nevertheless need to draw on abstractions (i.e. reasons that underpin individual approaches). Thirdly, while some abstractions are drawn upon when examining particulars, Sunstein nevertheless concedes that analogical reasoning 'operates without a comprehensive theory that accounts for

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<sup>417</sup> John F. Sowa and Arunk Majumdar, 'Analogical Reasoning' in Wilfred Lex, Aldo de Moor and Bernhard Ganter, *Conceptual Structures of Knowledge Creation and Communication: 11<sup>th</sup> International Conference on Conceptual Structures, ICCS 2003, Dresden* (Springer 2003) 16, 19

<sup>418</sup> Cass R. Sunstein, 'On Analogical Reasoning Commentary' (1992) 106 *Harvard Law Review* 741, 746

<sup>419</sup> Cass R. Sunstein, 'On Analogical Reasoning Commentary' (1992) 106 *Harvard Law Review* 741, 746

<sup>420</sup> Cass R. Sunstein, 'On Analogical Reasoning Commentary' (1992) 106 *Harvard Law Review* 741, 746

<sup>421</sup> For more on this see: Richard A. Posner, 'Legal Reasoning from the Top Down and from the Bottom Up' (1992) 59 *University of Chicago Law Review* 433.

the particular outcome it yields.<sup>422</sup> This means that the full reasoning/basis for a judgment is never fully articulated. Finally, by adopting analogical reasoning law is seen to operate 'without express reliance on any general principles about the right or the good.'<sup>423</sup> Instead, the principles that underpin a judgment remain obscured from view. While it is possible to identify several drawbacks to this way of viewing legal reasoning in practice, this form of reasoning does nevertheless afford legal scholars an opportunity to rethink how the relationship between law and precedent (as it manifests itself in analogical reasoning) impacts on issues of temporality.<sup>424</sup> By this I mean to draw attention to the points of reflection that surround how precedents are gathered, called upon and attended upon.<sup>425</sup> How this is done depends upon specific processes of citation, incitation and adjudication, something that marks out the lawyers engagements with issues of temporality as being distinct from those of historians and other scholars that deal in the relation between past, present and future.

For example, legal theorist/historian Cornelia Vismann explored the materiality of this process by commenting on how during the Roman Republic official journals were used to document the development of the law from year to year. If deemed relevant, precedents from one year would be 'consulted, copied, revised, and modified' to create a 'chain of transmission... an empire of files in the rhythm of the

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<sup>422</sup> Cass R. Sunstein, 'On Analogical Reasoning Commentary' (1992) 106 Harvard Law Review 741, 747

<sup>423</sup> Cass R. Sunstein, 'On Analogical Reasoning Commentary' (1992) 106 Harvard Law Review 741, 746

<sup>424</sup> Some examples of criticisms are discussed by Sunstein here: Cass R. Sunstein, 'On Analogical Reasoning Commentary' (1992) 106 Harvard Law Review 741, 767-781. It is also interesting to note some more conventional defences that have been advanced in relation to the epistemic and institutional advantages of analogical reasoning. For more on this see: Emily Sherwin, 'A Defense of Analogical Reasoning in Law' (1999) 66 University of Chicago Law Review 1179.

<sup>425</sup> This is a point that was raised by my examiners during the viva and discussed in relation to my engagement with Maitland.

successive terms of office.<sup>426</sup> She also alluded to ‘techniques of erasure’<sup>427</sup> and how from the 16<sup>th</sup> century onwards it is possible to see a move away from erasure towards a desire for preservation. All of these things signal a space within law to rethink the relationship between law and particular notions of temporality. In this chapter, I will therefore attempt to move between static and more fluid approaches to law’s engagements with temporality, sketching an outline of some of the literatures that have emerged in this area. To start with I will show how for many, law adopts a linear form of temporality. I will then move on to look at some of the difficulties that have come to be associated with this, drawing on literatures that seek to expose the challenges faced by law when it is confronted by other forms of temporality. I will then build on these observations by suggesting that by viewing law as a tradition we may be able to overcome the limits of law’s relationship with linear temporality without compromising its stability and ability to make effective use of the past. To do this I will return to the work of Hans-Georg Gadamer, as it will be through an engagement with his approach to philosophical hermeneutics that I will be able to show how when thought of as a tradition, law can be seen to represent an ongoing interpretative process. I will suggest that as a result of this we are able to incorporate more flexible notions of temporality into law, something that can be could potentially be used to develop a novel understanding of the relationship between law and historiography, where historiography can be identified as a form of resistance.

i. Tracing Time: Law and Linear Temporality

When examining how legal scholars are able to approach the relationship between law and temporality it is helpful to undertake a closer engagement with debates that have emerged within the field of philosophical hermeneutics. More specifically, it is useful to turn to the work of Paul Ricoeur as it is possible to see how he explores law’s relationship with stasis and change by looking at how law’s understanding of temporality is linked to the practical functions that it seeks to perform. However before turning to Ricoeur, it is important to note the similarities and differences

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<sup>426</sup> Cornelia Vismann, *Files: Law and Media Technology* (Geoffrey Winthrop-Young tr, Stanford University Press 2008) 48

<sup>427</sup> Cornelia Vismann, *Files: Law and Media Technology* (Geoffrey Winthrop-Young tr, Stanford University Press 2008) 92



between Gadamer and Ricoeur's hermeneutical projects. This is because while both can indeed be seen to draw on the hermeneutic tradition of Schleiermacher, Dilthey and Heidegger, they do so in very different ways. As discussed earlier, Gadamer's hermeneutics emphasises the productive potential of prejudices and historicity in processes of understanding, developing the notion of a *fusion of horizons* to explain the exchange that occurs between and interpreter and their object of study. In doing so he claimed that all understanding is framed by language, something which enabled him to distance himself from Dilthey and other methodological understandings of hermeneutics. In contrast, Ricoeur can be seen to have incorporated several distinct approaches to hermeneutics into his thinking, uniting them by drawing on the tradition of French reflective philosophy. While both can be seen to have linked self-understanding to acts of interpretation, (Gadamer referred to this link as an *application* of self-understanding to facilitate interpretation whereas Ricoeur referred to this link as an *appropriation* of self-understanding to facilitate interpretation), they each ascribed a very different purpose/function to their philosophical hermeneutics. Gadamer chose to focus on what happens to the interpreter in interpretation, whereas Ricoeur focused on conflicting methods of interpretation by attempting to mediate between them. In doing so, each can be seen to have framed their hermeneutical projects in different ways. For Gadamer, his project was concerned with examining what happens to us when we understand.<sup>428</sup> For Ricoeur, his project was concerned with establishing how we *should* interpret.<sup>429</sup> Another important point of departure can be seen in their treatment of the concept of tradition, as while Gadamer embraced notions of tradition, Ricoeur was highly critical of this concept. Such differences must be kept in mind when examining the insights that they provide in relation to how law is able to engage with the past, as while Gadamer was content to confine acts of interpretation to the actual contents of a text, Ricoeur always sought to achieve meaning by adopting a viewpoint that existed externally to a text. As a consequence of this, I will confine my engagements with Ricoeur's strain of philosophical hermeneutics to a consideration of how he analyses processes of judgment (i.e. how he explores how law relates to temporality in terms of its practices). When examining the potential for alternative understandings of

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<sup>428</sup> For an example of this see: Hans-Georg Gadamer, *Truth and Method* (Joel Weinsheimer and Donald G. Marshall tr, Continuum 2012)

<sup>429</sup> For an example of this see: Paul Ricoeur, *Oneself as Another* (Kathleen Blamey tr, Chicago University Press 1995).

temporality within law, I will focus on the insights that can be found within Gadamerian hermeneutics.

Philosopher Paul Ricoeur has shown how law can be seen to adopt a foreword facing approach to temporality through the act of judging. To do this he identified two ends to judging, the short-term end and the long-term end. For him the former was concerned with bringing an end to uncertainty, forming a 'terminal phase of a drama with several actors' representing 'the closure of an unpredictable process.'<sup>430</sup> This involves stating law 'in terms of a singular situation.'<sup>431</sup> The latter end of judging is then directed towards securing what he referred to as 'public peace.'<sup>432</sup> Both ends of judging would appear to concern themselves with the future, drawing on a linear sense of temporality. In a similar vein Andrew J. Wistrich has commented on law's pulls towards both the past and the future by arguing that while law has traditionally been thought to be past-oriented, it is now becoming more future-oriented as a result of a shifting emphasis in methods in lawmaking (i.e. the use of statutes, treaties and administrative regulations rather than law's memory of past law).<sup>433</sup> Drawing on the work of Richard A. Posner, Wistrich argues that the past plays an important role in law, identifying nine key ways in which the past impacts on law. These are:

- (1) Respect for tradition;
- (2) status quo bias;
- (3) path dependence;
- (4) escalation of commitment;
- (5) a desire to avoid responsibility;
- (6) a reluctance to invest in improving upon past solutions to similar problems;
- (7) a preference for intertemporal consistency;
- (8) an inclination to follow the example of others;
- and (9) a penchant for precommitment.<sup>434</sup>

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<sup>430</sup> Paul Ricoeur, *The Just* (David Pellauer tr, The University of Chicago Press 2000) 129

<sup>431</sup> Paul Ricoeur, *The Just* (David Pellauer tr, The University of Chicago Press 2000) 129

<sup>432</sup> Paul Ricoeur, *The Just* (David Pellauer tr, The University of Chicago Press 2000) 129

<sup>433</sup> Andrew J. Wistrich, 'The Evolving Temporality of Lawmaking' (2012) 44(3) Connecticut Law Review 737, 737

<sup>434</sup> Andrew J. Wistrich, 'The Evolving Temporality of Lawmaking' (2012) 44(3) Connecticut Law Review 737, 740-741

In listing these influences Wistrich argues that law 'contains features that systematically weigh the past more heavily than the present and future'<sup>435</sup>, identifying features such as:

(1) a grounding in ancient religion and moral philosophy; (2) a written constitution that is difficult to amend; (3) entrenched statutes that sometimes outline their transitory purposes; (4) the doctrine of stare decisis; (5) the Ex Post Facto Clause; (6) the presumption against statutory retroactivity; (7) statutes of limitations; (8) originalist and textualist approaches to constitutional interpretation; and (9) the finality of court judgments.<sup>436</sup>

However in spite of such attempts to ground law in the past, by framing his discussion in terms of linear temporality and the idea of moving from the past, to the present into the future Wistrich has observed a shift towards the future. For him such a shift has occurred as a result of a growing dissatisfaction with the methods of the common law and the proliferation of statute law. According to him, lawmaking occurs along at least five temporal dimensions. The first concerns 'law's direction' and whether it applies 'retrospectively (such as the common law) or prospectively (such as constitutions).'<sup>437</sup> Secondly we have 'law's duration' where we must ask whether 'it is enduring or transient.'<sup>438</sup> Thirdly there is the 'speed with which law is made', where we must ask whether it is made 'quickly, or whether it is the product of a gradual drawn out process'<sup>439</sup> that is evolutionary in nature. The fourth

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<sup>435</sup> Andrew J. Wistrich, 'The Evolving Temporality of Lawmaking' (2012) 44(3) Connecticut Law Review 737, 741

<sup>436</sup> Andrew J. Wistrich, 'The Evolving Temporality of Lawmaking' (2012) 44(3) Connecticut Law Review 737, 741-742

<sup>437</sup> Andrew J. Wistrich, 'The Evolving Temporality of Lawmaking' (2012) 44(3) Connecticut Law Review 737, 750

<sup>438</sup> Andrew J. Wistrich, 'The Evolving Temporality of Lawmaking' (2012) 44(3) Connecticut Law Review 737, 750

<sup>439</sup> Andrew J. Wistrich, 'The Evolving Temporality of Lawmaking' (2012) 44(3) Connecticut Law Review 737, 750

dimensions concerns 'the basis, or raw material, on which a law is made,'<sup>440</sup> whether it is made using materials from the past or is based on predictions about the future. Finally there is 'law's purpose'<sup>441</sup> where we need to ask whether the law is aimed at preserving the past or influencing the future.

While Wistrich refers to the American context his observations can nevertheless be related to the common law more generally, where the pace of change can be seen to be restricted by the ways in which law seeks to preserve/institutionalise its past/memory through notions of precedent. As with Ricoeur's interpretation of processes of judgment, it is possible to see how Wistrich develops a linear understanding of temporality where the past is clearly separated from the present and the future. A similar approach to the temporal categories of past, present and future can be seen in legal scholar José Brunner's assessment of law's relationship with temporality. Brunner framed his assessment in terms of law's ability to account for both stability and change, arguing that we need to reflect on how law exists at the intersection between secular eternity and transience in modernity to gain an understanding how law is able to provide stability whilst also facilitating change.<sup>442</sup> By looking at how Thomas Hobbes, John Locke and Jeremy Bentham attempted to address the problem of self-grounding in law, Brunner has examined how each theorist has intertwined law and time 'connecting both law and temporality to happiness.'<sup>443</sup> Drawing on Walter Benjamin, Brunner has reflected on the modern consciousness of time and how it has been standardised.<sup>444</sup> In doing so he has pointed towards the secularisation of time and how for him this enables us to construe law 'as such an intersection of secular eternity and transience in modernity, allowing for immovability and movement at the same time, combining

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<sup>440</sup> Andrew J. Wistrich, 'The Evolving Temporality of Lawmaking' (2012) 44(3) Connecticut Law Review 737, 750

<sup>441</sup> Andrew J. Wistrich, 'The Evolving Temporality of Lawmaking' (2012) 44(3) Connecticut Law Review 737, 750

<sup>442</sup> José Brunner, 'Modern Times: Law, Temporality and Happiness in Hobbes, Locke and Bentham' (2007) 8(1) Theoretical Inquiries in Law 277

<sup>443</sup> José Brunner, 'Modern Times: Law, Temporality and Happiness in Hobbes, Locke and Bentham' (2007) 8(1) Theoretical Inquiries in Law 277, 277

<sup>444</sup> José Brunner, 'Modern Times: Law, Temporality and Happiness in Hobbes, Locke and Bentham' (2007) 8(1) Theoretical Inquiries in Law 277, 278

stability with change.<sup>445</sup> In addition to this he has argued that it is through engaging with Hobbes, Locke and Bentham that we are able to see how ‘modern temporal consciousness is decisively interweaved with a modern legal consciousness’ where law forms an ‘edifice located and built in secular time.’<sup>446</sup> In order to develop this point Brunner has turned to Hobbes’s suggestion that ‘the present is the only aspect of temporality that we can sense directly’, while the past ‘exists in our memory only’ and the future is ‘but a fiction of the mind.’<sup>447</sup> For Hobbes temporality was ‘a defining element of human nature’, something that immerses human beings in a ‘temporal self-understanding.’<sup>448</sup> As a result of this, Hobbes characterised laws as hedges aimed at securing peoples enjoyment over time. In order to perform such a function, law therefore needed to ‘project an image of steady continuity into eternity.’<sup>449</sup> This then generated what Brunner has referred to as a ‘future-oriented consciousness’<sup>450</sup> within law.

In order to introduce a means of examining how law is then able to accommodate change Brunner turns to Locke, focusing on how unlike Hobbes Locke sought to explore how a political structure is able to ‘cope with fallacies and mistakes.’<sup>451</sup> According to Brunner, Locke located ‘personal identity in a temporal consciousness in which the present is not sharply distinguished from the past, but experienced as maintaining continuity between past and present.’<sup>452</sup> As a result of this, Brunner

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<sup>445</sup> José Brunner, ‘Modern Times: Law, Temporality and Happiness in Hobbes, Locke and Bentham’ (2007) 8(1) *Theoretical Inquiries in Law* 277, 279

<sup>446</sup> José Brunner, ‘Modern Times: Law, Temporality and Happiness in Hobbes, Locke and Bentham’ (2007) 8(1) *Theoretical Inquiries in Law* 277, 281

<sup>447</sup> José Brunner, ‘Modern Times: Law, Temporality and Happiness in Hobbes, Locke and Bentham’ (2007) 8(1) *Theoretical Inquiries in Law* 277, 284

<sup>448</sup> José Brunner, ‘Modern Times: Law, Temporality and Happiness in Hobbes, Locke and Bentham’ (2007) 8(1) *Theoretical Inquiries in Law* 277, 285

<sup>449</sup> José Brunner, ‘Modern Times: Law, Temporality and Happiness in Hobbes, Locke and Bentham’ (2007) 8(1) *Theoretical Inquiries in Law* 277, 287

<sup>450</sup> José Brunner, ‘Modern Times: Law, Temporality and Happiness in Hobbes, Locke and Bentham’ (2007) 8(1) *Theoretical Inquiries in Law* 277, 291

<sup>451</sup> José Brunner, ‘Modern Times: Law, Temporality and Happiness in Hobbes, Locke and Bentham’ (2007) 8(1) *Theoretical Inquiries in Law* 277, 291

<sup>452</sup> José Brunner, ‘Modern Times: Law, Temporality and Happiness in Hobbes, Locke and Bentham’ (2007) 8(1) *Theoretical Inquiries in Law* 277, 293

concludes that for Locke ‘individuals always also live in the past, for they live in the present with a particular identity that is based on their acts in the past and their memory of the past.’<sup>453</sup> Viewing identity in this way culminates in grounding ‘the possibility of law in memory, in the past-oriented temporal nature of individual identity.’<sup>454</sup> The future is then introduced into law by ‘introducing the possibility of mistaken judgments concerning future pleasures and happiness; hence the necessity to deliberate rationally on the future outcomes of actions.’<sup>455</sup> Finally in order to create yet more distance from purely past-oriented understandings of law Brunner moves on to Bentham, an ardent critic of the backward-facing nature of the common law tradition. For him it is Bentham that transformed the temporal consciousness of law, promoting legislation over past-oriented precedent. While it is interesting to see how Brunner connects law’s temporality to happiness to explain its need to project into the future, I would prefer to return to the functional advantages of construing law as a tradition when attempting to account for how it is able to accommodate both stasis and change, as this allows us to break away from a linear model of temporality that places legal practitioners and legal scholars alike in the middle of a binary pull towards either the past or the future.

## ii. Challenging the Linearity of Law

While assumptions about law’s relationship with linear concepts of temporality are widespread (as noted above), this is not to say these assumptions have gone entirely unchallenged. In 1989 cultural anthropologist Carol J. Greenhouse undertook an examination of the relationship between cultural conceptions of time (i.e. social time) and the organisation and management of legal institutions, reflecting on how temporality surfaces in popular understandings of law.<sup>456</sup> In doing so she referred to the challenges of ‘developing intellectual strategies for

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<sup>453</sup> José Brunner, ‘Modern Times: Law, Temporality and Happiness in Hobbes, Locke and Bentham’ (2007) 8(1) *Theoretical Inquiries in Law* 277, 293

<sup>454</sup> José Brunner, ‘Modern Times: Law, Temporality and Happiness in Hobbes, Locke and Bentham’ (2007) 8(1) *Theoretical Inquiries in Law* 277, 293

<sup>455</sup> José Brunner, ‘Modern Times: Law, Temporality and Happiness in Hobbes, Locke and Bentham’ (2007) 8(1) *Theoretical Inquiries in Law* 277, 295

<sup>456</sup> Carol J. Greenhouse, ‘Just in Time: Temporality and the Cultural Legitimation of Law’ (1989) 98 *The Yale Journal* 1631

dismantling the privileges of linear time cross-culturally<sup>457</sup>, reflecting on how linear time has come to dominate public life since the 12<sup>th</sup> century. Greenhouse suggested that ‘if linear time dominates our public lives it is because its primary efficacy is in the construction and management of dominant social institutions, not because it is the only “kind” of time that is culturally available.’<sup>458</sup> Linear time is therefore useful when attempting to secure a sense of legitimacy as it alludes to a unidirectional notion of progress and stability (as will be noted in the next chapter in relation to the ancient constitution). However in order to ‘fulfil its own claims to redemptive completeness’ it must borrow ‘from the other temporal idioms’<sup>459</sup> such as cyclical time. After reaching this conclusion, Greenhouse identified three distinct forms of time in law. Firstly she stated that in public life ‘Americans inherit a dominant temporal culture that stresses the linear, infinite nature of time and simultaneously the finite irreversibility of any individual’s lifetime.’<sup>460</sup> She connected this form of time with ‘ethnic and national histories.’<sup>461</sup> Secondly she advanced the temporality of law itself, something that she claimed ‘involves the constant expansion of a linear time framework’ via precedent and a sense of timelessness where ‘the endpoint of law in time is neither fixed nor envisaged.’<sup>462</sup> By making this observation Greenhouse identified two distinct features of law: (1) it is cumulative and (2) it is reversible. Finally, the third kind of time that she associated with law was that of ‘the judges’ own lifetime.’<sup>463</sup> The overall conclusion that she made was

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<sup>457</sup> Carol J. Greenhouse, ‘Just in Time: Temporality and the Cultural Legitimation of Law’ (1989) 98 *The Yale Journal* 1631, 1634

<sup>458</sup> Carol J. Greenhouse, ‘Just in Time: Temporality and the Cultural Legitimation of Law’ (1989) 98 *The Yale Journal* 1631, 1637

<sup>459</sup> Carol J. Greenhouse, ‘Just in Time: Temporality and the Cultural Legitimation of Law’ (1989) 98 *The Yale Journal* 1631, 1637

<sup>460</sup> Carol J. Greenhouse, ‘Just in Time: Temporality and the Cultural Legitimation of Law’ (1989) 98 *The Yale Journal* 1631, 1642

<sup>461</sup> Carol J. Greenhouse, ‘Just in Time: Temporality and the Cultural Legitimation of Law’ (1989) 98 *The Yale Journal* 1631, 1642

<sup>462</sup> Carol J. Greenhouse, ‘Just in Time: Temporality and the Cultural Legitimation of Law’ (1989) 98 *The Yale Journal* 1631, 1642

<sup>463</sup> Carol J. Greenhouse, ‘Just in Time: Temporality and the Cultural Legitimation of Law’ (1989) 98 *The Yale Journal* 1631, 1643

that law 'organises and reproduces an essentially temporal myth'<sup>464</sup> by drawing on the linear time of national histories. However she also stated that law draws its cultural force from 'its engagement and resolution of multiple, mutually contesting temporalities with the potential for posing rival claims on social actors.'<sup>465</sup> In doing so she touched upon how law is confronted by other temporalities that do not necessarily sit well with linear temporality.

Another interesting contribution to literatures on temporality and law that builds on the uneasiness identified by Greenhouse can be found in a piece by Rebecca R. French written in 2001 (again in the American context). French's analysis of the relationship between law and temporality centres around the proposition that 'time is always necessary in law, yet it is rarely examined. It now enters every part of how we practice, analyse, project, and balance legal arguments.'<sup>466</sup> By focusing on the necessity of time in law, French identified a tendency to assume that the time we draw on as lawyers is simple linear time. She suggested that this assumption stands at odds with how we actually engage with time in our everyday lives by claiming that 'we recreate *different layers of time...we expect time... we attempt to control time*.'<sup>467</sup> In doing so she identified several functions of time (in law) which include time as: a measuring device, a value unit, a delineator of rights, an organiser, a determination of what is reasonable or not, a power, as something that forms part of the professional duties of a lawyer, a resolver of conflicts and a central part of legal concepts such as precedent.<sup>468</sup> After making this observation French pursued four key points. Firstly she sought to establish law as something that is deeply embedded with ideas about time. Secondly she suggested that we can examine how law relates to time by looking at the attributes, models and forms of time in law. Thirdly she suggested that distinct approaches to time have largely

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<sup>464</sup> Carol J. Greenhouse, 'Just in Time: Temporality and the Cultural Legitimation of Law' (1989) 98 *The Yale Journal* 1631, 1650

<sup>465</sup> Carol J. Greenhouse, 'Just in Time: Temporality and the Cultural Legitimation of Law' (1989) 98 *The Yale Journal* 1631, 1650

<sup>466</sup> Rebecca R. French, 'Time in the Law' (2001) 72 *University of Colorado Law Review* 663, 663

<sup>467</sup> Rebecca R. French, 'Time in the Law' (2001) 72 *University of Colorado Law Review* 663, 664

<sup>468</sup> Rebecca R. French, 'Time in the Law' (2001) 72 *University of Colorado Law Review* 663, 664-667



been influenced by technological advancements and the spread of social theories. Finally she presented the idea that views on time interact with social and cultural processes which in turn impact upon the practice and production of law itself. Drawing on Greenhouse's article, French provides an overview of the development of different understandings of temporality spanning from Ancient Greece to the present. As a result of this she stated that 'law has the power to "create, alter, distort, or even destroy time itself, not simply our experience of it"<sup>469</sup>, identifying five forms of time that are present within law. These are: transcendent time, natural time, social formation time, industrial clock time and physicists' time.<sup>470</sup> While the overview provided by French draws attention to the proposition that there are several different understandings of temporality at play in law, like Greenhouses's article it nevertheless seems to stop short of looking at how understandings of temporality (and the dominance of linear temporality) limit the scope, or at least shape the scope, of how we are able to think about how law utilises its past and processes of history writing.

A similar approach to examining the relationship between law and temporality can be seen in an article written by Liaquat Ali Khan in 2009. However what is perhaps distinct about Khan's approach can be found in his exploration of the principle of 'temporal inertia'<sup>471</sup> and how he attempted to see how we are able to account for the coexistence of both stability and change within the law as Brunner has done. Khan argued that 'although law is an instrument of change, it is also an anchor for stability', which is why 'law maintains temporal inertia [that] assures that circumstances will remain the same or will be minimally altered over a period of time.'<sup>472</sup> He defined temporal inertia as 'law's interest to maintain its efficacy over a period of time... unless repealed, overruled, or put to nonuse', stating that 'temporality itself does not resist change, but is a tool to measure the resistance to change.'<sup>473</sup> For him, law is able to accommodate change by overcoming temporal

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<sup>469</sup> Rebecca R. French, 'Time in the Law' (2001) 72 University of Colorado Law Review 663, 693

<sup>470</sup> Rebecca R. French, 'Time in the Law' (2001) 72 University of Colorado Law Review 663, 718

<sup>471</sup> Liaquat Ali Khan, 'Temporality of Law' (2009) 40 McGeorge Law Review 55, 80

<sup>472</sup> Liaquat Ali Khan, 'Temporality of Law' (2009) 40 McGeorge Law Review 55, 80

<sup>473</sup> Liaquat Ali Khan, 'Temporality of Law' (2009) 40 McGeorge Law Review 55, 80

inertia and adapting to 'timeframe changes'.<sup>474</sup> However, this requires a more subtle engagement with precedent (a central tool of temporal inertia in law) where 'judges pay more sophisticated attention to temporal changes that might have occurred'.<sup>475</sup>

While each of these scholars has made a significant contribution to debates on law's relationship with temporality, inspiring a growing interest in the possibilities posed by law's interactions with different understandings of temporality, these insights have not necessarily been extended to law's engagements with history. Instead what is perhaps interesting about the three studies outlined above is how they seek to identify not only the dominance of linear temporality within law, but how law can also be seen to be confronted by other understandings of temporality in both theory and practice. In doing so they establish the central tension in law's relationship with temporality as it's somewhat paradoxical call for both stability and change. Each in their own way can be seen to acknowledge that law draws its legitimacy from both its ability to secure stability through time and its ability to respond to change, indicating a need to accommodate several theories of temporality at once. In order to gain an insight into how law's confrontations with other forms of temporality help inform our understanding of how law relates to history and its writing, I will borrow from this strand of literature. However I will also need to turn to other literatures that engage with questions of historiography, as while the observations of Greenhouse, French and Khan are useful, I aim to explore the relationship between law and temporality in the context of history writing (and not its doctrinal life).

### iii. Exploring Law as a Tradition

One way of exploring law's relationship with temporality in the context of history writing could involve thinking of law as a tradition (as discussed earlier). This would involve building on more flexible understandings of tradition, such as those advanced by Gadamer, to show how it is possible to break away from law's preoccupation with linear understandings of temporality. For example, historian Matthew E. Crow has argued that:

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<sup>474</sup> Liaquat Ali Khan, 'Temporality of Law' (2009) 40 McGeorge Law Review 55, 80

<sup>475</sup> Liaquat Ali Khan, 'Temporality of Law' (2009) 40 McGeorge Law Review 55, 106

...traditions are histories organised to establish particular continuities, but like any histories, traditions are made and remade by their actors... Histories are written, which means they are read, which means they are rewritten. The past is always incomplete, always being acted out, and always subject to a new reading.<sup>476</sup>

It is with this in mind that I would suggest that it is possible to argue against attempts to reduce the law to a unified text where its conditions of possibility are masked by a seemingly universal commitment to linear temporality. Instead, by focusing on how traditions are made and remade I would argue that it is possible to see how as a tradition law draws its force from its continual performance. By focusing on the idea of law as a written tradition we are provided with an opportunity to focus on processes of transmission. As a consequence of this, we are able to think about how law is concerned with renewal as well as reflections on past practices, forming a vertical bridge between past, present and future that facilitates both stasis and change. In pursuing a more flexible way of thinking about the temporal categories of past, present and future I will draw on my earlier discussions concerning Koselleck's theory of multiple temporalities. This is because rather than thinking of the past, present and future sequentially I would like to adopt a layered view of these categories where law is thought of as an ongoing interpretive process that is able to accommodate the past without becoming bound by it.<sup>477</sup> Viewing law in this way will provide me with a greater sense of fluidity, enabling me find a means of incorporating more flexible forms of historiography into laws treatment of the past.

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<sup>476</sup> Matthew E. Crow, 'Jefferson, Pocock, and the Temporality of Law in a Republic' (2010) 2(1) *Republic of Letters: A Journal for the Study of Knowledge, Politics, and the Arts* 55, 57

<sup>477</sup> Another interesting approach to law, tradition and temporality can be found in the work of Peter Goodrich. However, it is important to note how he characterised law in terms of rhetoric rather than tradition. For more on this see: Peter Goodrich, 'Epistolary Justice: The Love Letter as Law' (2013) 9(2) *Yale Journal of Law and the Humanities* 245

According to Peter Goodrich Western 'legal tradition was built from fragments of an obscure legal past and from what the glossators termed the spirit of Latinity'.<sup>478</sup> He claims that 'its major crises were over the loss, interception, or rewriting of a correspondence in a foreign language and sent from an archaic past', rendering the lawyer 'lovesick for a lost original'.<sup>479</sup> In this sense the immemorial character of law feeds into a 'love of originals and the belief that what comes first is both true and to be loved', thus establishing a key 'foundational principle of legal method'<sup>480</sup> that focuses on the formative impact of a distant past on the present as well as the future. Goodrich compounds the importance of the distant past on present by stating that:

Law is a matter of originals because it is always bound to the inscription of prior forms. Legal writing is a correspondence, a writing that is always a rewriting of invisible or unknowable sources, of precedents which repeat or customs which inscribe a prior and superior law.<sup>481</sup>

Goodrich introduced the ways in which law can be seen to be committed to originals in an early article where he stated that the 'legal tradition is a written tradition and is consequently centred upon the study of textual meanings'.<sup>482</sup> In making this statement he claimed that 'the historically privileged forms of legal study have been conducted with law as written language, with legal meaning as textual meaning and with law interpretation as a question of textual powers, of access to and knowledge of the scriptural codification of the law'.<sup>483</sup>

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<sup>478</sup> Peter Goodrich, 'Epistolary Justice: The Love Letter as Law' (2013) 9(2) Yale Journal of Law and the Humanities 245, 284-285

<sup>479</sup> Peter Goodrich, 'Epistolary Justice: The Love Letter as Law' (2013) 9(2) Yale Journal of Law and the Humanities 245, 285

<sup>480</sup> Peter Goodrich, 'Epistolary Justice: The Love Letter as Law' (2013) 9(2) Yale Journal of Law and the Humanities 245, 286

<sup>481</sup> Peter Goodrich, 'Epistolary Justice: The Love Letter as Law' (2013) 9(2) Yale Journal of Law and the Humanities 245, 286

<sup>482</sup> Peter Goodrich, 'Traditions of Interpretation and the Status of the Legal Text' (1986) 6(1) Legal Studies 53, 53

<sup>483</sup> Peter Goodrich, 'Traditions of Interpretation and the Status of the Legal Text' (1986) 6(1) Legal Studies 53, 53

In focusing on the idea of correct meaning, Goodrich establishes what he refers to as the ‘fundamentally exegetical character of legal studies.’<sup>484</sup> This makes it possible to link law to what we would identify today as modern hermeneutics, and while this may have initially involved the types of authoritative process of interpretation that emanated from religion in order to establish a unitary vision of law, this is not to say that we are unable to extend more recent versions of hermeneutics to law. As stated in chapter two, hermeneutics provides us with a flexible opportunity to navigate the nexus between past, present and future by exposing the questions of power and influence that arise in processes of interpretation. Goodrich expresses this as the relationship ‘between “hieroglyph” and power, between writing and authority, between institutional goals and discourse.’<sup>485</sup> In *Phaedrus*, Plato established a similar connection between the written word and power (more broadly conceived). For example, when Phaedrus recounts a conversation between Thamus and Theuth about writing he repeats the following statement:

“O King, here is something that, once learned, will make the Egyptians wiser and will improve their memory; I have discovered a potion for memory and for wisdom.” Thamus, however, replied: “O most expert Theuth, one man can give birth to the elements of an art, but only another can judge how they can benefit or harm those who will use them. And now, since you are the father of writing, your affection for it has made you describe its effects as the opposite of what they really are. In fact, it will introduce forgetfulness into the soul of those who learn it: they will not practice using their memory because they will put their trust in writing, which is external and depends on signs that belong to others, instead of trying to remember from the inside, completely on their own. You have not discovered a potion for remembering, but for reminding; you provide your students with the appearance of wisdom, not with its reality. Your invention will enable them to

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<sup>484</sup> Peter Goodrich, ‘Traditions of Interpretation and the Status of the Legal Text’ (1986) 6(1) *Legal Studies* 53, 53

<sup>485</sup> Peter Goodrich, ‘Traditions of Interpretation and the Status of the Legal Text’ (1986) 6(1) *Legal Studies* 53, 57

hear many things without being properly taught, and they will imagine that they have come to know much while for the most part they will know nothing. And they will be difficult to get along with, since they will merely appear to be wise instead of really being so.”<sup>486</sup>

Here we see how the written word can be deceptive, providing those that engage with it uncritically a false sense of security. Instead of ensuring the unproblematic transmission of knowledge, writing can be seen to engage in processes of dissimulation. Writing must therefore be approached with caution, something that is especially true in relation to law.

Goodrich addresses the challenges of interpreting texts by returning to the work of the glossators and post-glossators, noting four key aspects of exegesis. Firstly he draws attention to the tenet of doctrine where it is assumed that the text in question is absent of contradiction and repetition, unified in advance by doctrine.<sup>487</sup> He then moves on to the tenet of legality where emphasis is placed on the literal meaning of a text and authorial intentions.<sup>488</sup> The third tenet he draws on is that of the unity of meaning and univocality of language where texts are thought to have only one meaning that is delivered when we read according to a procedure.<sup>489</sup> Finally he refers to the tenet of resolution where it is believed that a text must be made to resolve an issue.<sup>490</sup> Goodrich suggests that law warrants additional reflection, stating that 'law indeed is differentiated from other discourses precisely by the strictly normative character of its texts and the consequently exhaustive pre-

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<sup>486</sup> Plato, 'Phaedrus' in John M. Cooper (ed), *Plato: Complete Works* (Alexander Nehamas and Paul Woodruff (trs) Hackett Publishing 1997) 506, 551-552

<sup>487</sup> Peter Goodrich, 'Traditions of Interpretation and the Status of the Legal Text' (1986) 6(1) *Legal Studies* 53, 62

<sup>488</sup> Peter Goodrich, 'Traditions of Interpretation and the Status of the Legal Text' (1986) 6(1) *Legal Studies* 53, 62

<sup>489</sup> Peter Goodrich, 'Traditions of Interpretation and the Status of the Legal Text' (1986) 6(1) *Legal Studies* 53, 63

<sup>490</sup> Peter Goodrich, 'Traditions of Interpretation and the Status of the Legal Text' (1986) 6(1) *Legal Studies* 53, 63

cognition or foreknowledge that the jurist has of legal answers to legal questions.<sup>491</sup> Furthermore he claims that the legal text, as opposed to other texts, 'provides for everything in advance, the text needs merely to be repeated and applied, comprehended and taught.'<sup>492</sup> It was in this sense that it was possible to regard the law as a tradition where there was no need to look beyond the legal text for meaning. For Goodrich this means that traditionally the role of the interpreter was one of custodianship, where the tradition of law was to be preserved. However, if we move forward to look at the tenets of hermeneutics after Dilthey we are able to see the interpreter assigned a slightly different role. Instead of seeking to recover a single authoritative meaning from a text, the interpreter concerns themselves with transmitting 'historical meaning to its contemporary significance.'<sup>493</sup>

To make the most of the observations outlined above Goodrich has also examined the process of legal interpretation with the view of accounting for the normative dimension of a legal text, albeit in relation to a view of law as rhetoric. He has emphasised how 'the object of interpretation, be it word, sentence, text or discourse, is never something given of itself, but always a construction, something posited or produced.'<sup>494</sup> In doing so he argues that:

... only as a historical and social knowledge- as opposed to a strictly normative legal technique- can law interpretation and the legal text come to be contested within the legal institution, and the ritual text and ceremonial meaning be confronted by its substantive practices and called to account for what it has done, for its practice.<sup>495</sup>

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<sup>491</sup> Peter Goodrich, 'Traditions of Interpretation and the Status of the Legal Text' (1986) 6(1) Legal Studies 53, 63

<sup>492</sup> Peter Goodrich, 'Traditions of Interpretation and the Status of the Legal Text' (1986) 6(1) Legal Studies 53, 64

<sup>493</sup> Peter Goodrich, 'Traditions of Interpretation and the Status of the Legal Text' (1986) 6(1) Legal Studies 53, 66

<sup>494</sup> Peter Goodrich, 'Historical Aspects of Legal Interpretation' (1986) 61(3) Indiana Law Journal 331, 334

<sup>495</sup> Peter Goodrich, 'Historical Aspects of Legal Interpretation' (1986) 61(3) Indiana Law Journal 331, 334

The need to step outside of the law when interpreting it is an important acknowledgement to make, with the broader implication being that when studying law more generally it can be helpful to do so from a particular standpoint. The benefits of adopting a position when engaging with law can be seen in both the critical legal studies and socio-legal studies movements. In terms of hermeneutics and its deployment in relation to law we can see how stepping outside of law has enabled us to regard law as a discourse, with language being constitutive of not only law but also the means of engaging with it.<sup>496</sup>

However when turning to issues of interpretation (and its intrinsic connection to notions of tradition) it is important to remain alert to different approaches to interpretation in relation to law. I wish to distinguish my approach from that adopted by more positivist scholars where interpretation is thought of strictly as a legal technique necessary to the everyday working of the law. Such an approach to interpretation is extremely normative in character and is closely related to linear conceptions of temporality via its relationship with positivist conceptions of law. Examples of such approaches to interpretation can be found in the work of Ronald Dworkin and Linell E. Cady. Drawing on the work of Dworkin, Cady has established three types of judicial interpretation that revolve around distinct understandings of uses of the past. First of all she refers to conventionalism where moral assessment is separated from prior decisions, with prior decisions taking priority over morality.<sup>497</sup> Secondly she refers to naturalism where moral assessment and prior decisions are combined and 'prior decisions are to be interpreted in the widest possible context and weighed in terms of substantive ideals of justice.'<sup>498</sup> However, this is not to say that the need to fit with past decisions is bypassed altogether. Finally she advances instrumentalism, which 'follows naturalism in allowing moral considerations to guide judicial decisions but radically extends this by denying that

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<sup>496</sup> For an example of this see: Ari Z. Bryen, *Violence in Roman Egypt: A Study in Legal Interpretation* (University of Pennsylvania Press 2013)

<sup>497</sup> Linell E. Cady, 'Hermeneutics and Tradition: The Role of the Past in Jurisprudence and Theology' (1986) 79(4) *The Harvard Theological Review* 439, 448

<sup>498</sup> Linell E. Cady, 'Hermeneutics and Tradition: The Role of the Past in Jurisprudence and Theology' (1986) 79(4) *The Harvard Theological Review* 439, 448



past decisions have any intrinsic constraint upon moral considerations.<sup>499</sup> While Cady applies these types of interpretation to theological interpretation it is possible to see how in a legal context, for some, morality forms the core of interpretation. In order to move away from such a strong association with morality I would prefer to adopt a more Gadamerian approach, construing interpretation as a philosophical method. While when applied to law Gadamerian interpretation does involve certain normative elements, it is nevertheless possible to see how it incorporates both subjective and objective elements into process of understanding. In doing so it presents us with a means of understanding historically, something which can be seen to facilitate the inclusion of more fluid understandings of temporality into law.

It is hoped that by retaining a sense of fluidity within law that it is possible to negate the suggestion that law is simply a one way dialogue concerned with the imposition of norms. Construing law as a tradition is useful when attempting to secure such a fluidity, as it provides us with a means of looking more closely at the potential role performed by the past in shaping and reshaping the nature of law in the present.<sup>500</sup> For example, Martin Krygier has pursued the possibility of construing law as tradition in a more flexible sense by advancing three key points. Firstly he argues that traditionality forms a central component of almost all legal systems, secondly he argues that this brings into question the 'post-Enlightenment antinomy between tradition and change' and thirdly, he claims that the 'traditionality of law is inescapable'.<sup>501</sup> He also argues that 'law is a profoundly social practice' and that it is important that we try to 'understand the nature and behaviour of traditions in social life'<sup>502</sup> when we try to understand the law. When examining the concept of

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<sup>499</sup> Linell E. Cady, 'Hermeneutics and Tradition: The Role of the Past in Jurisprudence and Theology' (1986) 79(4) *The Harvard Theological Review* 439, 448

<sup>500</sup> For examples of legal scholars engaging with the concept of tradition as well as the hermeneutics of Hans-Georg Gadamer refer to: Frances J. Mootz, 'The Ontological Basis of Legal Hermeneutics: A Proposed Model of Inquiry Based on the Work of Gadamer, Habermas, and Ricoeur' (1988) 68 *Boston University Law Review* 523, William N. Eskridge Jr, 'Gadamer/Statutory Interpretation' (1990) 90(3) *Columbia Law Review* 609 and Alan C. Hutchinson, 'Work-in-Progress: Gadamer, Tradition, and the Common Law' (2000) 76 *Chicago-Kent Law Review* 1015.

<sup>501</sup> Martin Krygier, 'Law as Tradition' (1986) 5(2) *Law and Philosophy* 237, 237

<sup>502</sup> Martin Krygier, 'Law as Tradition' (1986) 5(2) *Law and Philosophy* 237, 239

tradition, Krygier focuses his attentions on three central elements. The first is a sense of 'pastness'<sup>503</sup> where traditions are thought to originate from the past. This then furnishes them with an 'authoritative presence', and while this may be 'derived from a real or believed-to-be real past' its 'traditionality consists in its *present* authority and significance for the lives, thoughts or activities of participants'.<sup>504</sup> Finally traditions are not simply discovered, they are 'passed down over intervening generations'<sup>505</sup> and it is this that provides them with their social character. These elements tie in well with Gadamer's suggestion that for a tradition to maintain a sense of validity it must be performed, providing an interesting insight into the nature and scope of law. However it is interesting to note that Krygier extends this even further by suggesting that 'law is organised to preserve, maintain and draw systematically and constantly upon'<sup>506</sup> traditions, assigning law a pivotal role in the preservation of traditions over time.

The popular decision to locate traditions in the past (real or imagined) creates an intriguing dynamic between the past and the present, especially in relation to law. For example, Krygier has observed that 'the legal past is central to the legal present' and has commented on how law 'records and preserves a composite of (frequently inconsistent) beliefs, opinions, values, decisions, myths, rituals, deposited over generations.'<sup>507</sup> According to him, this provides law with a uniquely powerful relationship with tradition, because unlike the traditions that are preserved through art and literature law institutionalises its 'past-maintenance'.<sup>508</sup> While some recordings are more authoritative than other, Krygier can be seen to place special emphasis on how 'participants in legal traditions are required to justify their arguments in terms of acceptable interpretations of these authoritative materials.'<sup>509</sup> He states that it is this that gives the 'past-in-the-present power over

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<sup>503</sup> Martin Krygier, 'Law as Tradition' (1986) 5(2) Law and Philosophy 237, 240

<sup>504</sup> Martin Krygier, 'Law as Tradition' (1986) 5(2) Law and Philosophy 237, 240

<sup>505</sup> Martin Krygier, 'Law as Tradition' (1986) 5(2) Law and Philosophy 237, 240

<sup>506</sup> Martin Krygier, 'Law as Tradition' (1986) 5(2) Law and Philosophy 237, 240

<sup>507</sup> Martin Krygier, 'Law as Tradition' (1986) 5(2) Law and Philosophy 237, 241

<sup>508</sup> Martin Krygier, 'Law as Tradition' (1986) 5(2) Law and Philosophy 237, 241

<sup>509</sup> Martin Krygier, 'Law as Tradition' (1986) 5(2) Law and Philosophy 237, 241

those who think and act in the present.<sup>510</sup> This authority over the present is not however absolute, as ‘the past speaks with many voices.’<sup>511</sup> Krygier has even suggested that this is inevitable, stating that within every complex written tradition:

... any particular “present” is a slice through a continuously changing diachronic quarry of deposits made by generations of people with different, often inconsistent and competing values, beliefs, and views of the world. This assorted stock forms the constantly changing present of the tradition, to which each generation of participants contributes in turn.<sup>512</sup>

As a consequence of this movement legal doctrines and values rarely remain static, creating an internal tension that drives change. This tension necessitates the presence of ‘choice in particular legal applications’, meaning that ‘texts and their interpreters are embedded in a broader complex tradition’ that makes sure that ‘meanings attributed to texts will change’.<sup>513</sup> Such an incorporation of a more flexible understanding of tradition into legal scholarship can be seen to reflect the increased interdisciplinary of legal research,<sup>514</sup> where renewed reflections on the nature and scope of law are encouraged.

However, interdisciplinarity is not embraced by all. For some the use of insights drawn from other disciplines has resulted in an unacceptable shift away from the everyday materiality of the law towards endless methodological and theoretical reflection.<sup>515</sup> The rejection of universal categories along with the growing prevalence of social theory is thought to pose a threat to not only the coherence of law, but also its broader importance within the academy. I would however argue

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<sup>510</sup> Martin Krygier, ‘Law as Tradition’ (1986) 5(2) *Law and Philosophy* 237, 242

<sup>511</sup> Martin Krygier, ‘Law as Tradition’ (1986) 5(2) *Law and Philosophy* 237, 242

<sup>512</sup> Martin Krygier, ‘Law as Tradition’ (1986) 5(2) *Law and Philosophy* 237, 242

<sup>513</sup> Martin Krygier, ‘Law as Tradition’ (1986) 5(2) *Law and Philosophy* 237, 242

<sup>514</sup> For a general discussion of this see: Anthony Bradney, ‘Law as a Parasitic Discipline’ (1998) 25(1) *Journal of Law and Society* 71

<sup>515</sup> For an example of such a critique see: Paddy Hillyard, ‘Invoking Indignation: Reflections on Future Directions of Socio-Legal Studies’ (2002) 29(4) *Journal of Law and Society* 645

that this is an impoverished view of recent developments in legal scholarship. Far from diminishing the law, methodological borrowings from other disciplines such as history and literary studies have in many respects provided law with a renewed vigour with regards to questions of national identity, tradition and legitimacy. For many, interdisciplinarity has created an opportunity to revisit how law uses history and language as its central mechanisms of operation.<sup>516</sup> Some have even used insights gained in other fields to identify history as an important site of legal intervention, although it should be noted that not everyone that has identified history as an area of interest for legal scholarship has fully embraced the types of methodological reflexivity discussed above. Insights from other disciplines would therefore appear useful when thinking about law as a tradition, especially if we accept the social character of law. They would also appear to provide us with a means of escaping the tendency within law to attempt to separate past, present and future by regarding history as the linear forward-facing flow of events and facts through these three apparently distinct temporal categories.<sup>517</sup> Instead by looking to theories of interpretation we are able to analyse law as a tradition, something that like history requires continual performance to retain its force.

#### iv. The Temporalisation of History in Law

Legal historian Kunal Parker has drawn on a wide variety of literatures in an attempt to examine the ways in which law utilises different understandings of temporality. He has focused his work in this area by asking what type(s) of history law draws upon and how they impact on how we situate law in history. In doing so he has formed an explicit connection between literatures on developments in legal history (such as those initiated by Robert W. Gordon) and literatures on temporality and law (such as those initiated by Greenhouse). As a starting point, Parker engages with Oliver Wendell Holmes Jr. and his claim that the common law tradition is 'impervious to history.'<sup>518</sup> More specifically he focuses on how Holmes argued that

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<sup>516</sup> For example see: William M. Wiecek, 'Clio as Hostage: The United States Supreme Court and the Uses of History' (1988) 24 California Western Law Review 227

<sup>517</sup> For an example of such a conception of time in law see: Emmanuel Melissaris, 'The Chronology of the Legal' (2005) 50(4) McGill Law Journal 839

<sup>518</sup> Kunal M. Parker, 'Law "In" and "As" History: The Common Law in the American Polity, 1790-1900' (2011) 1(3) UC Irvine Law Review 587, 589

'common law thinkers had begun to believe that the common law could be understood as a matter of ahistorical logic', something which he was against as he regarded the law to be 'irreducible to logic.'<sup>519</sup> Instead Holmes argued that 'like all law, the common law had to be seen... as the product of nothing but history, as something without ahistorical foundations, as something that had arisen in time.'<sup>520</sup> He also argued that as a result of this 'the common law was overly committed to repeating the past.'<sup>521</sup> Parker shows how while on the surface Holmes's criticisms of the common law tradition would appear inconsistent, that this is not so as Holmes was in fact alluding to different aspects of the common law tradition as he understood them. These two aspects were the logic-oriented tradition of the common law and the precedent-oriented tradition of the common law. Parker states that we are able to reconcile Holmes's two critiques by turning to his 'antifoundational conception of history' where 'history is the largely negative practice of revealing the merely temporal origins of phenomena in order to dismantle the foundations upon which such phenomena rest.'<sup>522</sup> Parker then moves on to look at how Gordon also appears to regard history as something that operates in the negative, acting as an enemy to 'law's claim to self-sufficiency.'<sup>523</sup> In adopting Holmes's description of historical consciousness, Parker would appear to suggest that 'In undermining law's autonomy, history reveals law to be a kind of politics, such that law might be remade in accordance with society's desires, might be a product of democratic will.'<sup>524</sup> For Gordon, history therefore performed an auxiliary role.

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<sup>519</sup> Kunal M. Parker, 'Law "In" and "As" History: The Common Law in the American Polity, 1790-1900' (2011) 1(3) UC Irvine Law Review 587, 589

<sup>520</sup> Kunal M. Parker, 'Law "In" and "As" History: The Common Law in the American Polity, 1790-1900' (2011) 1(3) UC Irvine Law Review 587, 589

<sup>521</sup> Kunal M. Parker, 'Law "In" and "As" History: The Common Law in the American Polity, 1790-1900' (2011) 1(3) UC Irvine Law Review 587, 589

<sup>522</sup> Kunal M. Parker, 'Law "In" and "As" History: The Common Law in the American Polity, 1790-1900' (2011) 1(3) UC Irvine Law Review 587, 590

<sup>523</sup> Kunal M. Parker, 'Law "In" and "As" History: The Common Law in the American Polity, 1790-1900' (2011) 1(3) UC Irvine Law Review 587, 590

<sup>524</sup> Kunal M. Parker, 'Law "In" and "As" History: The Common Law in the American Polity, 1790-1900' (2011) 1(3) UC Irvine Law Review 587, 590

The erosion of the law-politics distinction that came ‘in the name of antifoundational history’, arguably resulted in law coming to be thought of ‘as something that had to be made in the present, with full awareness of its contingency, provisionality, and reversibility.’<sup>525</sup> Parker has observed how such insights can be linked to the growing presence of legal historians within law faculties, observing how this has resulted in an increased turn to history to expose the contingency and politics of law. Observations such as these make it possible to see how our uses of history have been transformed so that we are able to focus our attentions on missed opportunities and the possibilities that they create, spawning a wide range of critical literatures directed at challenging repressive understandings and applications of law. However profitable these literatures may be, Parker has suggested that this has resulted to ‘a sense of intellectual exhaustion’, signalling a need ‘to rejuvenate our thinking, to explore other possibilities not offered by our current dominant modes of contextualisation.’<sup>526</sup> In an attempt to work his way out of this intellectual exhaustion, Parker has sought to examine how the common law has come to turn to history not merely defensively (i.e. to secure legitimacy) but also to reveal the ‘possible relationship between history and law that are occluded by the Holmesian antifoundational turn to history to which we are heirs.’<sup>527</sup> In an attempt to explore the broader consequences of this Parker has posed a number of questions that force critically oriented legal scholars to revisit their preference for seemingly never ending contingency.<sup>528</sup> He does this by proposing that our transformation of historical knowledge into ‘an indefinitely accommodating contextual frame’ has ‘produced too much *sameness*, rather too much *flattering*.’<sup>529</sup> In an attempt to move away from this flattening, he asks:

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<sup>525</sup> Kunal M. Parker, ‘Law “In” and “As” History: The Common Law in the American Polity, 1790-1900’ (2011) 1(3) UC Irvine Law Review 587, 592

<sup>526</sup> Kunal M. Parker, ‘Law “In” and “As” History: The Common Law in the American Polity, 1790-1900’ (2011) 1(3) UC Irvine Law Review 587, 593-594

<sup>527</sup> Kunal M. Parker, ‘Law “In” and “As” History: The Common Law in the American Polity, 1790-1900’ (2011) 1(3) UC Irvine Law Review 587, 604

<sup>528</sup> He presents these questions in: Kunal Parker, *Common Law, History, and Democracy in America, 1790-1900: Legal Thought Before Modernism* (Cambridge University Press 2011)

<sup>529</sup> Kunal M. Parker, ‘Response: The Politeness of History’ (2015) 40(1) Law and Social Inquiry 264, 265

What would it be like to take seriously the teleological and foundational frames of the past instead of dismissing them for their misguided faiths? Could the objects of our study- which we so skilfully render contingent by fitting them into our historical frameworks- be made to speak back to us in ways that pushed through or interrupted our own framing devices?<sup>530</sup>

To approach such questions Parker attempts to ‘move beyond or look behind our ways of producing historical knowledge’ by reconstructing ‘the foundational and teleological world of the nineteenth century not... out of any concern with justice, but as a kind of aesthetic object designed to produce certain uncanny effects *for us*.’<sup>531</sup> He ‘offers a history that draws its temporality from its object of investigation’, utilising law’s ability to combine stasis and change to highlight the importance of seeking out not only that which changes but also that which remains the same.<sup>532</sup> This unique and provocative call to revisit how we explore the relationship between law and history (through an awareness of the consequences of adopting a particular sense of temporality) has generated an interesting range of responses. For example Marianne Constable locates the radicalism of Parker’s contribution in the way that it advances a different sort of history.<sup>533</sup> She remarks that he not only highlights how Modernism has swept away foundations, but also shows us how it “invites self-reflection”.<sup>534</sup> In contrast to this, Shai Lavi has focused on how Parker asks how law can teach us about the reach and limits of disciplinary thinking.<sup>535</sup> In doing so he casts *Common Law, History and Democracy in America* as a

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<sup>530</sup> Kunal M. Parker, ‘Response: The Politeness of History’ (2015) 40(1) *Law and Social Inquiry* 264, 265

<sup>531</sup> Kunal M. Parker, ‘Response: The Politeness of History’ (2015) 40(1) *Law and Social Inquiry* 264, 267

<sup>532</sup> Kunal M. Parker, ‘Response: The Politeness of History’ (2015) 40(1) *Law and Social Inquiry* 264, 268

<sup>533</sup> Marianne Constable, ‘The Predicament of Modern Law: Parker’s History of a Law Without a History that Matters’ (2015) 40(1) *Law and Social Inquiry* 238, 239

<sup>534</sup> Marianne Constable, ‘The Predicament of Modern Law: Parker’s History of a Law Without a History that Matters’ (2015) 40(1) *Law and Social Inquiry* 238, 239

<sup>535</sup> Shai Lavi, ‘Turning the Tables on Legal History: Parker’s Common Law, History and Democracy in America’ (2015) 40(1) *Law and Social Inquiry* 245, 245

contribution to critiques on the “law and...” paradigm.<sup>536</sup> He suggests that Parker identifies the overly historicist nature of legal history in the present as a limit on ‘the horizons of the common law’, denying us the opportunity to acknowledge and then study the potential ‘internal logic and directionality of history.’<sup>537</sup> In addition to this, Renisa Mawani has observed how Parker accounts for the survival of the common law tradition despite the growth of criticism that was directed at it in early America.<sup>538</sup> She emphasises how law is committed to not only the past but also the present and the future, thus engaging with law’s ‘immemoriality’ and ‘insensibility’.<sup>539</sup>

Arguably the debate that Parker’s work instigates bears the potential to reach long into the future, extending beyond the boundaries of legal history to all historically oriented critical projects. It is already possible to see how renewed engagements with questions of temporality since Greenhouse’s intervention in 1989 have prompted a re-problematisation and rethinking of the interactions between law and time, something which has in turn generated growing literatures that seek to challenge our assumptions surrounding the seemingly organic/unproblematic nature of time, focusing on how this impacts on the operation and study of law. For example, American legal historian Mary L. Dudziak has drawn on the work of Lynn Hunt to critique the ways in which the concept of *wartime* impacts on our views on war rights.<sup>540</sup> She argues that by ‘unpacking war’s temporality’ we can gain ‘a more satisfactory understanding of the ongoing relationship between war and American law and politics.’<sup>541</sup> For Dudziak, the act of confronting our assumptions about temporality by looking at how as legal scholars we have often relied upon a linear

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<sup>536</sup> Shai Lavi, ‘Turning the Tables on Legal History: Parker’s Common Law, History and Democracy in America’ (2015) 40(1) *Law and Social Inquiry* 245, 248

<sup>537</sup> Shai Lavi, ‘Turning the Tables on Legal History: Parker’s Common Law, History and Democracy in America’ (2015) 40(1) *Law and Social Inquiry* 245, 248

<sup>538</sup> Renisa Mawani, ‘The Times of Law’ (2015) 40(1) *Law and Social Inquiry* 253, 255

<sup>539</sup> Renisa Mawani, ‘The Times of Law’ (2015) 40(1) *Law and Social Inquiry* 253, 257

<sup>540</sup> Mary L. Dudziak, ‘Law, War, and the History of Time’ (2010) 98(5) *California Law Review* 1669

<sup>541</sup> Mary L. Dudziak, ‘Law, War, and the History of Time’ (2010) 98(5) *California Law Review* 1669, 1673



understanding of temporality performs a crucial role in the study of law's broader sites of interaction. Renisa Mawani has also made an insightful contribution to the study of law and temporality in relation to postcolonial studies by showing how 'law as temporality presents a set of questions and invites a formulation through which to critically examine the Indian settler as Asian settler question.'<sup>542</sup> She argues that 'law's times cannot be conceived solely in terms of history or historicity', instead 'the temporalities of law demand a critical engagement with law's role in the production and organisation of time as past, present and future.'<sup>543</sup> For Mawani, such an engagement facilitates the recognition of 'law's imposition of time on colonial-legal subjects, and the tensions and disjunctions between law's time and lived time.'<sup>544</sup> Furthermore by thinking of law as temporality and adopting a more flexible view of past, present and future, Mawani establishes a means of not only focusing on 'law's claim to authority, legitimacy, and universality' but also 'highlights law's becoming.'<sup>545</sup> When combined with the focus provided by questions such as those posed by Parker it is possible to identify an opportunity to not only revive and extend historically oriented critical legal scholarship, but also an opportunity to re-visit some of the assumptions that underpin this broad canon of work.

There are two aspects of these developments that I find particularly promising in relation to my attempt to construe law as a tradition. Firstly, I believe that by examining law's role in the production and organisation of time as past present and future we are able to re-invigorate debates on what it means to approach history with a critical stance, allowing historiography to become a form of resistance to the grand narratives upon which some critical scholarship would seem to implicitly rely. However in order to extend the potential functions of historiography in relation to law beyond processes of legitimation by drawing on insights from work on law and temporality, I would suggest that it becomes necessary to move beyond the act of

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<sup>542</sup> Renisa Mawani, 'Law as Temporality: Colonial Politics and Indian Settlers' (2014) 4(1) University of California Irvine Law Review 65, 69

<sup>543</sup> Renisa Mawani, 'Law as Temporality: Colonial Politics and Indian Settlers' (2014) 4(1) University of California Irvine Law Review 65, 69

<sup>544</sup> Renisa Mawani, 'Law as Temporality: Colonial Politics and Indian Settlers' (2014) 4(1) University of California Irvine Law Review 65, 69

<sup>545</sup> Renisa Mawani, 'Law as Temporality: Colonial Politics and Indian Settlers' (2014) 4(1) University of California Irvine Law Review 65, 93

giving voice to previously suppressed narratives (i.e. the production of microhistories). Instead, I would argue that such an extension can only arise through a reaffirmation of an appreciation of history writing as something that must always occur in the plural, even when some of the histories produced do not sit well with us in the present. By writing histories that draw their temporality from their objects of investigation, Parker has signalled a way of making use of law's propensity to accommodate both change and stasis to reveal not only that which changes but also that which remains the same.<sup>546</sup> Such a return to questions of continuity could be extended through an engagement with Koselleck's theory of multiple temporalities and his endorsement of open exchanges between conflicting accounts, as this would further encourage us to remain alert to the ways in which law can be thought of as a tradition that is shaped by context, but not necessarily fated to be bound by it. Moreover by emphasising how since the 18<sup>th</sup> century 'the truth of history changes with changing time, or to be more exact, that historical truth can become outdated' Koselleck has shown us how 'historical method has... meant having to define a point of view from which conclusions can be drawn.'<sup>547</sup> In light of such an acknowledgment of the formative effects of method, attempts to secure the innocence or unproblematically liberating force of history would appear to be severely undermined by the act of attempting to see the past anew, as in order to gain access to an alternative/previously suppressed account of the past we must first adopt a position in relation to it. Law's engagements with historiography may therefore benefit from being framed using Koselleck's extension of the concept of horizon, which he used to bring together the temporal categories of past, present and future in a way that enables us to navigate the growing gap between experience and expectation.<sup>548</sup> Law's engagements with historiography (on a theoretical and academic level) would then be able to make the most of both synchronic and diachronic analysis in relation to not only its objects of investigation but also itself.

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<sup>546</sup> For a look at how this works in practice see: Kunal M. Parker, *Common Law, History, and Democracy in America, 1790-1900: Legal Thought before Modernism* (Cambridge University Press 2013)

<sup>547</sup> Reinhart Koselleck, 'Concepts of Historical Time and Social History' in *The Practice of Conceptual History: Timing History, Spacing Concepts* (Adelheis Baker tr, Stanford University Press 2002) 115, 120

<sup>548</sup> A more detailed discussion on the categories of the space of experience and horizon of expectation was undertaken in my first chapter where I focused on the constant movement that occurs between the two.

Secondly by returning to the theme of thinking about what remains the same, something that is sometimes overlooked or rejected in favour of seeking out what has changed, it is possible to identify an opportunity to revisit the binary of continuity versus rupture that has often seen tradition placed in opposition to innovation. A similar return to thinking about how we deploy the categories of continuity and rupture can be seen in Koselleck's use of synchronic and diachronic analysis where he comments on how 'any synchrony is *eo ipso* at the same time diachronic.'<sup>549</sup> For Koselleck:

...*in actu*, all temporal dimensions are always intertwined, and it would contradict experience to define the "present" as, for instance, one of those moments that accumulate from the past into the future- or, conversely, that slip as intangible points of transition from the future into the past. In a purely rhetorical manner, all history could be defined as a permanent present in which past and future are contained- or as the continuous intertwining of past and future that makes any present constantly disappear.<sup>550</sup>

The opportunity to study change alongside stasis that is afforded by Koselleck's preference for diachronic synchronicity is useful to the study of law as a tradition as it enables us to reflect on the temporality of law itself. This opportunity for reflection is useful when attempting to rethink law's interactions with historiography as it enables us to focus on how these interactions continue to pivot around the entrenchment of notions of legitimacy. In the next two chapters, I will explore this more fully, showing how national identity is often consciously rooted in national myths and/or collective memories that are tasked with securing the legitimacy of relatively new power structures/regimes in the aftermath of civil unrest. I will also seek to extend my observations from previous chapters to illustrate how law continues to perform a vital function in the creation, maintenance and perhaps even

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<sup>549</sup> Reinhart Koselleck, 'Social History and Conceptual History' in *The Practice of Conceptual History: Timing History and Spacing Concepts* (Kerstin Behnke tr, Stanford University Press 2002) 20, 30

<sup>550</sup> Reinhart Koselleck, 'Social History and Conceptual History' in *The Practice of Conceptual History: Timing History and Spacing Concepts* (Kerstin Behnke tr, Stanford University Press 2002) 20, 30

displacement of particular understandings of national identity via its engagements with historiography. This will, in turn, prompt a consideration of how by thinking of historiography as resistance it may be possible to draw attention to the grand narratives that are not only being created and sustained by carefully crafted engagements with historiography via law, but are also perhaps capable of being resisted through alternative engagement with historiography. The next two chapters will, therefore, act as case studies that can be regarded as sites of engagement with history writing processes that make it possible to reflect on the broader implications of formal engagements with recording and recounting the past.

#### vi. Concluding Remarks

In order to show how insights gained in the aftermath of the temporalisation of history bear the potential to alter law's relationship with historiography I will first turn to the example of the Ancient Constitution. Here I will evaluate the significance of discourses and forms of historiography surrounding the Ancient Constitution through the writings of intellectual historian J.G.A Pocock. I will then turn to the example of post-Franco Spain where I will focus on evaluating Spain's transition to democracy through the lens of Koselleck's approach to using what has past to move forward into the future. While each of these case studies can be seen to engage with law in different ways (whether this be in relation to law's "origin story" or its ability to draw a veil over the past), they can both nevertheless be seen to test the limits of linear understandings of temporality by forcing us to confront the consequences of law's commitment to narrow understandings of time. When thought of in relation to the Ancient Constitution, this can be seen in how by allowing law to inform England's historical outlook during the 17<sup>th</sup> century, historians and lawyers alike imposed stark limitations on beliefs relating to the origins political obligation. When thought of in relation to post-Franco Spain, this can be seen in official attempts to control the circulation of the past to limit the possibility of future violence. By using history to reduce the scope of action in the present, both examples can be seen to draw attention to the drawbacks that can be associated with assumptions surrounding the didactic potential of historical knowledge in relation to the law by challenging the use of historical narratives to

secure the authority of law in the present.<sup>551</sup> They do this by revealing how a particular form of temporality can be seen to emerge from such narratives, where the temporal categories of past, present and future are used to secure a sense of continuity and stability. In order to examine the extent to which law can become implicated in the relationship between historiography and resistance, the next two chapters will be used to interrogate law's interactions with temporality. More specifically, they will be used to reflect on how law can be seen to either facilitate or stymie exchanges between historiography and resistance by focusing on the forms of historiography that law has come to rely upon through its commitment to particular theories of temporality.

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<sup>551</sup> When I refer to historical narratives I am referring to the Ancient Consitution and other attempts to ground the legitimacy of the law in the past, where ideas of custom and continuity are advanced to explain present arrangements.

## Chapter 4

# Defending and Disrupting Continuity: Mapping the Temporal Limits of the Common Law Mind

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*And as to Rebellion in particular against Monarchy; one of the most frequent causes of it, is the Reading of books of Policy, and Histories of the ancient Greeks, and Romans; from which, young men, and all others that are unprovided of the Antidote of solid Reason, receiving a strong, and delightful impression, of the great exploits of warre.*

Thomas Hobbes<sup>552</sup>

*A nation which easily casts itself loose from the traditions of the past loses steadiness of purpose, and ultimately, wearied by excitement, falls into the arms of despotism.*

Samuel Rawson Gardiner<sup>553</sup>

*...who overcomes  
By force, hath overcome but half his foe.*

John Milton<sup>554</sup>

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In order to unearth the broader consequences of law's engagements with temporality and how they shape its relationship with historiography and resistance, it is helpful to employ the concept of tradition, as it is via law's relationship with temporality that law's relationship with historiography is formed. However, by committing itself to linear understandings of temporality, law can be seen to commit itself to an equally limited understanding of tradition. While this may enable law to draw on notions of tradition for its story of legitimation, such uses of tradition do not sit well with more flexible understandings of this concept (such as those discussed

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<sup>552</sup> Thomas Hobbes, *Leviathan* (Richard Tuck ed, Cambridge Texts in the History of Political Thought, Cambridge University Press 2008) 225-226

<sup>553</sup> Samuel Rawson Gardiner, 'Introduction' in Samuel Rawson Gardiner (ed), *The Constitutional Documents of the Puritan Revolution 1625-1660* (Oxford University Press 1951) viv, xxxi

<sup>554</sup> John Milton, *Paradise Lost* (Penguin Classics 2014) 1:648-649

in previous chapters).<sup>555</sup> In order to facilitate a closer examination of how law has utilised the concept of tradition (in relation to issues of temporality) I will draw on some of the literatures surrounding the development of the common law mind via the Ancient Constitution, paying particular attention to how discourses surrounding the Ancient Constitution and the static representational practices that they engender have come to dominate law's understanding of history.<sup>556</sup> More specifically, I will reflect on the extent to which it is possible to associate the Ancient Constitution with more positivistic forms of historiography, focusing on how via the Ancient Constitution legal scholars have come to adopt a regrettably positivistic understanding of temporality when engaging with the past. In addition to this I will also suggest that by drawing on history for its story of legitimation, law has already grasped the potential for history and its writing to function in the service of particular standpoints, albeit in a way that is yet to yield the type of results that lead to the displacement of singular grand narratives.

i. The Ancient Constitution: Re-assessing the Reach of Tradition

Discourses surrounding the Ancient Constitution present themselves as an especially useful focal point when reflecting on law's engagement with temporality in the context of history writing because of the ways in which they bring into focus

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<sup>555</sup> In previous chapters I have drawn on a more Gadamerian understanding of tradition in an attempt to show how by thinking of tradition as an ongoing interpretive process, rather than something concerned with acts of absolute prefiguration, it is possible to introduce a more flexible sense of temporality into law. Moreover, I have suggested that by thinking of law itself as a tradition it is possible to rethink law's relationship with historiography. This approach to tradition (and law) stands at odds with orthodox uses of this concept in relation to issues of legitimacy and continuity, something that will be made apparent in what is to follow.

<sup>556</sup> When I refer to the Ancient Constitution I draw on J.G.A. Pocock's identification of the Ancient Constitution as a theory that presented the relations of government and governed in England as being regulated by the common law, something which derived from custom which was itself assumed to be immemorial. The elements of custom, continuity and balance lie at the core of this understanding of the Ancient Constitution, establishing the common law as being constitutive of the English polity.

not only the consequences of adopting understandings of history that rely on restrictive theories of history writing, but also because of how they reveal how such commitments continue to haunt us in the present.<sup>557</sup> They are also useful because of the ways in which they enable us to see how law interacts with the concepts of national identity, tradition and legitimacy as it is possible to argue that the English civil wars represent an important time in the cementing of law's relationship with these concepts. It was during the 17<sup>th</sup> century that both law and history performed a visibly formative role in the construction of our constitutional arrangements. During this period the past became the site of present conflicts that bore the potential to alter the future irrevocably. Questions of legitimacy and tradition were raised with reference to a distant past, forcing those that desired both change and stability to confront their historiographical inheritance. Several theories of history writing emerged during this period in an attempt to address disputes over sovereignty and the force of the common law; generating a body of literature that can be thought to be indicative of the growing importance of history (and its writing).

By explicitly imbuing their histories with the concerns of their present, 17<sup>th</sup> century historians can be seen to have advanced a belief in the past and present existing in an evolutionary continuum. Rather than acting as an obstacle to historical understanding, such presentism and notions of continuity were thought to facilitate access to distant times so that lessons could be extrapolated and applied to the present. History was therefore recognised as an important political weapon, with great importance being placed on theories of history writing that established the objective nature of the claims that were being made about an assumed shared univocal past. In his seminal work, *The Ancient Constitution and the Feudal Law*,

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<sup>557</sup> Allusion to the ways in which the past can be seen to haunt the present will be made throughout this chapter and in the next. When doing so I will be drawing on the notion of "hauntology" as introduced by Jaques Derrida in his *Spectres of Marx* and developed by Mark Fisher, Nicolas Abraham and Maria Torok where 'Ghosts arrive from the past and appear in the present... [yet] cannot be properly said to belong to the past, even if the apparition represents someone who has been dead for many centuries, for the simple reason that a ghost is clearly not the same thing as the person who shares its proper name'. See: Peter Buse and Andrew Stott (eds), 'Introduction: A Future for Haunting' in *Ghosts: Deconstruction, Psychoanalysis and History* (Palgrave Macmillan 1990) 1, 11.



J.G.A. Pocock observed how the Ancient Constitution served as an ideological focal point for those that sought to ground the relationship between the King and his subjects in the notion of the original contract. In doing so, Pocock has demonstrated how a common law account of history was able to operate as a starting point for understanding the position of the people in relation to not only the King, but also parliament and the law. Such an approach to understanding England's past through its laws can be seen to date back to the 13<sup>th</sup> century, going largely unchallenged until the 18<sup>th</sup> century where 'politically, it had ceased to be... an appeal to the binding force of ancient custom.'<sup>558</sup> While later engagements with the discourses surrounding the Ancient Constitution do indeed offer much to our understanding of the functions of history and its writing (something that will be commented on later in this chapter), for the purposes of this chapter it is most useful to focus on 17<sup>th</sup> century engagements. After all, it is the authors of this period that felt so 'bound to their past by the law under which they lived' that 'their interpretation of the past depended upon and influenced'<sup>559</sup> their understanding of the law.

The use of historical understandings of law during the 17<sup>th</sup> century to guide perceptions of the past enabled participants of the English civil wars to understand themselves historically. However as useful as this was, these perceptions were often limited by the historical methods of the time. By reading their past through the history of their law, thinkers of this period committed themselves to a very narrow understanding of the temporal nexus between past between past, present and future. As a consequence of this, increased recourse to history in political debates during this period resulted in the growth of exemplar theories of history, with the ability of such histories to present the past as a repository for the present proving popular amongst Royalists and Parliamentarians alike.<sup>560</sup> In order to explore the

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<sup>558</sup> J.G.A. Pocock, *The Ancient Constitution and the Feudal Law: A Study of English Historical Thought in the Seventeenth Century* (Cambridge University Press 2004) 233

<sup>559</sup> J.G.A. Pocock, *The Ancient Constitution and the Feudal Law: A Study of English Historical Thought in the Seventeenth Century* (Cambridge University Press 2004) 251

<sup>560</sup> A good example of a proponent of exemplar theories of history writing is William Blundeville. For more on this see: Glenn Burgess, *The Politics of the Ancient*

broader implications of this preferred view of history, especially in relation to the ways in which law facilitated appeals to continuity and tradition by drawing on exemplar theories of history writing, I shall focus my attention on the reception of discourses on the Ancient Constitution emanating from the 17<sup>th</sup> and 18<sup>th</sup> centuries. In attaching particular significance to the 17<sup>th</sup> and 18<sup>th</sup> centuries I plan to build upon J.G.A. Pocock's observation that it was during this time that the English first attempted to 'understand themselves by understanding their past and their relation to it.'<sup>561</sup> I will pursue Pocock's suggestion that as a consequence of this renewed interest in history there was a revival of the work of medieval chroniclers, where understandings of the self were bound to the history of the nation state and its institutions, culminating in a wedding of law to history. This meant that the English historical outlook during this period was largely a product of its laws, resulting in a very narrow understanding of monarchical power which ultimately proved itself to be too rigid to survive the religious, social, political and economic upheavals of the 17<sup>th</sup> century.<sup>562</sup> So rather than providing a solid foundation from which to carry notions of undivided and unfettered monarchical power though to the next century, the pursuit of understanding 'English politics through the history of English law'<sup>563</sup> resulted in the emergence of ideological conflict that would persist for many years to come.

The problems that emanated from reading England's history through an historical understanding of its law meant that subsequent debates surrounding questions of sovereignty and the common law tended to shift away from idealised representations of the past towards alternative interpretations of the past, thus revealing more general changes in our relationship with processes of history writing. It is with this in mind that I will look at how the history of the English civil

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Constitution: An Introduction to English Political Thought, 1603-1642 (Pennsylvania State University Press 1993) 9.

<sup>561</sup> J.G.A. Pocock, *The Ancient Constitution and the Feudal Law: A Study of English Historical Thought in the Seventeenth Century* (Cambridge University Press 2004) xiii

<sup>562</sup> For further discussion on this see: J.G.A. Pocock, *The Ancient Constitution and the Feudal Law: A Study of English Historical Thought in the Seventeenth Century* (Cambridge University Press 2004) xiii-xiv

<sup>563</sup> J.G.A. Pocock, *The Ancient Constitution and the Feudal Law: A Study of English Historical Thought in the Seventeenth Century* (Cambridge University Press 2004) 237

wars has been (re)written and (re)interpreted by later generations, arguing that depictions of both the events and differing ideologies of this period have come to be suffused with more recent concerns. It is hoped that this will draw attention to the active elements of history writing, showing how seemingly static representations of past events can be set into motion again through a melding of 17<sup>th</sup> century concerns with the contemporary issues that they continue to touch upon. The concepts of national identity, tradition and legitimacy that were drawn upon in part one of this thesis will be of particular use here, as they provide us with a means of exposing the impact of law's engagements with historiography. More specifically, they make it possible to see how linear understandings of temporality have been drawn upon by lawyers and scholars alike to secure the formation and entrenchment of very particular understandings of national identity. It is for this reason that the present chapter is tasked with exploring the extent to which the historiography of law and the historiography of national identity can be thought to be constitutive of a historiography of resistance.

My engagement with the above question will be informed by my earlier discussions relating to Koselleck's views on the functions of concept, as by claiming that concepts bear political and social capacities Koselleck suggested that their semantic function and performance lay not only in the social and political contexts in which they arise but also feature as a factor in the formation of the conditions to which they pertain. In doing so a concept 'establishes a particular horizon for potential experience and conceivable theory, and in this way sets a limit.'<sup>564</sup> For Koselleck this meant that the 'history of concepts' is able to 'provide knowledge which is not accessible from empirical study.'<sup>565</sup> When applied to the concept of national identity and its interactions with law (especially during and immediately after the English civil wars) it is possible to see how historiography and law have both contributed towards the development and subsequent entrenchment of a very particular understanding of national identity. This understanding of national identity attracted a great deal of criticism during the English civil wars, with some (such as the Levellers, Diggers and Ranters) drawing on alternative interpretations of

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<sup>564</sup> Reinhart Koselleck, 'Begriffsgeschichte and Social History' in *Futures Past: On the Semantics of Historical Time* (Keith Tribe tr, Columbia University Press 2004) 86

<sup>565</sup> Reinhart Koselleck, 'Begriffsgeschichte and Social History' in *Futures Past: On the Semantics of Historical Time* (Keith Tribe tr, Columbia University Press 2004) 86

England's distant past in an attempt to resist it. While I would not go so far as to identify such instances of resistance as fully formed attempts to use historiography as a form of resistance to a dominant singular understanding of national identity (as rather than developing alternative theories of history writing they tended to develop alternative interpretations based on existing theories of history writing), I would nevertheless identify the efforts of the Levellers, Diggers and Ranters as important examples of more activist uses of history writing.<sup>566</sup> By mobilising alternative interpretations of past events they reaffirmed the importance of history and its writing in relation to issues of national identity and legitimacy via its interactions with law, signalling the potential for law to draw on different understandings of the past. Their efforts also act as an important reminder of the dangers that can be associated with histories produced by legal scholars that have not been trained in the finer nuances of historical scholarship.<sup>567</sup>

ii. The Importance of History: Assessing the Impact of Change and Transmission

When looking at popular 17<sup>th</sup>-century understandings of the processes by which political arrangements were legitimated it is possible to see two main models surface. The first related to the concept of custom and the other to the concept of grace. This has led to modern scholars such as Glen Burgess concluding that during this period 'things were legitimate because they were customary or, because they were the product of God's grace.'<sup>568</sup> While the concept of grace was closely linked to the Christian concept of Providence<sup>569</sup>, the concept of custom was borrowed from the common law and was used to develop the theory of the Ancient Constitution. However, it is important to note that while the theory of the Ancient Constitution can be regarded as a product of the common law mind, this is not to

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<sup>566</sup> By activist uses of history writing I mean to refer to uses of history that are directed at securing or preventing social, political or economic change.

<sup>567</sup> Here I am alluding to the dangers referred to by Maitland when he suggested that to reduce history to the handmaiden of law is to misunderstand the nature and function of history.

<sup>568</sup> Glen Burgess, *The Politics of the Ancient Constitution: An Introduction to English Political Thought, 1603-1642* (The Pennsylvania State University Press 1993) 3

<sup>569</sup> For detailed discussion on this concept see: Roger Hazelton, *Providence: A Theme with Variations* (SCM Press Ltd 1958) 79-85

say that this theory was only articulated by those trained in the law. Instead, it is helpful to turn to the definition advanced by J.G.A. Pocock where he has referred to the Ancient Constitution as a more general commitment to the idea that:

The relations of government and governed in England were assumed to be regulated by law; the law in force in England was assumed to be the common law; all common law was assumed to be custom, elaborated, summarised and enforced by statute; and all custom was assumed to be immemorial, in the sense that any declaration or even change of custom- uttered by a judge from his bench, recorded by a court in a precedent, or registered by king-in-parliament- presupposed a custom already ancient and not necessarily recorded at the time of writing.<sup>570</sup>

It is with this in mind that Burgess has concluded that the 'common law *constituted* the English polity,'<sup>571</sup> constructing a dominant language through which to explore issues of sovereignty and legitimacy. In order to overcome the difficulty of where this customary law originated from and shield it from potential criticism, the origins of the common law as it was expressed via the Ancient Constitution were said to emanate from time immemorial. In placing the common law beyond the reach of memory scholars of the Ancient Constitution were able to develop a doctrine of continuity, which in turn facilitated the entrenchment of the authority of the law and its institutions. As a consequence of this, a central point of contention during the English civil wars concerned the impact of the Norman Conquest, as can be seen in the ways in which the Ancient Constitution came to form the cornerstone of both Royalist and Parliamentary writings during the 17<sup>th</sup> century.

Pocock has suggested that by monopolising history through the deployment of the Ancient Constitution the common law (along with those that committed themselves to the study of the past via an historical understanding of law) was forced to

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<sup>570</sup> J.G.A. Pocock, *The Ancient Constitution and the Feudal Law: A Study of English Historical Thought in the Seventeenth Century* (Cambridge University Press 2004) 261

<sup>571</sup> Glen Burgess, *The Politics of the Ancient Constitution: An Introduction to English Political Thought, 1603-1642* (The Pennsylvania State University Press 1993) 4

maintain that William I had claimed the crown by title and not conquest.<sup>572</sup> This means that the Ancient Constitution cannot simply be regarded as a 'claim to prescriptive legitimation through the immemorial antiquity of custom', instead it must be regarded as 'a means of alleging that the common law, by reason of its antiquity, was the *lex tarrae* which protected the property and liberty of subjects.'<sup>573</sup> The broader ongoing significance of the Ancient Constitution as a vehicle of self-understanding can be seen when we look more closely at how modern historians such as Pocock have approached texts emanating out of the 17<sup>th</sup> and 18<sup>th</sup> centuries. For example, in his capacity as an intellectual historian Pocock has shown how texts can become 'a matrix or holding pattern within which a series of widely differing events can and do occur', making it possible to argue that 'text and event for the historian are nearly the same thing.'<sup>574</sup> He has even gone so far as to suggest that 'the text is an event as well as a framework within which further events occur.'<sup>575</sup> It is this sense that is possible to see how the writings of the 17<sup>th</sup> and 18<sup>th</sup> centuries *do* things rather than simply recount or describe things. By thinking of a text as both an action and an event we are able to examine how the conflicts of the English civil wars played out on paper as well as the battlefield. However, before a text can be read as an event it must be placed within its appropriate context. For intellectual historians such as Pocock, this involves looking closely at issues of language, as can be seen in the statement that:

There seem to be two main senses in which texts are events and make history. One is that they are actions performed in language contexts that make them possible, that condition and constrain

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<sup>572</sup> For more on this see: J.G.A. Pocock, *The Ancient Constitution and the Feudal Law: A Study of English Historical Thought in the Seventeenth Century* (Cambridge University Press 2004) 255-305.

<sup>573</sup> For more on this see: J.G.A. Pocock, *The Ancient Constitution and the Feudal Law: A Study of English Historical Thought in the Seventeenth Century* (Cambridge University Press 2004) 302

<sup>574</sup> J.G.A. Pocock, *Political Thought and History: Essays on Theory and Method* (Cambridge University Press 2011) 106

<sup>575</sup> J.G.A. Pocock, *Political Thought and History: Essays on Theory and Method* (Cambridge University Press 2011) 107

them but that they also modify. Texts, whether individually or cumulatively, act upon the languages in which they are performed as they perform they inform, injecting new words, facts, perceptions, and rules of the game; and, whether gradually or catastrophically, the language matrix becomes modified by the acts performed in it. A text is an actor in its own history, and a polyvalent text acts in a multiplicity of concurrent histories.<sup>576</sup>

Therefore, while texts can be seen to perform a function during the times in which they are written, their transmission then broadens their reach by making them available to subsequent generations. For Pocock, modes of transmission (as well as that which is being transmitted) tell us a great deal about a society, as by selecting its modes of transmission a society controls its image as something that exists 'continuously in time.'<sup>577</sup>

Pocock has suggested that when a society commits itself to written modes of transmission the documents that are then produced have a tendency to secularise any traditions that emerge by reducing them to a sequence of acts that are either recorded or not recorded.<sup>578</sup> All of this results in tradition becoming an essential feature of society, creating a need for each society to develop 'its own mode of conceiving its past.'<sup>579</sup> When thought of in relation to the Ancient Constitution and its role in not only constructing but also maintaining a strong sense of English national identity, the concept of tradition takes on an interesting dimension via its relationship with the common law mind. By this I mean to say that by using the Ancient Constitution as a vehicle for understanding the nature and origins of the

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<sup>576</sup> J.G.A. Pocock, *Political Thought and History: Essays on Theory and Method* (Cambridge University Press 2011) 114

<sup>577</sup> J.G.A. Pocock, *Political Thought and History: Essays on Theory and Method* (Cambridge University Press 2011) 204

<sup>578</sup> J.G.A. Pocock, *Political Thought and History: Essays on Theory and Method* (Cambridge University Press 2011) 204

<sup>579</sup> J.G.A. Pocock, *Political Thought and History: Essays on Theory and Method* (Cambridge University Press 2011) 189

common law tradition, scholars have been able to generate an understanding of tradition as a backwards facing device. For example, while in Part I of this thesis I have referred to more flexible Gadamerian understandings of tradition, when looking at how law has approached this concept it is possible to identify a far narrower approach. It is possible to see how, via the Ancient Constitution, law has construed tradition as ‘an indefinite series of repetitions of an action, which on each occasion is performed on the assumption that it has been performed before’ and that because of this ‘its performance is authorised.’<sup>580</sup> Thinking of a tradition along these lines places its origins beyond reach, denying heirs of such traditions an opportunity to uncover their invented nature. Societies that think of tradition in this way will then think of their past as ‘an immemorial continuity’ where its structures are ‘inherited from an infinitely receding chain of transmitters.’<sup>581</sup> This is not, however, something that can easily be achieved when a society selects written modes of transmission when attempting to secure its continuity through time. Pocock has noted how ‘a literature tradition is never a pure tradition, since the authority of written words is not dependent on usage and presumption only.’<sup>582</sup> For him, written processes of transmission ‘cut across the processes of transmission and create new patterns of social time’ when they are read by later generations ‘whose interpretation of them may differ from that of intervening transmitters of the tradition they express.’<sup>583</sup> History and historiography then bear the potential to be regarded as political practices that are closely linked to the memory of a given society or state.<sup>584</sup> The increasing importance of history and its writing via the Ancient Constitution in relation to issues of national identity and notions of

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<sup>580</sup> J.G.A. Pocock, *Political Thought and History: Essays on Theory and Method* (Cambridge University Press 2011) 190

<sup>581</sup> J.G.A. Pocock, *Political Thought and History: Essays on Theory and Method* (Cambridge University Press 2011) 190

<sup>582</sup> J.G.A. Pocock, *Political Thought and History: Essays on Theory and Method* (Cambridge University Press 2011) 203

<sup>583</sup> J.G.A. Pocock, *Political Thought and History: Essays on Theory and Method* (Cambridge University Press 2011) 203

<sup>584</sup> For more on this see: J.G.A. Pocock, *Political Thought and History: Essays on Theory and Method* (Cambridge University Press 2011) 217-238.



legitimacy during the English civil wars can therefore be interpreted as questions of historiography and perhaps even resistance when explored through the concept of tradition.

As indicated in the previous chapters, when a Gadamerian approach to tradition is used it is possible to reflect on how as a tradition law has gained its force from its continual performance and constant re-enactment. It is in this sense that tradition is able to act as a means of inserting a more fluid sense of temporality into law. However, when a more restrictive understanding of tradition is adopted a more limited linear understanding of temporality emerges. Through the growth of the Ancient Constitution it is possible to see how a more limited linear understanding of temporality (and tradition) came to take hold of 17<sup>th</sup> century historiography, triggering a reliance on forms of historiography capable of securing a stable connection between the past and present via a view of tradition as something concerned with strict preservation rather than processes of innovation. As a result of this reliance, a key theme that emerged during the English civil wars related to the inability of the common law (as it was understood through the Ancient Constitution) to accommodate change. For many, this inability to accommodate change prompted a desire to reshape the present by re-examining the past, as by rooting the legitimacy of present arrangements in the past adherents of the Ancient Constitution reduced the scope of more overt instances of resistance in the present. This is curious, as prior to the conflicts leading up to the English civil wars the theory of the Ancient Constitution had itself initially been appropriated and re-purposed to serve as a form of resistance to monarchical power in the form of the royal prerogative. Charles I's increasingly arbitrary exercises of prerogative power to raise funds during the earlier parts of the 17<sup>th</sup> century had resulted in growing discontent amongst the gentry, generating concerns over the limitations of the Ancient Constitution as a way of understanding the scope of monarchical power. Disputes surrounding Ship Money, fines in Distraint of Knighthood and forest laws dating back to Edward I led many to resent Charles's personal rule, seeing his enforcement of levies and taxes dating back centuries as an abuse of his position. It was as a result of this that the study of history became an increasingly logical means of settling political questions, with the Ancient Constitution presenting itself as an interesting focal point for rethinking the balance of power/influence.<sup>585</sup>

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<sup>585</sup> By the 17<sup>th</sup> century history had become an increasingly important aspect of the political and social education of the gentry and middle classes, with many recognising it as a means of gaining political wisdom and knowledge of the true

However while the Ancient Constitution presented itself as an opportunity to reshape flows of power/influence, those that drew on it could not afford for their actions to be interpreted as being subversive; instead, they needed to be seen to be defending the common law tradition through their engagement with law's origin story. To do this they had to make use of historical argumentation that demonstrated the historical importance of Parliament in the defence of the rights and liberties of the people. This required them to produce a history where the King existed under the law and not above it as James VI and I and then Charles I claimed. This would then afford both the common people and increasingly disaffected gentry protection from the excesses of the monarchy. For example, the poet Thomas May has been credited with producing the first official Parliamentary history of the English civil wars. May's two-part work on *The History of the Parliament of England* was published in 1647 and 1650, drawing on his translation of Lucan's *Pharsalia*, a Roman epic poem relating to the conflict between Julius Caesar and the Roman Senate. By drawing parallels between the events depicted by Lucan and the conflict he was living through, May drew attention to the threat posed by unrestrained monarchy on the liberties of Englishmen. Similarly, theologian Joshua Sprigge authored a history entitled *Anglia Rediviva* which was first published in 1647. In its dedication, Sprigge proclaimed:

My dear countrymen (for to you I direct this story, for it is yours; in your land were these battles fought; these actions done for your sakes, (the vindication and defence of your parliament, laws, and liberties) and by your hands); you, that have with bleeding hearts and distilling eyes been spectators of common sufferers under the insulting paces of arbitrary power and unlimited prerogative.<sup>586</sup>

Like May, Sprigge suggested that the civil wars were fought to preserve the ancient liberties of Englishmen. So rather than being the aggressors, Parliament were

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religion. For more on this see: R.C. Richardson, *The Debates on the English Revolution* (Manchester University Press 1998) 4.

<sup>586</sup> Joshua Sprigge, *Anglia Rediviva; England's Recovery: The History of the Motions, Actions, and Successes of the Army under the Immediate Conduct of His Excellency Sir Thomas Fairfax, KT. Captain-General of all the Parliament's Forces in England* (Oxford University Press 1854) vii

presented as a central actor in the defence of traditional liberties. In 1659 lawyer and historian John Rushworth extended Parliamentary engagements with history and history writing by referring more explicitly to the methods he was deploying. In the preface to his *Historical Collections*, Rushworth stated:

I pretend only in this Work to bare Narrative of matter of Fact, digested in order of time; not interposing my own Opinion, or interpretation of Actions. I infuse neither Vinegar nor Gall into my ink... I use the Language of that Time of which I write, speaking as the then Parliaments spake, and not robbing any man of the honour or Epithite which they then pleaded give him.<sup>587</sup>

However, in reality, Rushworth's *Historical Collections* betrayed his close links to the Republic, revealing his belief in the misguided actions of the King.<sup>588</sup> For example, by claiming that 'by one and the same thing have King and People been hurt, and by the same must be cured; to vindicate, what, new thing? No, our ancient vital Liberties, by reinforcing the ancient Laws made by our Ancestors'<sup>589</sup>, Rushworth was re-stating the arguments that had already been made by both May and Sprigge. He appealed to a distant past in order to paper over resistance directed against the concept of absolute monarchy. So rather than appealing to the active element of history writing that would enable him to set into motion fixed representations of the past that would facilitate change in the present, Rushworth drew on the legitimating force of history to conceal contemporary concerns surrounding outmoded conceptions of political authority.

The authors of the Ancient Constitution (as it was understood during the English civil wars) can, therefore, be identified as 'common lawyers with scholarly

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<sup>587</sup> John Rushworth, *Historical Collections* (J.A. Robert Boulter at the Turks-head in Cornhill 1682)  
<<https://archive.org/stream/historicalcolleca00rush#page/n11/mode/2up>>  
accessed 29 May 2016

<sup>588</sup> Rushworth was Cromwell's personal secretary, something that undoubtedly influenced his historical writings.

<sup>589</sup> John Rushworth, *Historical Collections* (J.A. Robert Boulter at the Turks-head in Cornhill 1982)  
<<https://archive.org/stream/historicalcolleca00rush#page/500/mode2up>>  
accessed 29 May 2016

interests... who interpreted the past from the standpoint of their own day.<sup>590</sup> While in doing so they have been accused of ransacking 'historical records for the requisite evidence', interpreting it 'in light of [the] common law,'<sup>591</sup> by framing history in this way common lawyers were able to put in place what has since been described as a 'history centring on law and government, pervasive respect for common law, and an increasingly confident and aggressive House of Commons.'<sup>592</sup> This new history was carefully crafted to obscure the invented nature of the common law tradition, furnishing it with a sense of legitimacy designed to place it beyond the reach of criticism. In claiming that the common law originated from time immemorial common lawyers were able to borrow from the authority of accepted past events, forging a strong connection between the past and their present. This connection then served to undermine any subsequent efforts to bring its resulting power structures into disrepute as well as challenges from more ardent Royalists that were resistant to change.<sup>593</sup> These lawyers with scholarly interests were more than mere functionaries, by acknowledging the scope for past events to be put to work in the present they were alluding to a role for historians in not only the transmission but also the creation of tradition. For example, Sir Edward Coke has been popularly credited with using the theory of the Ancient Constitution as means of strengthening the power of parliament against the interference of the royal prerogative.<sup>594</sup> He did this by arguing that the law (or at least the framework through

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<sup>590</sup> Corrine C. Weston, 'England: Ancient Constitution and Common Law' in J.H. Burns and M. Goldie (eds), *The Cambridge History of Political Thought 1450-1700* (Cambridge University Press 1991) 374, 374

<sup>591</sup> Corrine C. Weston, 'England: Ancient Constitution and Common Law' in J.H. Burns and M. Goldie (eds), *The Cambridge History of Political Thought 1450-1700* (Cambridge University Press 1991) 374, 374

<sup>592</sup> Corrine C. Weston, 'England: Ancient Constitution and Common Law' in J.H. Burns and Mark Goldie (eds), *The Cambridge History of Political Thought 1450-1700* (Cambridge University Press 1991) 374, 374

<sup>593</sup> For a more detailed account of this refer to: J.G.A. Pocock, 'Burke and the Ancient Constitution: A Problem in the History of Ideas', *Politics, Language, and Time: Essays on Political Thought and History* (The University of Chicago Press 1989) 202.

<sup>594</sup> Although it is important to note that this view of Coke's position largely results from the work of J.G.A. Pocock in this area. There are other scholars, such as Corrine C. Weston, that would argue that Coke's views on the presumably immutable character of the common law are less straightforward.

which it operated) was immutable and had not changed in any meaningful way despite England being conquered at various points in its past.<sup>595</sup> To emphasise this point he drew on the work of jurist Sir John Fortescue and the idea that:

... throughout the period of these nations and their kings, the realm has been continuously ruled by the same customs as it is now, customs which if they had not been the best, some of those kings would have changed for the sake of justice or by the impulse of caprice, and totally abolished them, especially the Romans, who judged almost the whole of the rest of the world by their laws.<sup>596</sup>

In doing so Coke reaffirmed the common law tradition's relationship with the concept of custom, forcing those that sought to challenge this understanding of the common law to adopt the logic of the Ancient Constitution when doing so.<sup>597</sup> The disruptive potential of being able to retell a history should not therefore be underestimated.

iii. Testing the Foundations of the Common Law Mind: Casting Off the Norman Yoke

Quentin Skinner has examined how ideological argumentation during the English civil wars was often sustained by appeals to the past, noting that this involved 'an appeal either to see precedents in history for new claims being advanced, or to see history itself as a development toward the point of view being advocated or denounced.'<sup>598</sup> According to Skinner, 'awareness of the past became a politically

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<sup>595</sup> For more on this refer to the preface to the Second Part of Coke's *Reports* published in 1602.

<sup>596</sup> John Fortescue, *De Laudibus Legum Anglie* (Cambridge University Press 2011) 39

<sup>597</sup> Unfortunately, I am unable to do credit to the full complexities of the development of the common law tradition. For an indication of the direction of my thought refer to: Donald R. Kelley, 'Law' in J.H. Burns and M. Goldie (eds), *The Cambridge History of Political Thought 1450-1700* (Cambridge University Press 1991) 66-94.

<sup>598</sup> Quentin Skinner, 'History and Ideology in the English Revolution' (1965) 8(2) *The Historical Journal* 151, 151

relevant factor in English society during its constitutional upheavals.<sup>599</sup> The prevalence of such appeals are reflected in the ways in which conflicting ideologies surrounding the origins of law, the reach of monarchy and extent of Parliamentary right made use of historical narratives. However, while it is possible to separate out several conflicting ideologies (such as those adopted by Royalists, Parliamentarians, Levellers and radical absolutists), Skinner points out that these conflicting ideologies 'had relied on identical historical backing'<sup>600</sup> to support their claims. The historical backing that Skinner refers to here relates to depictions of the Norman Conquest and its impact on the continuity of the common law. This is something that has also been observed by David Norbrook where he has stated that 'in a society where custom and respect for elders still carried such weight, antiquarian research could heighten esteem for an idealised "ancient constitution" from which it could be perilous to depart.'<sup>601</sup> For Royalists, this involved presenting themselves as defenders of the Ancient Constitution from a 'usurping Parliament', for Parliamentarians this meant defending the Ancient Constitution from a 'tyrannical ruler.'<sup>602</sup> For example, it is possible to see how some Royalists became committed to a belief in the Ancient Constitution and its function in relation to issues of legitimacy.<sup>603</sup> Historian John Miller has even suggested that while Royalists may

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<sup>599</sup> Quentin Skinner, 'History and Ideology in the English Revolution' (1965) 8(2) *The Historical Journal* 151, 151

<sup>600</sup> Quentin Skinner, 'History and Ideology in the English Revolution' (1965) 8(2) *The Historical Journal* 151, 151

<sup>601</sup> David Norbrook, 'The English Revolution and English Historiography' in N.H. Keeble (ed), *The Cambridge Companion to Writing of the English Revolution* (Cambridge University Press 2006) 233, 234

<sup>602</sup> David Norbrook, 'The English Revolution and English Historiography' in N.H. Keeble (ed), *The Cambridge Companion to Writing of the English Revolution* (Cambridge University Press 2006) 233, 234

<sup>603</sup> While the English civil wars are often presented as a series of conflicts between Parliamentarians and Royalists I believe it is helpful to move away from such a binary way of interpreting the events of the 17<sup>th</sup> century. In order to bring to the fore the use of history and its writing during this period it is instead helpful to look at how both Parliamentarians and Royalists drew on the same notion of tradition to develop their arguments. For more subtle approaches to the study of the English civil wars (where emphasis is placed on more local conflicts and how they were extended through the Civil wars) see: Alan Everitt, 'The Local Community and the Great Rebellion' in R.C. Richardson (ed), *The English Civil Wars: Local Aspects*

have expressed a belief in notions of divine right that stood at odds with the goals of Parliamentarians, what separated them from Parliamentarians was not their views on the existence of a theory of the Ancient Constitution, but the source of the threat to the constitution and the law that emerged out of the balance of power it promoted. For Miller, the Royalist 'emphasis on divine right was quite compatible with the belief in the Ancient Constitution, itself a part of God's creation', with many Royalists believing in the common law and the need for 'the king to respect it.'<sup>604</sup> Instead, what separated Royalists from Parliamentarians was their belief that under the Ancient Constitution the crown had become too weak (rather than too strong), rendering it unable to maintain order.<sup>605</sup> It is in this sense that I would argue that both Parliamentarians and Royalists alike adopted a limited understanding of tradition rooted in a linear understanding of temporality, something which in turn has resulted in the law gravitating towards theories of history writing concerned with the construction of what we would today recognise as grand narratives.<sup>606</sup>

Even more radical thinkers such as the Levellers can be seen to have framed their arguments using a limited understanding of tradition drawn from the theory of the Ancient Constitution.<sup>607</sup> Drawing on the work of chroniclers such as William Martyn, Raphael Holinshead, John Speed and Samuel Daniel, the Levellers centred their challenges around the notion of continuity.<sup>608</sup> In doing so they framed their

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and David Underdown, *Revel, Riot and Rebellion: Popular Politics and Culture in England 1603-1660* (Clarendon University Press 1985).

<sup>604</sup> John Miller, *After the Civil Wars: English Politics and Government in the Reign of Charles II* (Longman 2000) 115

<sup>605</sup> For example Royalist Sir Francis Seymour, 1<sup>st</sup> Baron Seymour of Trowbridge drew on the ancient constitution to defend his locality against centralised intervention. For more on this see: Robert C. Johnson, Mary Frear Keeler, Maija Jansson Cole and William B. Bidwell (eds), *Commons Debates 1628* (Yale University Press 1977) 56-57

<sup>606</sup> For a more detailed account of Royalist interactions with the ancient constitution see: David L. Smith, *Constitutional Royalism and the Search for Settlement, c. 1640-1649* (Cambridge University Press 1994).

<sup>607</sup> For further discussion on this see: David Wotton, 'Leveller Democracy and the Puritan Revolution' in J.H. Burns and Mark Goldie (eds), *The Cambridge History of Political Thought 1450-1700* (Cambridge University Press 1991) 412, 419

<sup>608</sup> For example see: Samuel Daniel, *The First Part of the History of England* (London 1612)

arguments in terms of continuity versus rupture, incorporating assumptions about the legitimating force of the past into their accounts. I would argue that this shows how those that are co-opted into a society that has elected to conceive of its history along very narrow lines are prevented from breaking free of the effects of their presumed past. Drawing on the work of Antonio Gramsci, Pocock has characterised such peoples as subaltern. Through linking history to political action, he suggests that if history can be regarded as being part of our identity it can also be regarded as forming part of our autonomy. If this is the case, then any rewriting of history will inevitably involve a reconstruction of our autonomy. When our histories are constructed by others using discourses that we do not have access to we can find ourselves included in worlds where we lack a means of direct expression.<sup>609</sup> When applied to the Levellers, an interesting problem emerges. Pocock has expressed this problem by posing the following question:

How is one to write the history of an activity from which one was excluded, in which one was subject or subaltern but not actor?  
How is one to write oneself into a history that is that of the diminution or alienation of one's self by exclusion from action?<sup>610</sup>

Pocock suggests that one solution may be found in the form of counter-histories where 'one narrates the action as it looks when one is excluded from it and it was done to rather than by one.'<sup>611</sup> He does however identify a flaw in this approach, suggesting that rather than freeing the subaltern from their position of subordination, the production of counter-histories may in fact serve to perpetuate their excluded status. I would argue that this is something that can be seen in not only the histories produced by the Levellers but also more recent histories that task themselves with emancipation. As by framing their history in opposition to a *dominant* narrative they allow their suppressors to establish the scope of their

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<sup>609</sup>For more on this see: J.G.A. Pocock, *Political Thought and History: Essays on Theory and Method* (Cambridge University Press 2011) 227-256.

<sup>610</sup> J.G.A. Pocock, *Political Thought and History: Essays on Theory and Method* (Cambridge University Press 2011) 231

<sup>611</sup> J.G.A. Pocock, *Political Thought and History: Essays on Theory and Method* (Cambridge University Press 2011) 232



histories.<sup>612</sup> When looking at Leveller histories it is possible to see how their interventions pivoted around the discourses of the Ancient Constitution, something which is perhaps best evidenced in their theory of the Norman Yoke.

Eminent historian Christopher Hill studied the Levellers development of the theory of the Norman Yoke, where it was suggested that 'before 1066 Anglo-Saxon inhabitants of this country' were 'free and equal citizens, governing themselves through representative institutions.'<sup>613</sup> After the Conquest these liberties were thought to have been replaced by 'the tyranny of an alien King and landlords'<sup>614</sup>, implying that all subsequent laws were nothing but the will of a tyrant that lacked any authoritative connection to the subjects that they sought to govern. J.G.A. Pocock has affirmed this view of Leveller engagements with the Ancient Constitution, suggesting that the Levellers 'denounced the Norman usurpation and looked backwards to Anglo-Saxon liberty.'<sup>615</sup> On the surface, this would seem to link the Levellers to common lawyers who also focused on an idealised vision of the past. However Pocock claims that rather than arguing that the common law dated back to time immemorial (thus denying the conquest), the Levellers 'engaged in a revolt against the whole existing structure of the common law'<sup>616</sup> by arguing that there had in fact been a conquest. This then meant that the law 'derived from

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<sup>612</sup>This is a point that I have sought to make throughout Part I by advocating a move away from the idea of replacing one overarching narrative with a seemingly more inclusive one.

<sup>613</sup> Christopher Hill, *Puritanism and Revolution: Studies in Interpretation of the English Revolution of the 17<sup>th</sup> Century* (Pimlico 2001) 52

<sup>614</sup> Christopher Hill, *Puritanism and Revolution: Studies in Interpretation of the English Revolution of the 17<sup>th</sup> Century* (Pimlico 2001) 52

<sup>615</sup> J.G.A. Pocock, *The Ancient Constitution and the Feudal Law: A Study of English Historical Thought in the Seventeenth Century* (Cambridge University Press 2004) 125

<sup>616</sup> J.G.A. Pocock, *The Ancient Constitution and the Feudal Law: A Study of English Historical Thought in the Seventeenth Century* (Cambridge University Press 2004) 126

the tyranny of the Conqueror and partook of the illegitimacy that had characterised his [Charles I] entire rule.<sup>617</sup>

Pocock describes the Leveller approach to history as 'a strange hybrid', arguing that while their rejection of Normanism amounted to a rejection of history and existing law, their 'anti-historical theory could only be expressed in historical language.'<sup>618</sup> For him, 'the past could only be rejected through a reinterpretation of the past.'<sup>619</sup> This places an interesting slant on the function being performed by their engagement with history writing, as rather than simply reiterating an increasingly dominant grand narrative centred on the Ancient Constitution, Pocock saw the Levellers as developing an alternative theory of history in opposition to this. In adopting 'the language of political rationalism'<sup>620</sup> they avoided the charge of conservative historicism, appealing instead to natural right and reason. Prior to this Christopher Hill had also commented on the 'momentous transition' the Levellers had made, noting their shift from 'the recovery of rights which used to exist to the pursuit of rights because they ought to exist.'<sup>621</sup> For Hill this represented a shift away from 'historical mythology' towards 'political philosophy'<sup>622</sup>, where biblical and constitutional theories were merged in order to advance a belief in the natural freedom of men. Although both Hill and Pocock disagreed on a number of key issues, they can both be seen to conclude that the Leveller interpretation of the

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<sup>617</sup> J.G.A. Pocock, *The Ancient Constitution and the Feudal Law: A Study of English Historical Thought in the Seventeenth Century* (Cambridge University Press 2004) 126

<sup>618</sup> J.G.A. Pocock, *The Ancient Constitution and the Feudal Law: A Study of English Historical Thought in the Seventeenth Century* (Cambridge University Press 2004) 127

<sup>619</sup> J.G.A. Pocock, *The Ancient Constitution and the Feudal Law: A Study of English Historical Thought in the Seventeenth Century* (Cambridge University Press 2004) 127

<sup>620</sup> J.G.A. Pocock, *The Ancient Constitution and the Feudal Law: A Study of English Historical Thought in the Seventeenth Century* (Cambridge University Press 2004) 126

<sup>621</sup> J.G.A. Pocock, *The Ancient Constitution and the Feudal Law: A Study of English Historical Thought in the Seventeenth Century* (Cambridge University Press 2004) 126

<sup>622</sup> Christopher Hill, *Puritanism and Revolution: Studies in Interpretation of the English Revolution of the 17<sup>th</sup> Century* (Pimlico 2001) 68

Norman Conquest stood in opposition to that of both Royalists and Parliamentarians. However the extent to which this can be regarded as an entirely distinct mode of history writing is, in my opinion, debatable. The assumptions made by Royalists and Parliamentarians about the centrality of time immemorial in relation to legitimacy appear to have been carried through to Leveller understandings of history, making it important to look at how others have interpreted their attempt to break with the authority of law through an appeal to the past.

In contrast to Hill and Pocock, R.B. Seaberg has suggested that it would be an oversimplification to suggest that the Levellers rejected all existing rule as alien yoke.<sup>623</sup> He has also suggested the Leveller understanding of the doctrine of continuity requires greater thought, arguing that 'the doctrine of continuity as understood and employed by the Levellers was no simple belief in the unchanging law, but represented a more complex view of the rhythm basic to English history.'<sup>624</sup> In doing so he has identified the key points of impact of the Conquest as relating to 'the introduction of new terms, forms of pleas, offices of courts... and the appointment of central judges.'<sup>625</sup> As a consequence of this, the Levellers were able to argue that William the Conqueror had 'robbed England of the traditional structure of the laws of Edward the Confessor by setting up the dictates of his own will'<sup>626</sup>, generating an increased dependence on lawyers. For example, John Lilburne regarded the imposition of a centralised administrative structure as being the source of a troubling distance between the inhabitants of England and the law that governed them. He claimed that:

... the practizes in the Courts at Westminster, flow not from God nor his Law, nor the law of Nature and reason, no nor yet from

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<sup>623</sup> R.B. Seaberg, 'The Norman Conquest and the Common Law: The Levellers and the Argument from Continuity' (1981) 24(4) *The Historical Journal* 791, 792

<sup>624</sup> R.B. Seaberg, 'The Norman Conquest and the Common Law: The Levellers and the Argument from Continuity' (1981) 24(4) *The Historical Journal* 791, 793

<sup>625</sup> R.B. Seaberg, 'The Norman Conquest and the Common Law: The Levellers and the Argument from Continuity' (1981) 24(4) *The Historical Journal* 791, 794

<sup>626</sup> R.B. Seaberg, 'The Norman Conquest and the Common Law: The Levellers and the Argument from Continuity' (1981) 24(4) *The Historical Journal* 791, 795

the understanding of any righteous, just or honest men, but from the Devill, and the will of Tyrants...

... if we impartially read our English histories, wee shall clearly find, that the tedious, unknown, and impossible to be understood, common law practices in Westminster Hill, came in by the will of a Tyrant, namely William the Conqueror, who by his sword conquered this Kingdome.<sup>627</sup>

What is perhaps interesting about Lilburne's criticism is that it appeals to a tradition of natural rights and liberties whose legitimacy in the present still depends upon a belief in the propensity of the past to speak directly to the present. This is interesting because while Lilburne's interpretation of the Norman Conquest differed from that espoused by Royalists and Parliamentarians, it seems to rely on an equally rigid understanding of custom and tradition, one that does not allow for the possibility of adaptation. I would argue that this represents a commitment to a linear understanding of temporality where the past, present and future exist in a sequential continuum, which in turn lends itself to an identification with singular theories of history writing where truthful univocal accounts of past events are sought out in order to make sense of the present. Moreover, I would argue that linear understandings of temporality such as those that are reflected in 17<sup>th</sup>-century discourses emanating from the Ancient Constitution stymie the reach of resistance by committing those that draw on them to the logic of the grand narrative form. National identity based on a restrictive understanding of the source of the common law tradition is limited to a homogenised vision of a unified people, something that ignores the many levels on which the civil wars took place. So, while history and its writing was indeed identified as an important site of activity, resulting in a series of stimulating paper-skirmishes, the extent to which they were in a position to operate as a form of resistance is not as clear as the likes of Pocock would suggest. By drawing on the legitimating force of history Royalists, Parliamentarians and Levellers all drew on static representational practices that acted to mask the full nature of the issues the conflict touched upon. In doing so they denied themselves a much-needed moment of reflexivity that did not occur until the 18<sup>th</sup> century when

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<sup>627</sup> John Lilburne, *The Just Mans Justification* (London 6 June 1646)  
<<http://all.libertyfund.org/pages/leveller-tracts-10#T10.6>> accessed 4 January 2016

scholars began to revisit the histories of the 17<sup>th</sup> century with equally challenging questions in mind. So rather than rising up against tradition and restrictive histories, by incorporating assumptions about the force of the past in the present, the Levellers can be seen to have limited the scope of their claims by framing them according to the logic of the Ancient Constitution.<sup>628</sup>

iv. Mapping the Intellectual Framework of Civil War Discourses: Ongoing Paper-skirmishes and the (re)Writing of the Origins of the Law

In the 18<sup>th</sup> century re-interpretations of civil war literatures fed into broader conflicts between the Whigs and Tories. In contrast to this, 19<sup>th</sup> century engagements with these literatures can be seen to reflect a desire to minimise conflict whilst promoting Liberal notions of democracy. It is even possible to see how interest in the English civil wars has extended through to the 20<sup>th</sup> and 21<sup>st</sup> centuries, and while this interest has been tempered by an uneasiness concerning the impact of methodology and theory on historical writings, these histories are equally partisan in nature. What this sustained interest shows us is how the Ancient Constitution continues to touch upon issues that are important to us today, something that perhaps stems from the ways in which we are able to attach normative force to traditions through the adoption of a particular approach to history and its writing. In doing so we are able to establish a sense of moral legitimacy in relation to arguments that we make in the present by connecting tradition to historiography and interpretation. Our ongoing engagements with the Ancient Constitution can also be seen to highlight the scope for manoeuvre that exists within this approach to examining and explaining the origins of the common law tradition more generally, indicating the presence of some sort of inherent fluidity within historical narratives themselves. Several challenges do however emerge when traditions are used to secure a sense of cohesion, especially when the concept of tradition is construed as narrowly as it was during the 17<sup>th</sup> century. Anthropologist Bruce Rigsby has explored how tradition and notions of traditionality have come to be associated with ‘the dead hand of time’, where the ‘normativeness of tradition’ is cast as ‘the internal force

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<sup>628</sup> For more on this see Herbert Butterfield’s comparison of the English and French revolutions in: Herbert Butterfield, *The Englishman and His History* (Cambridge University Press 1944) 6-7.

which holds society in a given form over time.<sup>629</sup> Through its connection to normativity tradition often becomes involved in securing the continuation of a stable national identity over time, as can be seen in the context of the Ancient Constitution. Nevertheless Rigsby has also alluded to a less conservative side of tradition where it is possible to see how some have 'invoked tradition in order to rationalise and to legitimate creative and innovative social changes.'<sup>630</sup> While such a belief in the innovative potential of tradition (when construed more broadly) sits well with attempts to think of law as a tradition in a more Gadamerian sense, the extent to which this was possible during the English civil wars themselves is questionable. In order to explore this issue further, it is helpful to reflect upon the extent to which exemplar theories of history writing and the linear understandings of temporality that they engender shaped the scope of the concept of tradition at this time.<sup>631</sup>

The Renaissance has been widely identified as a period of particular significance in the development of our engagements with forms of history writing because it was during this time that we became 'more aware of time and of change', something that 'stimulated a new interest in the study of the past.'<sup>632</sup> Historian Kevin Sharpe has suggested that it was during this time that we began to reflect on 'the differences that time could create'<sup>633</sup>, as can be seen in Francesco Petrarca's contribution to historical studies. According to Sharpe, Petrarca's deployment of anachronism to construct imaginary correspondence with the authors of classical Rome generated 'a new attitude to history' at a time where 'medieval men lived in

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<sup>629</sup> Bruce Rigsby, 'Custom and Tradition: Innovation and Invention' (2006) 6 Macquarie Law Journal 113, 124

<sup>630</sup> Bruce Rigsby, 'Custom and Tradition: Innovation and Invention' (2006) 6 Macquarie Law Journal 113, 124

<sup>631</sup> By framing my analysis in terms of historiography's impact on the scope of the concept of tradition I adopt Koselleck's approach to interpreting concepts. I do this in an attempt to show how changing approaches to historiography can alter the meaning and operation of social and political concepts, something that I hope to use to signal an opportunity to rehabilitate law's understanding of tradition in the aftermath of the linguistic turn in historiography.

<sup>632</sup> Kevin Sharpe, *Sir Robert Cotton 1536-1631: History and Politics in Early Modern England* (Oxford University Press 1971) 1

<sup>633</sup> Kevin Sharpe, *Sir Robert Cotton 1536-1631: History and Politics in Early Modern England* (Oxford University Press 1971) 1

a sphere of time dictated by theology and bounded by creation and revelation.<sup>634</sup> In doing so he introduced philological and etymological considerations into the examination of texts, shaping humanist approaches to not only history but also other forms of literature. The inclusion of philological and etymological considerations resulted in the development of an understanding of law, language and institutions as ‘the product of time’<sup>635</sup>, with the concept of prudence performing a central role in directing those engaged in examining the past. This meant that the study of the past encompassed the goal of obtaining ‘a memory of things past, a consciousness of things present, and a foresight of things to come.’<sup>636</sup> Sharpe has suggested that it is because of this that Petrarch can be credited with ‘the beginnings of a critical approach to historical sources’<sup>637</sup>, although it is important to note that his insights were not necessarily extended across all humanist history writing. Instead what is perhaps useful to focus on is his inclusion of temporal considerations into the interpretation of texts, signalling an important shift in the scope of historical writing.

A further useful development in historiography can be located in Niccoló Machiavelli’s approach to drawing on history where it is possible to see how experience of the past can be used to generate ‘a body of rules for the conduct of political life.’<sup>638</sup> His acknowledgement of the didactic potential of history not only established history as a useful tool for the present, but it also extended the audience of historically oriented writings to include holders of power. Sharpe notes that while this linking of history to politics enabled Machiavelli to carve history out as a distinct discipline; these insights were shaped by his assumption that conditions in Florence during his own time were comparable to those of classical Rome. While this may for some represent a limitation on what Machiavelli’s

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<sup>634</sup> Kevin Sharpe, *Sir Robert Cotton 1536-1631: History and Politics in Early Modern England* (Oxford University Press 1971) 1

<sup>635</sup> Kevin Sharpe, *Sir Robert Cotton 1536-1631: History and Politics in Early Modern England* (Oxford University Press 1971) 1

<sup>636</sup> Kevin Sharpe, *Sir Robert Cotton 1536-1631: History and Politics in Early Modern England* (Oxford University Press 1971) 1

<sup>637</sup> Kevin Sharpe, *Sir Robert Cotton 1536-1631: History and Politics in Early Modern England* (Oxford University Press 1971) 2

<sup>638</sup> Kevin Sharpe, *Sir Robert Cotton 1536-1631: History and Politics in Early Modern England* (Oxford University Press 1971) 3

engagements with the past can say about classical Rome, his disinclination to accommodate the realities of change nevertheless provide us with an interesting opportunity to examine the political anxieties of 16<sup>th</sup> century Florence. For example, in Chapter V of *The Prince* Machiavelli looked to the Spartans and the Romans for guidance on how to govern cities that before being conquered had lived under their own laws.<sup>639</sup> By examining how the Spartans lost control of Athens and Thebes he was able to conclude that there are three ways of holding annexed territories.<sup>640</sup> The choices he put forward were 'the first, to destroy their political institutions; the second, to go to live there yourself; the third, to let them continue to live under their own laws, exacting tribute and setting up an oligarchical government.'<sup>641</sup> He then extended these statements to Florence's loss of Pisa in 1494, stating that 'anyone who becomes master of a city accustomed to a free way of life, and does not destroy it, may expect to be destroyed by it himself, because when it rebels, it will always be able to appeal to the spirit of freedom and its ancient institutions.'<sup>642</sup> What is interesting about both Petrarch and Machiavelli's contributions (despite their limitations) is how they demonstrate how history writing is always imbued with the concerns of the present in which they are being produced, regardless of how aware or unaware of historical distance their authors are.<sup>643</sup>

The Reformation then created a further opportunity to develop a new attitude towards history that was shaped by time, as it was during the Reformation that

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<sup>639</sup> Niccoló Machiavelli, *The Prince* (Quentin Skinner and Russell Price eds, Cambridge Texts in the History of Political Thought, Cambridge University Press 2008) 17

<sup>640</sup> Niccoló Machiavelli, *The Prince* (Quentin Skinner and Russell Price eds, Cambridge Texts in the History of Political Thought, Cambridge University Press 2008) 17

<sup>641</sup> Niccoló Machiavelli, *The Prince* (Quentin Skinner and Russell Price eds, Cambridge Texts in the History of Political Thought, Cambridge University Press 2008) 17-18

<sup>642</sup> Niccoló Machiavelli, *The Prince* (Quentin Skinner and Russell Price eds, Cambridge Texts in the History of Political Thought, Cambridge University Press 2008) 18

<sup>643</sup> For further discussion on historical distance along with Machiavelli's contributions to historical thought see: Mark Salber Phillips, *On Historical Distance* (Yale University Press 2013)



'theological debates over free will, grace, and good works'<sup>644</sup> prompted alternative readings of authoritative texts. While on the surface it is possible to see how 'the Reformation of its nature rejected history'<sup>645</sup> in the sense that it cast doubt on the force of recent precedent, this is not to say that reformers did not make use of history and processes of history writing. Historian Rosemary O'Day has explored how the Reformation created its own historiography, looking at how 'religious reformers' and 'official reformers' drew on the past to 'justify the act of reformation.'<sup>646</sup> In separating out reformers that saw the Reformation 'as the fulfilment of the church's need for renewal' from those that saw it as 'serving the needs of the... English body politic', O'Day acknowledged that 'there was no *single* Reformation use of history.'<sup>647</sup> Instead, multiple histories emerged to reflect the competing claims within Reformation ideology itself. While many of these historians drew on Italian humanist writings, they did so within what O'Day refers to as the 'nationalistic framework of English historical writing of the late fifteenth and sixteenth centuries.'<sup>648</sup> She provides the example of William Tyndale's version of *The New Testament*, stating that his concern with accuracy reflected a desire to 'prove the historical pedigree of reformed Christianity.'<sup>649</sup> Like others before him, reformers such as Tyndale sought to root the legitimacy of their projects in a distant past, laying the foundations for national identity rooted in authoritative reformed Christianity. Texts produced by reformers, therefore, performed an important function both culturally and politically, as is reflected in the broader impact of John Foxe's *Book of Martyrs*<sup>650</sup> on anti-Catholic thought throughout the 17<sup>th</sup> century and beyond. All of this makes it possible to suggest that history writing became an increasingly significant site of activity, establishing itself as something that could be deployed tactically in situations of conflict.

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<sup>644</sup> Kevin Sharpe, *Sir Robert Cotton 1536-1631: History and Politics in Early Modern England* (Oxford University Press 1979) 5

<sup>645</sup> Rosemary O'Day, *The Debate on the English Reformation* (Routledge 2002) 5

<sup>646</sup> Rosemary O'Day, *The Debate on the English Reformation* (Routledge 2002) 5

<sup>647</sup> Rosemary O'Day, *The Debate on the English Reformation* (Routledge 2002) 5-6

<sup>648</sup> Rosemary O'Day, *The Debate on the English Reformation* (Routledge 2002) 6

<sup>649</sup> Rosemary O'Day, *The Debate on the English Reformation* (Routledge 2002) 7

<sup>650</sup> John Foxe, *Foxe's Book of Martyrs: Select Narratives* (John N. King ed, Oxford World Classics, Oxford University Press 2009)

By drawing on renaissance historiography, scholars of the early modern period were able to affirm a connection between the legitimacy of present arrangements and the past.<sup>651</sup> In doing so they revealed how by adopting a particular approach to history and its writing it is possible to frame engagements with the past as a legitimating gesture. This practice of rooting legitimacy in the past via a particular way of engaging with historiography became very popular, especially in relation to setting the boundaries of national identity in the century leading up to the English civil wars. It is in this sense that we are able to see a frozen understanding of tradition emerge, where tradition becomes linked to ideas of legitimacy through its apparent role in acts of preservation and prefiguration. For example, Richard Helgerson has explored how 'discursive forms of nationhood and the nation's political forms were mutually self-constituting'<sup>652</sup>, arguing that this was reflected in the development of chronicle history during the 16<sup>th</sup> century. Helgerson claimed that 'chronicle was the Ur-genre of national self-representation' and that 'more than any other discursive form, chronicle gave Tudor Englishmen a sense of their national identity.'<sup>653</sup> Prior to this history was not regarded as a profession in the sense that it would require formal training.<sup>654</sup> Instead what separated it from other forms of literature was its relation to truth.<sup>655</sup> The resurgence of the chronicle form that occurred leading up to the English civil wars can, therefore, be regarded as a

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<sup>651</sup> For example, Michael J. Braddick has commented on how during this period the concept of legitimacy can be seen to have represented what he refers to as a 'historically observable set of justified relationships rather than a normatively awarded status.' For more on this see: Michael J. Braddick, *State Formation in Early Modern England c. 1550-1700* (Cambridge University Press 2000) 71

<sup>652</sup> Richard Helgerson, *Forms of Nationhood: The Elizabethan Writing of England* (The University of Chicago Press 1994) 11

<sup>653</sup> Richard Helgerson, *Forms of Nationhood: The Elizabethan Writing of England* (The University of Chicago Press 1994) 11

<sup>654</sup> For an example of this see: 'A Shirt English Chronicle: The Succession of Kings from the Earliest Times to the Norman Conquest' in John Stowe, *Three Fifteenth-Century Chronicles with Historical Memoranda* (James Gardiner ed, Camden Society 1880) 1-17

<sup>655</sup> Chris Given-Wilson, *Chronicles: The Writing of History in Medieval England* (Hambeldon Continuum 2004) 1

sign of the growing role of historiography in establishing (and then challenging) the scope of national identity.<sup>656</sup>

Such developments in historiography can be regarded as all the more noteworthy when thought of in relation to the rapid growth in publication via the printing press that occurred during the mid-17<sup>th</sup> century.<sup>657</sup> It has been suggested that as a result of this 'never before had so many people turned to writing, never before had so many seen their thoughts into print, and never before had what they printed generated such extensive interest and public debate.'<sup>658</sup> Observations such as these make it possible to infer that the distinctive character of 17<sup>th</sup> conflicts lay in their diverse ideological underpinnings rather than any one specific outward event. This is because while earlier conflicts concerning sovereignty often revolved around issues of rightful succession, by the time we reached the Stuarts this was no longer the central issue of contention.<sup>659</sup> Instead as discussed earlier, subjects were beginning to ask themselves on what conditions a monarch held their power.<sup>660</sup> This more nuanced questioning of the scope of sovereignty was magnified by the diverse range of voices that emerged during these debates, as is reflected in the spread of literature produced by those existing outside of traditional elites as well as literature written by women.<sup>661</sup> The explosive potential of the many books, pamphlets, tracts and broadsides that accompanied armed conflict during

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<sup>656</sup> For a more detailed account of the evolution of the chronicle form and how it can be linked to the changing function of history see: Chris Given-Wilson, *Chronicles: The Writing of History in Medieval England* (Hambeldon Continuum 2004) and Richard Helgerson, *Forms of Nationhood: The Elizabethan Writing of England* (The University of Chicago Press 1994).

<sup>657</sup> N.H. Keeble, 'Introduction' in N.H. Keeble (ed), *The Cambridge Companion to Writing of the English Revolution* (Cambridge University Press 2006) 1, 1

<sup>658</sup> N.H. Keeble, 'Introduction' in N.H. Keeble (ed), *The Cambridge Companion to Writing of the English Revolution* (Cambridge University Press 2006) 1, 2

<sup>659</sup> For more detailed discussion on this see: J. R. Tanner, *English Constitutional Conflicts of the Seventeenth Century 1603-1689* (Cambridge University Press 1947) 4

<sup>660</sup> For more detailed discussion on the events leading up to the English civil wars see: J. R. Tanner, *English Constitutional Conflicts of the Seventeenth Century 1603-1689* (Cambridge University Press 1947)

<sup>661</sup> For an example of such diversification see: Hero Chalmers, *Royalist Women Writers 1650-1689* (Oxford University Press 2007)

the English civil wars along with their attempt to (re)write the history of English law should not therefore be underestimated when studying civil war discourses. Edward Hyde, 1<sup>st</sup> Earl of Clarendon even went so far as to refer to the influx of textual interventions during the 17<sup>th</sup> century as ‘paper-skirmishes’<sup>662</sup>, signalling a need to look closely at the many levels on which the conflicts of the English civil wars arose.<sup>663</sup>

It has been suggested that ‘the impact of the English Revolution and its effects on historical study long outlived their original context.’<sup>664</sup> This is very clear when we look at how both the religious and political dimensions of this conflict shaped many debates that came to dominate the 18<sup>th</sup> century.<sup>665</sup> The 18<sup>th</sup> century was a time of great change, generating a need to revisit the upheaval of the previous century to evaluate the impact of not only the Restoration of the English monarchy after the end of the Protectorate but also the Glorious Revolution of 1688. Earlier discourses surrounding the Ancient Constitution presented themselves as a fruitful resource from which 18<sup>th</sup>-century historians could draw lessons from when debating issues of legitimacy. However, what perhaps distinguishes 18<sup>th</sup> century engagements with history and its writing from 17<sup>th</sup> century engagements is the level of faith that was placed in the past in general. History ceased to occupy the same position of prominence during the 18<sup>th</sup> century as it had during the 17<sup>th</sup> century, something that can perhaps be linked to the rise of rationalism. So, while the past continued to act as a source of great interest, it was now approached with scepticism rather than reverence.

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<sup>662</sup> Edward Hyde, Earl of Clarendon, *The History of the Rebellion and the Civil Wars in England*, vol. 3 (Oxford University Press 1979) 91

<sup>663</sup> For details on the reach/accessibility of printed materials during this period and how increased access to printed materials facilitated new interactions between reader, text and author see: Cecile M. Jagodzinski, *Privacy and Print: Reading and Writing in Seventeenth-Century England* (University of Virginia Press 1999) and David Cressy, ‘Literacy in Seventeenth-Century England: More Evidence’ (1977) 8(1) *Journal of Interdisciplinary History* 141.

<sup>664</sup> R.C. Richardson, *The Debates on the English Revolution* (Manchester University Press 1998) 5

<sup>665</sup> For example, it is possible to see how civil war discourses surrounding the ancient constitution were mobilised to further the rivalry between not only Whigs and Tories but also Anglicans and Dissenters. For more on this see: R.C. Richardson, *Debates on the English Revolution* (Manchester University Press 1998) 5.

Nevertheless, the continued relevance of the Ancient Constitution in the aftermath of the English civil wars remains visible in the exchanges that took place between the Whigs and Tories. For example, while the Whigs drew on the literature of the English civil wars to establish the emergence of constitutional monarchy as inevitable, the Tories drew on the civil wars to bolster support for the monarchy and the Church. Attempts to engage in the (re)writing of history via the theory of the Ancient Constitution, therefore, continued to perform a significant function in relation to attempts to negotiate the scope and orientation of power/influence in the aftermath of the civil wars. Pocock has even suggested that in order to make it more palatable to 18<sup>th</sup>-century tastes, the concept of the Ancient Constitution was transformed from being a concept shaped by appeals to a static understanding of custom, to a concept shaped by reason.<sup>666</sup> He has observed that:

Politically, it [the Ancient Constitution] had ceased to be principally- perhaps at all- an appeal to the binding force of ancient custom; historically it had ceased to be essentially a conviction that law and constitution were immemorial, based upon a too exclusive knowledge of the common law with its dogma that the law was custom and custom was immemorial.<sup>667</sup>

This change was perhaps in part prompted by James I and his tendency to claim 'too wide and undefined a power'<sup>668</sup> by referring back to the Ancient Constitution and arguments surrounding the role of his will in shaping laws, customs and privileges. The force and scope of the Ancient Constitution was therefore more carefully monitored after the close of the English civil wars, as the potential for history to act as a locus of conflict remained fresh in the minds of lawyers and historians alike.

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<sup>666</sup> J.G.A. Pocock, *The Ancient Constitution and the Feudal Law: A Study of English Historical Thought in the Seventeenth Century* (Cambridge University Press 2004) 241

<sup>667</sup> J.G.A. Pocock, *The Ancient Constitution and the Feudal Law: A Study of English Historical Thought in the Seventeenth Century* (Cambridge University Press 2004) 233

<sup>668</sup> J.G.A. Pocock, *The Ancient Constitution and the Feudal Law: A Study of English Historical Thought in the Seventeenth Century* (Cambridge University Press 2004) 233

Some interesting examples of the conflicts that resurfaced through reference to histories produced during the English civil wars can be seen in the work of Lawrence Echard and John Oldmixon. Like many Tories, Echard drew on the work of Edward Hyde, 1<sup>st</sup> Earl of Clarendon in an attempt to draw attention to the harsh treatment of Charles I. However, in his *History of England*, Echard claimed that the principal aim that underpinned his work was a desire to write a history of England dedicated to truth and fidelity.<sup>669</sup> While admirable, this desire for impartiality was in many ways obstructed by his reliance on the work of Edward Hyde, as was noted by Oldmixon in the preface to his *Critical History of England* where he stated that:

As to Mr. Echard's Honesty, I am as ready to do him justice as any Man; but there's a great deal of Difference between Honesty and Zeal, and between Honesty and Genius. 'Tis pretty plain, by his Preface to his last Volume, that he look'd on his Work as in a Degree of Perfection, above Censure or Criticism; and I would never have given him Cause to think otherwise had not the Errors in it turn'd most upon Things of the highest Concernment.<sup>670</sup>

Echard's historical contributions were therefore regarded as little more than Tory propaganda by Whigs such as Oldmixon. However similar criticisms were often also levelled at Whig histories, a key example being Catherine Macaulay's *History of England*. Here Macaulay referred to 'that enlarged system of Liberty introduced by the Saxons'<sup>671</sup>, advancing an idealised version of England prior to the Norman Conquest in an attempt to justify the overthrow of the monarchy. However, by allowing her radical republicanism to shape her engagement with the execution of

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<sup>669</sup> Lawrence Echard, *The History of England: From the First Entrance of Julius Caesar and the Romans, to the End of the Reign of King James the First* (Jacob Tonson with Greys-Inn 1707) Preface

<sup>670</sup> John Oldmixon, *The Critical History of England, Ecclesiastical and Civil: Wherein The Errors of the Monkish Writers, and others before the Reformation, are Expos'd and Corrected as are also the Deficiency and Partiality of Later Historians* (J. Pemberton, at the Buck and Sun 1726) iii

<sup>671</sup> Catherine Macaulay, *The History of England From the Accession of James I to the Elevation of the House of Hanover Vol. II* (I Nourse 1776) 1  
<<https://archive.org/stream/historofengland01macau#page/n257/mode/1up/search/norman+yoke>> accessed 4 January 2016

Charles I, Macaulay came to alienate not only Tories but also many moderate Whigs. By openly referring to Charles I as 'a tyrant, a traitor, a murderer, and a public and implacable enemy to the commonwealth' who had 'with wicked design to erect an unlimited and tyrannical government, traitorously and maliciously levied war against the people and their representatives'<sup>672</sup>, Macaulay severely limited the appeal of her historical writings. The desire for authoritative impartial histories then became increasingly apparent, as the disruptive force of historical writing could not be allowed to gain a foothold in the 18<sup>th</sup> century as it had done in the 17<sup>th</sup>.

What is interesting about exchanges such as those outlined above is the way that they recognised how historical accounts could be manipulated according to an author's personal preferences, signalling the emergence of a distrust of the role of presentism in gaining access to the meaning of the past. When placed alongside the more general shift in attitudes towards both the nature and function of history writing that occurred during the latter parts of the 18<sup>th</sup> century, I would argue that it is possible to see how depictions of the Ancient Constitution were being set into motion to reveal the ongoing ideological disputes of the times.<sup>673</sup> Or to put it another way, it is interesting to see how the synchronic moments of historical accounts were being breached by what we would today recognise as diachronic analysis.<sup>674</sup> As a result of this, direct attempts at mobilising historical writings in relation to contemporary issues were frowned upon, with the rise of reason casting doubt on the value of history and its writing in the present. For example, Lord Bolingbroke has been identified by many as a great exponent of the type of historical scepticism that emerged in this age of political rationalism. In his *Letters on the Study and Use of History*, he argued that it is not entirely possible to know what happened in the

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<sup>672</sup> Catherine Macaulay, *The History of England From the Accession of James I to the Elevation of the House of Hanover Vol. II* (I Nourse 1776) 1  
<<https://archive.org/stream/historofengland01macau#page/n994/mode/1up>>  
accessed 4 January 2016

<sup>673</sup> Something which perhaps feeds into Koselleck's observations regarding the broader impact of what he refers to as the temporalisation of history.

<sup>674</sup> Refer to my earlier engagement with Koselleck's analysis of Albrecht Altdorfer's depiction of the Battle of Issus and how it is possible to see the events that are being depicted merge with the events surrounding their depiction.

distant past.<sup>675</sup> For him, this meant that we should only refer to historical moments that are relevant to the times in which we live if we are attempting to use history as a source of lessons to be used in the present.

Historians of the 19<sup>th</sup> century can be seen to have taken Bolingbroke's sentiments even further, with the likes of Samuel Rawson Gardiner advocating the strict imposition of distance between an historian and their subject. Gardiner claimed that 'the historian writing in a later generation is distracted neither by... buoyant hopes, nor by... melancholy despair'<sup>676</sup>, enabling them to produce more accurate accounts of past events based on a close scrutiny of primary sources. For him, the study of revolutions was an attractive pursuit for an historian 'not because it is exciting, but because it reveals more clearly than smaller changes the law of human progress.'<sup>677</sup> Statements such as these can be interpreted as a deliberate attempt to freeze history, casting the English civil wars as a fixed moment in our past that would then lead to an improved present. Instead of acting as a continuing source of conflict, Gardiner sought to present a neutralised account of events that clearly located conflict in the past. It has however been noted that this strong desire to present an unbiased chronological account of events was hampered by his Liberal Nonconformist background.<sup>678</sup> It has been suggested that in an attempt to resolve the ongoing religious conflict between Anglicanism and Dissent, Gardiner sought to 'remove the historical source of this rivalry'<sup>679</sup> by showing that the traditions of Anglicanism and Puritanism had existed alongside one another. So rather than extricating himself from the concerns of his age, Gardiner did as many before him had done, drawing on the historical writings of the 17<sup>th</sup> century to address conflicts that had continued through to his present.

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<sup>675</sup> Henry St. John, Lord Viscount Bolingbroke, *Letters on the Study and Use of History* (T.Cadell 1779) <<https://archive.org/details/lettersonstudyus00boliiala>> accessed 4 January 2016

<sup>676</sup> Samuel Rawson Gardiner, *The Constitutional Documents of the Puritan Revolution 1625-1660* (Oxford University Press 1951) x

<sup>677</sup> Samuel Rawson Gardiner, *The Constitutional Documents of the Puritan Revolution 1625-1660* (Oxford University Press 1951) x

<sup>678</sup> R.C. Richardson, *The Debate on the English Revolution* (Manchester University Press 1998) 95

<sup>679</sup> R.C. Richardson, *The Debate on the English Revolution* (Manchester University Press 1998) 95



It is not until the 20<sup>th</sup> and 21<sup>st</sup> centuries that we see a more wide-reaching reflection on the impact of personal circumstances on processes of historical writing, something that indicated a shift towards more conscious uses of historiography as a means of reshaping (or at least revealing) power dynamics.<sup>680</sup> To start with it became possible to see how histories became tied to particular ideologies, including the desire to inculcate a sense of progress. The turn to the ideological underpinnings of history and its writing can be regarded as an attempt to reveal the distortions that occur when the views of those that write history are imposed on the interpretation of the past, an issue that was especially rife in relation to interpretations of discourses on the Ancient Constitution. The historian Herbert Butterfield is famous for his rejection of what he referred to as:

... the tendency in many historians to write on the side of Protestants and Whigs, to praise revolutions provided they have been successful, to emphasise certain principles of progress in the past and to produce a story which is the ratification if not the glorification of the present.<sup>681</sup>

Butterfield labelled this type of history as the Whig interpretation of history, stating that it entailed studying the past with reference to the present.<sup>682</sup> While he conceded that 'there is a tendency for all history to veer over into Whig history'<sup>683</sup>, he nevertheless believed that reading the past through the present acted as 'an obstacle to historical understanding.'<sup>684</sup> For him 'real historical understanding is not achieved by the subordination of the past to the present, but rather by our making

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<sup>680</sup> For more detailed discussion on this shift see: Georg G. Iggers, *Historiography in the Twentieth Century: From Scientific Objectivity to the Postmodern Challenge* (Wesleyan University Press 2005)

<sup>681</sup> Herbert Butterfield, *The Whig Interpretation of History* (W.W. Norton & Company 1965) v

<sup>682</sup> Herbert Butterfield, *The Whig Interpretation of History* (W.W. Norton & Company 1965) 11

<sup>683</sup> Herbert Butterfield, *The Whig Interpretation of History* (W.W. Norton & Company 1965) 6

<sup>684</sup> Herbert Butterfield, *The Whig Interpretation of History* (W.W. Norton & Company 1965) 11

the past our present and attempting to see life with the eyes of another century than our own.<sup>685</sup> Therefore by proposing that ‘history is not the study of origins’ but rather ‘the analysis of all the mediations by which the past was turned into our present’<sup>686</sup>, Butterfield would appear to allude to the importance of both synchronic and diachronic analysis. Moreover, by arguing that ‘the historian is something more than the mere passive external spectator’ and that ‘by imaginative sympathy he makes the past intelligible to the present’<sup>687</sup>, Butterfield highlighted the need for each generation to rewrite its own history. This led him to conclude that ‘the truth of history is no simple matter, all packed and parcelled ready for handling in the marketplace.’<sup>688</sup> When applied to literatures that engage with the English civil wars it is possible to identify depictions of key events as touchstones around which conflicts pivot. By this I mean to say that conflicts take place on many levels, one of them being the past. In order to make this more visible it becomes necessary to engage with a theory of history writing that not only accommodates the active element of history writing, but also actively encourages a reflection on the possibility of a multilayered notion of temporality. This is because while methodological concerns have informed our reading of older histories, they have not necessarily resulted in the type of self-reflexivity advocated by the likes of Butterfield.

Even more recent 20<sup>th</sup>-century engagements with the events of the English civil wars can be seen to be read through the eyes of the present. This can be seen most clearly in the work of Hugh Trevor-Roper, Lawrence Stone and Christopher Hill. For them, the civil war could be explained as a class conflict, where the aristocracy were pitted against the gentry, the rich against the poor gentry and the rising bourgeoisie against a declining feudal order.<sup>689</sup> For example, Christopher

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<sup>685</sup> Herbert Butterfield, *The Whig Interpretation of History* (W.W. Norton & Company 1965) 11

<sup>686</sup> Herbert Butterfield, *The Whig Interpretation of History* (W.W. Norton & Company 1965) 47

<sup>687</sup> Herbert Butterfield, *The Whig Interpretation of History* (W.W. Norton & Company 1965) 92

<sup>688</sup> Herbert Butterfield, *The Whig Interpretation of History* (W.W. Norton & Company 1965) 132

<sup>689</sup> It is however worth remembering that disagreements arose between these scholars, especially between Hugh Trevor-Roper and Lawrence Stone. So rather

Hill's rich contribution to the study of the 17<sup>th</sup> century can be seen to focus on the voices of 'the landless ex-peasantry'.<sup>690</sup> He argued that 'the growing inequality of seventeenth-century English society'<sup>691</sup> presented itself as a central challenge of the time, claiming that law was made by the ruling class to secure the protection of their interests.<sup>692</sup> Attempts to resist the legitimacy of the law (through reference to the Norman Conquest) were, therefore, cast as an attempt to reshape English society as a whole. In addition to this Hugh Trevor-Roper identified the 17<sup>th</sup> century as a time of widespread political struggle, extending his analysis beyond the English context to look at Western Europe more generally. He claimed that the social character of England, Spain and Italy had changed so much that people were no longer prepared to tolerate the conditions they had been forced to endure.<sup>693</sup> In order to re-focus historical analysis on issues of social change, Trevor-Roper suggested that 'we must look past the background, into the structure of society... [for all revolutions]... are made real and formidable by defects of social structure.'<sup>694</sup> Finally Lawrence Stone suggested that the nobility of the 17<sup>th</sup> century faced an economic crisis, with the growing importance of the gentry acting as an important catalyst for change.<sup>695</sup> Each interlocutor can be seen to interpret the events and discourses of the English civil wars through the lens of economic concerns, framing their understanding of the Ancient Constitution in terms of class struggle and changes in social structure. While this way of interpreting the events of the English civil wars certainly adds colour to our understanding of this conflict, this is not to

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than attempting to blur their arguments together, I am suggesting that their work can be said to be representative of a particular approach to history writing.

<sup>690</sup> Christopher Hill, *Liberty Against the Law: Some Seventeenth Century Controversies* (The Penguin Press 1996) x

<sup>691</sup> Christopher Hill, *Liberty Against the Law: Some Seventeenth Century Controversies* (The Penguin Press 1996) 234

<sup>692</sup> Christopher Hill, *Liberty Against the Law: Some Seventeenth Century Controversies* (The Penguin Press 1996) 253

<sup>693</sup> For further discussion on this see: Hugh Trevor-Roper, *The Crisis of the Seventeenth Century: Religion, the Reformation and Social Change* (Liberty Fund 2001)

<sup>694</sup> Hugh Trevor-Roper, 'The General Crisis of the Seventeenth Century' (1959) 16 *Past and Present* 31, 34

<sup>695</sup> Lawrence Stone, *Causes of the English Revolution 1529-1642* (Routledge 2001)

say that these literatures are not as revealing as those produced by the likes of Gardiner. They not only add an additional layer of analysis to the conflicts of the 17<sup>th</sup> century, they also reveal concerns that were present within the minds of their authors during their production. So, while the contributions of Trevor-Roper, Stone and Hill are indeed highly valuable to anyone interested in the conflicts of the English civil wars, it remains important to avoid the temptation of final conclusions when engaging with their work. Instead, like the histories of the 18<sup>th</sup> and 19<sup>th</sup> centuries, when read both synchronically and diachronically we are able to glean an insight into the intellectual environments in which they were produced.

#### v. Concluding Remarks

The events and ideologies of the English civil wars would seem to operate as a useful foil for exploring a wide range of issues that emerge both in the past and the present. For the purposes of my argument, I have identified the evolution of the Ancient Constitution via discourses emanating from the English civil wars as an especially fruitful way of examining how law has traditionally drawn on a linear understanding of temporality for its story of legitimation. In doing so I have argued that this has resulted in a relationship with history that has been heavily influenced by the types of historiography that were drawn upon during the 17<sup>th</sup> century. While this enables me to establish a strong connection between historiography and law (through their engagements with ideas of national identity, tradition and legitimacy), when attempting to see how resistance features in this relationship things become less clear. In Part I I established that it is possible to see how historiography and resistance can be seen to interact with each other to the extent that some forms of historiography can come to be regarded as a form of resistance. Inserting law into this relationship would seem to dilute my argument, as while I would say that history writing acted as an important medium through which to challenge the Ancient Constitution and the model of power that it sustained, by relying on a linear understanding of temporality such attempts were in many ways bound by the logic of the grand narrative form where history is meant to exist in the singular. While this sort of historiography has since attracted a great deal of criticism,<sup>696</sup> I would argue that the law nevertheless remains rooted in an understanding of history that

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<sup>696</sup> For a detailed account of this shift refer to: Georg G. Iggers, *Historiography in the Twentieth Century: From Scientific Objectivity to the Postmodern Challenge* (Wesleyan University Press 2005)

seeks to maintain a linear (albeit carefully demarcated) connection between the past and present. By adhering to a limited understanding of tradition law continues to draw its force from appeals to the past, committing itself to a somewhat regressive and often counterintuitive relationship with history and its writing. It is with this in mind that I would argue that questions of legitimacy and tradition can be reframed as questions of historiography and resistance, as by making claims as to law's legitimacy we are also expressing a particular relationship with history and its writing. The scope for historiography to act as a form of resistance, when problematised in relation to law, would, therefore, appear to be limited. If this is to change, law must first revisit its relationship with temporality.

Pocock has argued that the historiography of the English civil wars was comprised of two opposing schools of thought: that of the common lawyers who believed in the immemorial origins of the common law tradition, and that of a group of dissenters that drew on the principles of feudal tenure. His interventions in relation to these schools of thought are directed at drawing attention to how the 17<sup>th</sup> century can be distinguished from other epochs in England's history because by the ways in which it reflects an attempt by thinkers of the time to understand themselves by understanding their past and their relation to it.<sup>697</sup> By making such an observation, Pocock focused on how scholars of the 17<sup>th</sup> century obtained knowledge of their history through the study of law, something which ultimately served as a central limitation on understandings of political obligation during this period. I would argue that such conclusions can be linked to my broader arguments relating to a tendency within law to prefer singular accounts to plural ones. However, I would not necessarily go so far as to suggest that the two schools of thought identified by Pocock are entirely distinct from one another, as in many ways they can both be seen to draw on equally limited understandings of temporality. In order to explore the potential for law to alter its relationship history and its writing it is helpful to focus on the situations in which law is confronted by other forms of temporality. To do this I will now turn to the example of post-Franco Spain, where through an unorthodox approach to transitional justice an opportunity to re-evaluate law's relationship with linear temporality has emerged.

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<sup>697</sup> J.G.A. Pocock, *The Ancient Constitution and the Feudal Law: A Study of English Historical Thought in the Seventeenth Century* (Cambridge University Press 1987)

## Chapter 5

# Recovering (from) the Past: Rethinking the Need to Forget

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*Memory produced to suit “the collective identity” came from the German seven P’s: professors who produced collective memory, priests, politicians, poets, press..., in short, people who regard themselves as the keepers of collective memory, those who pay for it, produce it, and use it with the intent of instilling trust and a sense of safety... to me this is not anything but ideology.*

Reinhart Koselleck<sup>698</sup>

*Thanks to our revision, the film Western History has become consistent, intellectually satisfying, and aesthetically pleasing. Inconsistent, illogical, and unpleasant elements have been edited. Still, the question remains whether the inconsistent, the illogical, and the unpleasant, in short, the absurd, are in not in fact essential to the film. Or whether the absurdity of history is not in fact a reason for hope: the hope that all rational “prospective” must fail.*

Vilém Flusser<sup>699</sup>

*... beware of my partisanship, my mistakes of fact and the distortion inevitably caused by my having seen only one corner of events. And beware exactly the same things when you read any other books on this period of the Spanish war.*

George Orwell<sup>700</sup>

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The fifteen months Reinhart Koselleck spent in a Soviet prisoner camp in Karaganda (now Kazakhstan) had a dramatic impact on his beliefs surrounding interactions between identity, history and memory.<sup>701</sup> When combined with his experience of life under Nazi control Koselleck came to express a strong distaste

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<sup>698</sup> Javiér Fernández Sebastián and Juan Francisco Fuentes, ‘Conceptual History, Memory, and Identity: An Interview with Reinhart Koselleck’ (2006) 2(1) Contributions to the History of Concepts 99, 113

<sup>699</sup> Vilém Flusser, ‘A Historiography Revised’ in *Writings* (Erik Eisel tr, University of Minnesota Press 2002) 137

<sup>700</sup> George Orwell, *Homage to Catalonia* (Penguin Books 2013) 195

<sup>701</sup> For an overview of the early life of Reinhart Koselleck see: Niklas Olsen, *History in the Plural: An Introduction to the Work of Reinhart Koselleck* (Berghahn Books 2012) 1-8

for projects concerned with the cultivation of collective memory, stating that ‘any kind of collective memory displeases me because I know that true memory is independent from so-called collective memory... my position in regards to this is that my memory depends on my experience and nothing else.’<sup>702</sup> In an interview conducted in April 2005, a year before his death, Koselleck was asked to comment on what he thought to be ‘the foundations for the construction or mending of a common memory in a country torn by ideological civil war, like Spain.’<sup>703</sup> His response was concise. He replied stating that ‘the rule I follow in this subject consists of always preserving differences and debating differences without masks...I believe that insisting on difference is the best way to contribute to peace and to common memory, given that memory is divided.’<sup>704</sup> When evaluated in relation to the proposition that for some ‘the success of Spain’s transition into democracy following Franco’s death can be attributed to a wise management of memory and forgetfulness’<sup>705</sup>, Koselleck’s plea for mutual recognition based on an acknowledgment of the divided nature of memory raises some important questions. For the purposes of this chapter, the questions that I will focus on pertain to the propensity for conflicts to continue beneath the surface of blanket amnesties enacted through sanitised universalised accounts of the past. Post-Franco Spain provides us with an especially interesting opportunity to explore the continuation of conflict in the face of restricted engagements with the past not only because of the ways in which debates concerning the balancing of remembering and forgetting have surfaced both within Spain and internationally, but also because of how law has been used as a vehicle for the institutionalisation of mass forgetting in the aftermath of violent civil unrest. This chapter will therefore be used to explore how law’s relationship with temporality surfaces in the context of recovering a shared

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<sup>702</sup> Javier Fernández Sebastián and Juan Francisco Fuentes, ‘Conceptual History, Memory, and Identity: An Interview with Reinhart Koselleck’ (2006) 2(1) *Contributions to the History of Concepts* 99, 113

<sup>703</sup> Javier Fernández Sebastián and Juan Francisco Fuentes, ‘Conceptual History, Memory, and Identity: An Interview with Reinhart Koselleck’ (2006) 2(1) *Contributions to the History of Concepts* 99, 116

<sup>704</sup> Javier Fernández Sebastián and Juan Francisco Fuentes, ‘Conceptual History, Memory, and Identity: An Interview with Reinhart Koselleck’ (2006) 2(1) *Contributions to the History of Concepts* 99, 116

<sup>705</sup> Javier Fernández Sebastián and Juan Francisco Fuentes, ‘Conceptual History, Memory, and Identity: An Interview with Reinhart Koselleck’ (2006) 2(1) *Contributions to the History of Concepts* 99, 115

sense of national identity rooted in a collective memory. In order to do this, I will reflect on the extent to which memory can be thought of as a site in which law and historiography as resistance can meet. Or to be more precise, I will ask how memory (and the vast literatures on memory studies that have emerged in recent years) can be seen to prompt a re-evaluation of law's engagements with temporality and perhaps even processes of resistance. I will focus on the potential for memory to expand law's use of temporality via a continuation of the idea that it is helpful to think of law as a written tradition, focusing on how law is directly linked to processes of transmission. However, this is not to say that by focusing on memory I believe that law will be able to overcome its preoccupation with authoritative singular historical narratives. Rather my aim is to suggest that part of our rethinking of law's relationship with history and its writing could involve a closer engagement with insights made within memory studies.<sup>706</sup>

As indicated in previous chapters, law encounters a number of challenges when it attempts to navigate the temporal categories of past, present and future. Attempts to ground the legitimacy of law in the past are confronted by a need for law to reach into the future, generating a need for law to accommodate both stability and change whilst maintaining an authoritative presence in the present. This chapter will extend my discussions from previous chapters to encourage a return to thinking about how history and its writing is often used to produce certain effects, extending beyond an exploration of the stabilising force of history to include an acknowledgement of the potentially destabilising force of history writing. By restating the potential for history and its writing to be regarded as an expression of power/influence I hope to draw attention to some of the hazards that can be associated with law's attempts to adopt a more proactive role in the writing of history. By this I mean to say that it is important to acknowledge the dangers that can result from law's attempt to usurp/regulate the functions of history writing. In order to explore the nature and reach of law's interventions in processes of history writing I will draw attention to the impact that law's understanding of history and its writing has had on people's everyday lives, examining the instances of resistance that can emerge when law adopts too narrow an approach to historiography. I will also aim to draw attention to the ways in which the tension between the need to secure stability whilst

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<sup>706</sup> An interesting example of an interdisciplinary dialogue on memory studies can be seen in 'The Frankfurt Memory Studies Platform', for further details see: <<http://www.memorystudies-frankfurt.com/about/>> accessed 5<sup>th</sup> August 2016



accommodating change manifests itself in law's treatment of the past via the concept of tradition, re-stating the benefits of adopting a more Gadamerian understanding of this concept when thinking about the operation of law and how it often becomes involved in developing a form of temporality that can at times seem to be at odds with other forms of temporality.

i. Fracturing the Past: Exploring the Growing Importance of Memory in National Identity

In order to navigate more recent interactions between law, historiography and the formation/solidification of national identity it is important to include a consideration of the role of memory (especially collective memory) and acts of commemoration. This is because memory and acts of commemoration have come to perform an increasingly significant role in securing strong national identities in the aftermath of violent conflict, especially in relation to civil conflicts where the need to heal internal divides has been of paramount importance. National myths have been revived and re-purposed in the present to establish connections between past and present causes, blurring the line between history and memory. Images of defeat have also been established as being equally potent as images of victory when seeking to strengthen the legitimacy of modern governments. A frequently cited example of a heroic defeat can be seen in the fall of Masada in 74 CE, where according to Jewish historian Josephus Flavius 960 Jewish men and women took their own lives when they were faced with the prospect of falling into Roman captivity.<sup>707</sup> Archaeologist and historian Neil Asher Silberman has observed how 'though Masada had played no role in Jewish tradition, its rediscovery by Western explorers eventually captured the imagination of the Jewish community in Palestine.'<sup>708</sup> Masada has since become 'a symbol of anti-imperialist struggle'<sup>709</sup>, gaining an important

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<sup>707</sup> For an overview of how the fall of Masada has been depicted over time see: Neil Asher Silberman, 'From Masada to the Little Bighorn: The Role of Archaeological Site Interpretation in the Shaping of National Myths' (1999) 3 Conservation and Management of Archaeological Sites 9

<sup>708</sup> Neil Asher Silberman, 'From Masada to the Little Bighorn: The Role of Archaeological Site Interpretation in the Shaping of National Myths' (1999) 3 Conservation and Management of Archaeological Sites 9, 12

<sup>709</sup> Neil Asher Silberman, 'From Masada to the Little Bighorn: The Role of Archaeological Site Interpretation in the Shaping of National Myths' (1999) 3 Conservation and Management of Archaeological Sites 9, 12

ideological status within modern Israel. Yael Zerubavel has examined what she refers to as 'Masada's odyssey from the periphery of historical knowledge to the centre of Israeli collective memory.'<sup>710</sup> She has traced the rise of an 'activist commemorative narrative' and its casting of Masada as 'a historical metaphor for a national struggle for freedom and the readiness to fight for it to the bitter end.'<sup>711</sup> In doing so she has revealed how the State of Israel has 'blurred the line separating the ancient Masada defenders and the fallen soldiers of the Israel Defence Forces'<sup>712</sup> who have died in contemporary wars. As a consequence of this she has concluded that 'Israeli memory thus reconstructs a coherent temporal continuum between Masada and contemporary Israel: the end of Antiquity symbolically opens up, leading into the beginning of the modern Zionist revival.'<sup>713</sup> By making such an observation Zerubavel demonstrates how collective memory performs 'a major role in classifying, interpreting, and introducing the meaning of history into contemporary life.'<sup>714</sup> The relationship between memory, history writing and national identity would therefore seem to be a powerful one, with memory (both collective and individual) performing an increasingly prominent role in framing national identity.<sup>715</sup>

Appeals to collective memory in the furtherance of particular conceptions of national identity provide us with a valuable opportunity to see how 'nations must be produced, brought into being, and then constantly reproduced through symbolic

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<sup>710</sup> Yael Zerubavel, 'The Death of Memory and the Memory of Death: Masada and the Holocaust as Historical Metaphors' (1994) 45 *Representations* 72, 75

<sup>711</sup> Yael Zerubavel, 'The Death of Memory and the Memory of Death: Masada and the Holocaust as Historical Metaphors' (1994) 72, 77

<sup>712</sup> Yael Zerubavel, 'The Death of Memory and the Memory of Death: Masada and the Holocaust as Historical Metaphors' (1994) 72, 85

<sup>713</sup> Yael Zerubavel, 'The Death of Memory and the Memory of Death: Masada and the Holocaust as Historical Metaphors' (1994) 72, 85

<sup>714</sup> Yael Zerubavel, 'The Death of Memory and the Memory of Death: Masada and the Holocaust as Historical Metaphors' (1994) 72, 92

<sup>715</sup> For further discussion on this see: Duncan S.A. Bell, 'Mythscapes: Memory, Mythology, and National Identity' (2003) 54(1) *British Journal of Sociology* 63

acts of nationhood.<sup>716</sup> Political scientist and historian Benedict Anderson is known for drawing on the concept of collective memory (as it was first developed by Maurice Halbwachs) with the view of alerting us to the ways in which nations are constructed, encouraging us to further refine our understanding of the costs associated with establishing strong singular national identities.<sup>717</sup> As mentioned earlier with reference to Koselleck, for some collective memory is an extremely problematic concept as it seeks to homogenise something that is essentially fragmented and driven by personal experience. However, despite concerns relating to the possibility (and desirability) of establishing collective memories, it is nevertheless possible to see how 'memory seems to have claimed Truth's valorised position as a site of authenticity, as a point of anchorage- albeit an unsteady one- in a turbulent world stripped of much of its previous meaning.'<sup>718</sup> Challenges surrounding the dichotomy between myth and reality as well as fact and fiction are being renewed, with greater emphasis being placed on the opportunities offered by more flexible and less direct ways of talking about the past. It has even been suggested that 'memory can come to the fore in an age of historiographic crisis precisely because it figures as a therapeutic alternative to historical discourse.'<sup>719</sup>

Such a proliferation of our use of memory as a lens through to study national identity has raised a number of questions, especially in terms of why memory has come to be favoured over history. Historian Kerwin Lee Klein has suggested that 'we sometimes use *memory* as a synonym for *history* to soften our prose, to

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<sup>716</sup> Peige Desjarlais, 'Excavating Zion: Archaeology and Nation-Making in Palestine/Israel' (2013) 21(1) Totem: The University of Western Ontario Journal of Anthropology 1, 3

<sup>717</sup> For a more detailed discussion of Anderson's views on the formation of nations see: Benedict Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (Verso Books 2006) and for discussion of Halbwachs introduction of collective memory see: Maurice Halbwachs, *On Collective Memory* (Lewis A. Coser tr, University of Chicago Press 1992)

<sup>718</sup> Duncan S.A. Bell, 'Mythsapes: Memory, Mythology, and National Identity' (2003) 54(1) British Journal of Sociology 63, 65

<sup>719</sup> Kerwin Lee Klein, 'On the Emergence of *Memory* in Historical Discourse'(2000) 69(1) Representations 127, 145

humanise it, and to make it more accessible.<sup>720</sup> He argues that ‘*Memory* simply sounds less distant, and perhaps for that reason, it often serves to help draw general readers into a sense of the relevance of history for their own lives.’<sup>721</sup> Furthermore, he states that ‘memory appeals to us partly because it projects an immediacy we feel has been lost from history.’<sup>722</sup> Memory therefore appears to be more accessible than history, although what makes it distinct from history (in more recent contexts) remains open to debate.<sup>723</sup> For example, while memory has been identified by some as ‘the assembly of individual and collective recollections of the past’, history has been identified as ‘a critical discourse on the past, a reconstitution of facts and events that are subsequently contextualised and interpreted.’<sup>724</sup> Historian François Hartog has surveyed the separation Maurice Halbwachs sought to establish between memory and history through his development of the concept of collective memory more closely, focusing on how for Halbwachs ‘history is unitary... whereas there are as many collective memories as there are groups, each of which has its own sense of duration.’<sup>725</sup> He has then moved on to look at the work of Pierre Nora, who advocated the importance of being *between* history and memory. Instead of placing history and memory in opposition to one another (or blurring them together), Hartog comments on how for Nora ‘memory could revitalise and enlarge the field of contemporary history.’<sup>726</sup> As a result of this revitalisation, ‘collective memory could thus play for contemporary history the same

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<sup>720</sup> Kerwin Lee Klein, ‘On the Emergence of *Memory* in Historical Discourse’(2000) 69(1) *Representations* 127, 129

<sup>721</sup> Kerwin Lee Klein, ‘On the Emergence of *Memory* in Historical Discourse’(2000) 69(1) *Representations* 127, 129

<sup>722</sup> Kerwin Lee Klein, ‘On the Emergence of *Memory* in Historical Discourse’(2000) 69(1) *Representations* 127, 129

<sup>723</sup> For an example of an attempt to identify the differences between memory and history in more recent engagements with national identity see: Aline Sierp, *History, Memory, and Trans-European Identity: Unifying Divisions* (Routledge 2014)

<sup>724</sup> Aline Sierp, *History, Memory, and Trans-European Identity: Unifying Divisions* (Routledge 2014) 16

<sup>725</sup> François Hartog, *Regimes of Historicity: Presentism and Experiences of Time* (Saskia Brown tr, Columbia University Press 2015) 122

<sup>726</sup> François Hartog, *Regimes of Historicity: Presentism and Experiences of Time* (Saskia Brown tr, Columbia University Press 2015) 123

role the history of mentalities had played for modern history.<sup>727</sup> Such a sentiment can be seen most clearly in Nora's claim that:

What we call memory today is therefore not memory but already history. What we take to be flare-ups of memory are in fact its final consumption in the flames of history. The quest for memory is the search for one's history.<sup>728</sup>

In focusing on the importance of placing ourselves between history and memory Nora created a need to distinguish between what he identified as 'true memory' and 'memory transformed by its passage through history.'<sup>729</sup> The former is described as having 'taken refuge in gestures and habits, in skills passed down by unspoken traditions... ingrained memories' whereas the latter is described as 'voluntary and deliberate, experienced as a duty, no longer spontaneous... but never social, collective or all encompassing.'<sup>730</sup> Hartog identifies Nora's study of memory with an attempt to explore 'national history through the prism of memory', something that has since led to 'contestations of official history' and 'a privileging of memory over against history.'<sup>731</sup> So while Koselleck's concerns about the potential flattening of experience through the imposition of collective memory are worthy of note, it is also possible to see how by refraining from placing history and memory in opposition to one another (as Nora does) we are able to focus on the collective conditions that make memory possible, rather than collective memories themselves.<sup>732</sup>

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<sup>727</sup> François Hartog, *Regimes of Historicity: Presentism and Experiences of Time* (Saskia Brown tr, Columbia University Press 2015) 123

<sup>728</sup> Pierre Nora, 'Between Memory and History: Les Lieux de Mémoire' (1989) 26 Representations 7, 13

<sup>729</sup> Pierre Nora, 'Between Memory and History: Les Lieux de Mémoire' (1989) 26 Representations 7, 13

<sup>730</sup> Pierre Nora, 'Between Memory and History: Les Lieux de Mémoire' (1989) 26 Representations 7, 13

<sup>731</sup> François Hartog, *Regimes of Historicity: Presentism and Experiences of Time* (Saskia Brown tr, Columbia University Press 2015) 127

<sup>732</sup> For further discussion on this see: Siobhan Kattago, *Memory and Representation in Contemporary Europe: The Persistence of the Past* (Routledge 2012) 22

When seeking to examine the collective conditions that make memory possible it is helpful to observe the distinct temporal status of memory. Andreas Huyssen has stated that 'the temporal status of any act of memory is always the present and not, as some naive epistemology might have it, the past itself, even though all memory in some ineradicable sense is dependent on some past event or experience.'<sup>733</sup> For him 'it is this tenuous fissure between past and present that constitutes memory.'<sup>734</sup> The significance of placing memory in the fissure between past and present becomes clear when we turn to look at how recourse to memory can allude to ongoing struggle. For example in an edited collection on the politics of memory in Cyprus, Rebecca Bryant and Yiannis Papadakis have sought to expose 'the many subtle ways in which a conflict continues by other means in the absence of violence.'<sup>735</sup> According to them 'in Cyprus, history has become the primary actor in battles fought on legal and diplomatic terrains; as a result, narratives of the conflict represent a continuation of the conflict.'<sup>736</sup> In making such an observation Bryant and Papadakis make it possible to identify the study of dominant official histories in relation to the unofficial histories that emerge in their wake as a crucial step in our understanding of potential interactions between historiography and conflict. Observations such as these also make it possible to suggest that when thought of in relation to memory it becomes important to reflect on how we remember, as remembering would appear to increasingly involve acts of forgetting.<sup>737</sup>

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<sup>733</sup> Andreas Huyssen, *Twilight Memories: Marking Time in a Culture of Amnesia* (Routledge 1995) 3

<sup>734</sup> Andreas Huyssen, *Twilight Memories: Marking Time in a Culture of Amnesia* (Routledge 1995) 3

<sup>735</sup> Rebecca Bryant and Yiannis Papadakis, *Cyprus and The Politics of Memory: History, Community and Conflict* (I.B. Tauris 2012) 2

<sup>736</sup> Rebecca Bryant and Yiannis Papadakis, *Cyprus and The Politics of Memory: History, Community and Conflict* (I.B. Tauris 2012) 2

<sup>737</sup> For more detailed discussion of the need to no longer think of forgetting as something that exists in opposition to remembering see: David Sayer, 'How We Remember and What We Forget: Art History and the Czech Avant-garde' in Dariusz Gafijczuk and Derek Sayer (eds), *The Inhabited Ruins of Central Europe: Re-imagining Space, History, and Memory* (Palgrave Macmillan 2013) 148-177

## ii. Balancing Memory: Forgetting to Remember

It has been claimed that ‘remembrance shapes our links to the past’ and that as a consequence of this the ‘ways we remember define us in the present.’<sup>738</sup> If this is correct, then reflections on how and what we remember are of great importance when we attempt to study the boundaries of national identity formation and solidification in relation to processes of history writing. It is for this reason that the rest of this chapter will focus on what is forgotten and how conscious acts of forgetting feed into what we remember. Moreover, by examining the role of forgetting in remembering I hope to introduce the role performed by law in constructing and maintaining collective memories through time, whilst also highlighting the conflict that can emerge as a result of exchanges between remembering, forgetting and national identity. A visible example of the interactions between memory and forgetting in the context of national identity solidification can be found in modern China in relation to the Tiananmen Square protests of 1989. While the square itself celebrates a long history of protest, providing what has been described as ‘a locus of coalescence for political expression, collective memory, identity, and history’<sup>739</sup> within China, the events of 1989 have largely been expunged from public memory.<sup>740</sup> In her widely acclaimed monograph *The People’s Republic of Amnesia*, Louisa Lim has revisited the events of the 4<sup>th</sup> June 1989 from multiple perspectives to reveal how memories of these events have been suppressed and manipulated in both the public and private spheres. She examines how Tiananmen Square acts as the ‘political and symbolic heart of the nation’, asking how the collective memory of China has come to regard the square as a site of ‘national pride’ rather than a site of ‘national shame.’<sup>741</sup> In order to address this question Lim focuses on the human cost of maintaining the Square as a site of national pride, observing how the ‘Chinese people are practiced at not

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<sup>738</sup> Andreas Huyssen, *Twilight Memories: Marking Time in a Culture of Amnesia* (Routledge 1995) 249

<sup>739</sup> Wu Hung, ‘Tiananmen Square: A Political History of Monuments’ (1991) 35 *Representations* 84, 85

<sup>740</sup> For a more detailed account of the struggles that can be associated with Tiananmen Square see: Linda HersHKovitz, ‘Tiananmen Square and the Politics of Place’ (1993) 12(5) *Political Geography* 395

<sup>741</sup> Louisa Lim, *The People’s Republic of Amnesia: Tiananmen Revisited* (Oxford University Press 2014) 1

dwelling on the past' and how this has become a 'key survival tactic'<sup>742</sup> in modern China. For example in her interview with former soldier turned artist Chen Guang, Lim comments on how approved versions of history began to emerge as part of 'an aggressive propaganda initiative in the initial aftermath of the killings, during which time the government tried to saturate the country with its version of events.'<sup>743</sup> Such histories have since become well entrenched within the Chinese education system, with many members of the younger generations being almost oblivious to not only the protests of 1989 but also what provoked them.<sup>744</sup> For Lim:

Memory is dangerous in a country that was built to function on national amnesia. A single act of public remembrance might expose the frailty of the state's carefully constructed edifice of accepted history, scaffolded into place over a generation and kept aloft by a brittle structure of strict censorship, blatant falsehood, and wilful forgetting.<sup>745</sup>

The perceived threat posed my memory to official histories is so great that it is even possible to see how acts of private remembrance have been stifled in an attempt to avoid detracting from the legitimacy of the Chinese state. For example in 2014 Chen Guang was detained by public security agents as a result of a piece of private performance art commemorating the protests.<sup>746</sup> The detention of those that would seek to remember the Tiananmen Square protests both publicly and privately has been widely commented on, with many observing how state sanctioned amnesia has reached beyond the domestic public and private spheres to include the

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<sup>742</sup> Louisa Lim, *The People's Republic of Amnesia: Tiananmen Revisited* (Oxford University Press 2014) 5-6

<sup>743</sup> Louisa Lim, *The People's Republic of Amnesia: Tiananmen Revisited* (Oxford University Press 2014) 16

<sup>744</sup> It has even been suggested by some that the events of the 4<sup>th</sup> June 1989 are a CIA conspiracy, for more on this see: Rowena Xiaoqing He, *Tiananmen Exiles: Voices of the Struggle for Democracy in China* (Palgrave Macmillan 2004) 16-17

<sup>745</sup> Louisa Lim, *The People's Republic of Amnesia: Tiananmen Revisited* (Oxford University Press 2014) 105

<sup>746</sup> Andrew Jacob, 'Chinese Artist Detained Before Tiananmen Anniversary' *The New York Times* (New York, 9 May 2014) <<http://sinosphere.blogs.nytimes.com/2014/05/09/chinese-artist-detained-before-tiananmen-anniversary/>> accessed 6<sup>th</sup> January 2016



internet.<sup>747</sup> This strict control of memory alludes to the oppressive consequences of establishing and maintaining a collective memory, thus identifying memory as a site of potential contestation. The potential for memory to act as a site of contestation has been recognised in many other contexts, culminating in the convergence of a diverse range of literatures. For the purposes of my argument it is helpful to focus on the convergence that takes place between literatures emanating from philosophy, psychology and the field of transitional justice.<sup>748</sup> I would argue that these literatures have created a renewed opportunity to explore interactions between historiography and resistance, as they enable us to reflect on how history writing (and memory) are put to work in specific situations. Or to be more precise, by using history and memory to explore past traumas these literatures have assigned memory a central role in processes of recovery. However, in doing so they have also brought to the fore a number of challenges pertaining to the scope of memory and how it ought to be balanced against forgetting.

One way of exploring the reach of memory involves turning to Plato's metaphor of the wax tablet, this is because in *Theaetetus* he proposed that:

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<sup>747</sup> The Guardian has published a number of interesting articles on this matter, for examples see: Jonathan Kaiman, 'Last Tiananmen Square Prisoner Jailed on Counter-Revolutionary Charges Freed' *The Guardian* (Beijing, 31 May 2013) <<https://www.theguardian.com/world/2013/may/31/tiananmen-square-prisoner-freed>> accessed 6<sup>th</sup> January 2016, Jonathan Kaiman, 'Tiananmen Square Online Searches Censored by Chinese Authorities' *The Guardian* (Beijing, 4 June 2013) <<https://www.theguardian.com/world/2013/jun/04/tiananmen-square-online-search-censored>> accessed 6<sup>th</sup> January 2016, Tania Branigan, 'Australian Artist Arrested or Marking Tiananmen Anniversary' *The Guardian* (Beijing, 3 June 2014) <<https://www.theguardian.com/world/2014/jun/02/australian-artist-guo-jian-arrested-tiananmen-anniversary>> accessed 6<sup>th</sup> January 2016 and Tom Phillips, 'At Least Six Missing After Clampdown on Human Rights Lawyers in China' *The Guardian* (Beijing, 21 July 2015) <<https://www.theguardian.com/world/2015/jul/21/human-rights-lawyers-china-missing-clampdown>> accessed 6<sup>th</sup> January 2016

<sup>748</sup> It is however important to acknowledge that my interaction with these literatures is limited in that I confine myself to questions pertaining to balancing acts of remembrance with conscious acts of forgetting. For an idea of the general direction I am moving in see: Frances C. Yates, *The Art of Memory* (The Bodley Head 2014), Anne Whitehead, *Memory* (Routledge 2009) and Alexander Barahona de Brito, Carmen González-Enríquez and Paloma Aguilar (eds), *The Politics of Memory: Transitional Justice in Democratising Societies* (Oxford University Press 2001).

... we have in our souls a block of wax, larger in one person, smaller in another, and of purer wax in one case, dirtier in another; in some men rather hard, in other rather soft, while in some it is of the proper consistency... Whatever is impressed upon the wax we remember and know so long as the image remains in the wax; whatever is obliterated or cannot be impressed, we forget and do not know.<sup>749</sup>

In defining memory in this way Plato suggested that there are not only memories of greater or lesser quality, but that there also exists a possibility of misremembering something when impressions on the block of wax in our souls becomes compromised. In doing so he allowed space for perception as well as a space for potential error to emerge, thus identifying some potentially treacherous and uncomfortable aspects of memory. We can combine these insights with additional challenges that emerge in relation to memory to include the difficulty of distinguishing truthful memory from false memory, as well as the broader problem of choosing whether to remember or forget in the first place. In doing so we can build up a picture of the complexity of memory and its interactions with not only the past, but also the present and the future.

For example, the problem of choosing what to remember and what to forget has been approached from a wide range of perspectives, with author Milan Kundera approaching the issue through the concept of lightness and Nietzsche's doctrine of the eternal recurrence. In his novel *The Unbearable Lightness of Being* Kundera brought into focus the proposition that 'we believe that the greatness of man stems from the fact that he bears his fate as Atlas bore the heaviness on his shoulders.'<sup>750</sup> In response to this, Kundera argued that:

... the doctrine of eternal return implies a perspective from which things appear other than as we know them: they appear without the mitigating circumstances of their transitory nature. This

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<sup>749</sup> Plato, 'Theaetetus' in *Plato: Complete Works* (M.J. Rev Levett and Myles Burnyeast (trs), Hackett Publishing Company 1997) 157, 212

<sup>750</sup> Milan Kundera, *The Unbearable Lightness of Being* (Michael Henry Heim tr, Faber and Faber 1995) 32

mitigating circumstance prevents us from coming to a verdict. For how can we condemn something that is ephemeral, in transit? In the sunset of dissolution, everything is illuminated by the aura of nostalgia, even the guillotine.<sup>751</sup>

To explore this issue further Kundera drew on Nietzsche's strain of the doctrine of eternal recurrence, building on the belief that Nietzsche's use of the idea of eternal recurrence did not form a 'metaphysical doctrine' but an 'ethical imperative: to live as if "the eternal hourglass of existence" will never be turned again, in order to impress each of our actions the weight of an inescapable responsibility.'<sup>752</sup> Nietzsche's version of recurrence implies a cyclical rather than linear understanding of temporality, one that casts doubt on the ability to clearly distinguish between past, present and future. For Kundera however, the important question that emerges here is whether or not this burden ought to be regarded as 'life's most intense fulfilment'<sup>753</sup> or whether it is in fact lightness that ought to be pursued. Kundera explored this dilemma through the characters of Tomas (who sought lightness) and Tereza (who sought heaviness), advancing a sympathetic account of both modes of existence whilst simultaneously arguing that we sadly live in 'a world that rests essentially on the non-existence of return.'<sup>754</sup> In an attempt to assess the relative advantages and disadvantages of each approach, Kundera introduced a discussion on how lightness and heaviness were understood by the pre-Socratic philosopher Parmenides and the composer Beethoven. In Parmenides he found an exploration of opposites where lightness was identified as being positive and heaviness was identified as being negative.<sup>755</sup> In contrast to this he found in Beethoven a belief in the positive qualities of heaviness, referring to his motif/introductory phrase 'Der schwer gefasste Entschulss' which translates

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<sup>751</sup> Milan Kundera, *The Unbearable Lightness of Being* (Michael Henry Heim tr, Faber and Faber 1995) 4

<sup>752</sup> Karl Lowith, 'Nietzsche's Doctrine of Eternal Recurrence' (1945) 6(3) *Journal of the History of Ideas* 273, 276

<sup>753</sup> Milan Kundera, *The Unbearable Lightness of Being* (Michael Henry Heim tr, Faber and Faber 1995) 5

<sup>754</sup> Milan Kundera, *The Unbearable Lightness of Being* (Michael Henry Heim tr, Faber and Faber 1995) 4

<sup>755</sup> Milan Kundera, *The Unbearable Lightness of Being* (Michael Henry Heim tr, Faber and Faber 1995) 5

as 'the difficult resolution.'<sup>756</sup> Kundera stated that in Beethoven 'the weighty [difficult] resolution is at one with the voice of Fate' because 'necessity, weight, and value are three concepts inextricably bound.'<sup>757</sup> As a result of this 'only necessity is heavy, and only what is heavy has value.'<sup>758</sup>

To add yet greater emphasis to his evaluation of the merits of lightness and weight, each new section of his novel is framed in such a way that it requires a reader to re-evaluate their reading of the sections that come before it, something that has led to a belief that the repetitive structure of this novel poses a direct challenge to a reader's processes of remembering, preventing them from progressing through the narrative in a linear fashion.<sup>759</sup> It is with such observations in mind that it is possible to regard not only the content but also the entire structure of *The Unbearable Lightness of Being* acts as a provocative exploration of issues of repetition/recurrence and remembering/forgetting. By adopting such a challenging structure Kundera created an opening where we able to explore our relationship with memory through a reflection on balancing the need to remember with the usefulness of forgetting. He also provided us with an opportunity to reflect on what is at stake when we attempt to balance remembering and forgetting, identifying the struggle that takes place when we seek to both preserve and destroy traces of memory. Furthermore, by adopting the medium of the novel to explore issues of memory Kundera alluded to some of the more wide-reaching challenges faced by memory in the present age. In an interview given in 1986 Kundera commented on the different aesthetics that we can uncover in novels, contrasting his approach against that adopted by the likes of Flaubert.<sup>760</sup> For Flaubert the author was meant to disappear whereas for Kundera his presence in his novels was essential. To illustrate this point Kundera argued that 'novelistic thought must be the contrary [to

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<sup>756</sup> Milan Kundera, *The Unbearable Lightness of Being* (Michael Henry Heim tr, Faber and Faber 1995) 31

<sup>757</sup> Milan Kundera, *The Unbearable Lightness of Being* (Michael Henry Heim tr, Faber and Faber 1995) 31

<sup>758</sup> Milan Kundera, *The Unbearable Lightness of Being* (Michael Henry Heim tr, Faber and Faber 1995) 31

<sup>759</sup> Hana Pichova, *The Art of Memory in Exile: Vladimir Nabokov and Milan Kundera* (Southern Illinois University Press 2001) 65

<sup>760</sup> Jason Weiss, 'An Interview with Milan Kundera' (1986) 8(3) *New England Review and Bread Loaf Quarterly* 405, 406

what Flaubert believed it to be]; it must engage the attention.<sup>761</sup> He regarded the need for novels to engage their readers directly as being all the more acute in the present in which he was living, arguing that we have become worryingly ‘distrustful regarding thought’ and now ‘cease to think.’<sup>762</sup> It is in this sense that he identified the novel as an important ‘form of mediation’, casting his engagement with Nietzsche’s doctrine of eternal recurrence as a timely ‘intellectual provocation.’<sup>763</sup> Through inserting his voice into his novels Kundera set himself up as an opponent to what he termed ‘journalistic thought’, a form of thought that emerges in a world where ‘we replace thought with the non-thinking of the mass media.’<sup>764</sup> He even went so far as to suggest that technological developments and the rapid accumulation of information that they have prompted has led to us becoming ‘encumbered by information’, meaning that we ‘no longer try to pose questions’<sup>765</sup> to the information that confronts us. Instead reflection is ‘something which modern society gives no place to anymore.’<sup>766</sup> By making statements such as these I would argue that Kundera drew attention to an increasingly pressing need to think carefully about how we select what is to be remembered and what is to be forgotten in an age where infinite memory would appear possible. Moreover, by highlighting to the role of the media in filtering, and in many ways circumventing, opportunities for reflection I would suggest that Kundera alludes to the increasingly edited nature of our engagements with our past, especially when they occur through memory.

Recent transformations in how and what we remember along with the challenges that they pose has prompted some scholars to return to what can be described as the *ethics* of memory, adding an additional layer of reflection to attempts to

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<sup>761</sup> Jason Weiss, ‘An Interview with Milan Kundera’ (1986) 8(3) New England Review and Bread Loaf Quarterly 405, 406

<sup>762</sup> Jason Weiss, ‘An Interview with Milan Kundera’ (1986) 8(3) New England Review and Bread Loaf Quarterly 405, 406

<sup>763</sup> Jason Weiss, ‘An Interview with Milan Kundera’ (1986) 8(3) New England Review and Bread Loaf Quarterly 405, 450

<sup>764</sup> Jason Weiss, ‘An Interview with Milan Kundera’ (1986) 8(3) New England Review and Bread Loaf Quarterly 405, 407

<sup>765</sup> Jason Weiss, ‘An Interview with Milan Kundera’ (1986) 8(3) New England Review and Bread Loaf Quarterly 405, 407

<sup>766</sup> Jason Weiss, ‘An Interview with Milan Kundera’ (1986) 8(3) New England Review and Bread Loaf Quarterly 405, 407

navigate the increasingly visible relationship between memory, history writing and national identity. Paul Ricoeur has argued that through its relationship with past events, memory 'is committed to truth, even if it is not a truthful relationship to the past.'<sup>767</sup> For Ricoeur this raised the question of how it is possible to speak of an ethics of memory, leading him to suggest that it is possible to answer this question by identifying how memory has 'two kinds of relation to the past.'<sup>768</sup> The first is a relation of knowledge whereas the second is a relation of action. For Ricoeur this is possible because:

...remembering is a way of *doing* things, not only with words, but with our minds; in remembering or recollecting we are exercising memory, which is a kind of action. It is because memory is an exercise that we can talk of the *use* of memory, which in turn permits us to speak of the *abuses* of memory.<sup>769</sup>

It is in the connection between uses and abuses of memory that ethical problems arise. In order to establish a strong connection between uses and abuses of memory Ricoeur turned to Plato's examination of *mimetike techne* (the art of imitating) and the distinction he made between *phantastike techne* (which is unreliable) and *eikastike techne* (which may be true). By drawing on this distinction Ricoeur observed how there are 'two possibilities of imitating or of evoking', one of which 'is fallible and unreliable' and the other of which 'could be reliable.'<sup>770</sup> Ricoeur used these observations to secure memory as something that needs to be approached with caution, suggesting that there are three ways of approaching memory from this perspective. Firstly, there is what he termed the 'pathological-

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<sup>767</sup> Paul Ricoeur, 'Memory and Forgetting' in Richard Kearney and Mark Dooley (eds), *Questioning Ethics: Contemporary Debates in Philosophy* (Routledge 1999) 5, 5

<sup>768</sup> Paul Ricoeur, 'Memory and Forgetting' in Richard Kearney and Mark Dooley (eds), *Questioning Ethics: Contemporary Debates in Philosophy* (Routledge 1999) 5, 5

<sup>769</sup> Paul Ricoeur, 'Memory and Forgetting' in Richard Kearney and Mark Dooley (eds), *Questioning Ethics: Contemporary Debates in Philosophy* (Routledge 1999) 5, 5

<sup>770</sup> Paul Ricoeur, 'Memory and Forgetting' in Richard Kearney and Mark Dooley (eds), *Questioning Ethics: Contemporary Debates in Philosophy* (Routledge 1999) 5, 5

therapeutic level', then there is the 'pragmatic level' and finally there is 'the properly ethical-political'<sup>771</sup> level. When attempting to evaluate how memory is both used and abused it is helpful to look at each of these levels more closely.

Ricoeur's pathological-therapeutic level of analysis is helpful when looking at how memory (both individual and collective) is formed in the face of conflict, as it roots abuses of memory in what we commonly identify as 'the wounds and scars of memory.'<sup>772</sup> In this context Ricoeur suggests that it is possible to identify not only an excess of memory in some areas and a dramatic absence of memory in others, but also excesses and absences of forgetting. In an attempt to assess the impact of these excesses and absences he drew on Freud's essays on mourning and working through. To start with, Ricoeur turned to Freud's *Remembering, Repetition, and Working Through*. In this essay Freud tackled 'the problems of resistance and repression in psychoanalysis'<sup>773</sup>, showing how repetition acts as an obstacle to remembering. He argued that if the tendency to repeat rather than remember is to be overcome that both patient and doctor must exercise patience and learn to reconcile themselves with what Ricoeur interprets to be 'the impossibility of going directly to the truth- if there is any truth concerning the past.'<sup>774</sup> For Freud the gradual acceptance of the impossibility of directly accessing the past constituted what he regarded as the work of memory. Ricoeur can be seen to build on the idea of the work of memory/memory as work through his engagements with another essay entitled *Mourning and Melancholia* and the idea of the work of mourning. Ricoeur joined the two ideas together, suggesting that 'the work of memory *is* a kind of mourning' and that 'mourning is a painful exercise in

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<sup>771</sup> Paul Ricoeur, 'Memory and Forgetting' in Richard Kearney and Mark Dooley (eds), *Questioning Ethics: Contemporary Debates in Philosophy* (Routledge 1999) 5, 6

<sup>772</sup> Paul Ricoeur, 'Memory and Forgetting' in Richard Kearney and Mark Dooley (eds), *Questioning Ethics: Contemporary Debates in Philosophy* (Routledge 1999) 5, 6

<sup>773</sup> Paul Ricoeur, 'Memory and Forgetting' in Richard Kearney and Mark Dooley (eds), *Questioning Ethics: Contemporary Debates in Philosophy* (Routledge 1999) 5, 6

<sup>774</sup> Paul Ricoeur, 'Memory and Forgetting' in Richard Kearney and Mark Dooley (eds), *Questioning Ethics: Contemporary Debates in Philosophy* (Routledge 1999) 5, 6

memory.<sup>775</sup> In doing so he identified mourning with the act of reconciling oneself with ‘the loss of some objects of love’, where objects of love can be people as well as ‘ideals of all kinds.’<sup>776</sup> Following Freud, Ricoeur distinguished mourning from melancholia by stating that while mourning preserves a person’s self-esteem/sense of oneself, melancholia destroys it.<sup>777</sup> When applied to absences and excesses of memory Ricoeur placed them both on the side of melancholia, claiming that ‘it is the wounds and scars of history which are repeated in this state of melancholia.’<sup>778</sup> It is for this reason that he claimed that ‘mourning and “working through” are to be brought together in the fight for the acceptability of memories’, indicating that ‘memories have not only to be understandable, they have to be acceptable.’<sup>779</sup> Memory and mourning are therefore both types of reconciliation.

Ricoeur’s second level of analysis, the pragmatic level, focused on what he referred to as ‘more conspicuous’<sup>780</sup> abuses of memory. For him this level of analysis forces us to ask why memory becomes subject to abuse. Ricoeur suggested that ‘diseases of memory are basically diseases of identity’ because both personal and

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<sup>775</sup> Paul Ricoeur, ‘Memory and Forgetting’ in Richard Kearney and Mark Dooley (eds), *Questioning Ethics: Contemporary Debates in Philosophy* (Routledge 1999) 5, 7

<sup>776</sup> Paul Ricoeur, ‘Memory and Forgetting’ in Richard Kearney and Mark Dooley (eds), *Questioning Ethics: Contemporary Debates in Philosophy* (Routledge 1999) 5, 7

<sup>777</sup> Paul Ricoeur, ‘Memory and Forgetting’ in Richard Kearney and Mark Dooley (eds), *Questioning Ethics: Contemporary Debates in Philosophy* (Routledge 1999) 5, 7

<sup>778</sup> Paul Ricoeur, ‘Memory and Forgetting’ in Richard Kearney and Mark Dooley (eds), *Questioning Ethics: Contemporary Debates in Philosophy* (Routledge 1999) 5, 7

<sup>779</sup> Paul Ricoeur, ‘Memory and Forgetting’ in Richard Kearney and Mark Dooley (eds), *Questioning Ethics: Contemporary Debates in Philosophy* (Routledge 1999) 5, 7

<sup>780</sup> Paul Ricoeur, ‘Memory and Forgetting’ in Richard Kearney and Mark Dooley (eds), *Questioning Ethics: Contemporary Debates in Philosophy* (Routledge 1999) 5, 7



collective identity 'is always presumed, claimed, [and] reclaimed.'<sup>781</sup> In coming to this conclusion Ricoeur singled out the question of 'who am I?', suggesting that our tendency to answer this question in the register of 'what we are'<sup>782</sup> acts as the root cause of abuses of memory. In doing so he identified three challenges that render attempts to answer the question of 'who am I?'<sup>783</sup> fragile and open to abuse. To start with Ricoeur identified 'the difficulty of preserving identity through time'<sup>784</sup>, linking the challenges of memory to challenges of narration. In an attempt to explore this challenge Ricoeur divided identity into 'idem identity' and 'ipse identity'.<sup>785</sup> The former refers to a sense of sameness in the face of the passage of time whereas the latter refers to a flexibility that enables an individual to deal with change.<sup>786</sup> The fragility of identity then emerges as we move between the two in an attempt to secure a stable identity through time. The second challenge he identified relates to the problem of the other and the perceived threat that they pose. According to Ricoeur 'this threat is felt as a wound which leaves scars', leading to a rejection of the other which then culminates in exclusion as 'a response to this threat coming from the other.'<sup>787</sup> Finally there is the problem posed by what he

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<sup>781</sup> Paul Ricoeur, 'Memory and Forgetting' in Richard Kearney and Mark Dooley (eds), *Questioning Ethics: Contemporary Debates in Philosophy* (Routledge 1999) 5, 7-8

<sup>782</sup> Paul Ricoeur, 'Memory and Forgetting' in Richard Kearney and Mark Dooley (eds), *Questioning Ethics: Contemporary Debates in Philosophy* (Routledge 1999) 5, 8

<sup>783</sup> Paul Ricoeur, 'Memory and Forgetting' in Richard Kearney and Mark Dooley (eds), *Questioning Ethics: Contemporary Debates in Philosophy* (Routledge 1999) 5, 8

<sup>784</sup> Paul Ricoeur, 'Memory and Forgetting' in Richard Kearney and Mark Dooley (eds), *Questioning Ethics: Contemporary Debates in Philosophy* (Routledge 1999) 5, 8

<sup>785</sup> Paul Ricoeur, 'Memory and Forgetting' in Richard Kearney and Mark Dooley (eds), *Questioning Ethics: Contemporary Debates in Philosophy* (Routledge 1999) 5, 9

<sup>786</sup> Paul Ricoeur, 'Memory and Forgetting' in Richard Kearney and Mark Dooley (eds), *Questioning Ethics: Contemporary Debates in Philosophy* (Routledge 1999) 5, 8

<sup>787</sup> Paul Ricoeur, 'Memory and Forgetting' in Richard Kearney and Mark Dooley (eds), *Questioning Ethics: Contemporary Debates in Philosophy* (Routledge 1999) 5, 8

regarded as 'the violence which is a permanent component of human relationships and interactions.'<sup>788</sup> This violence is identified as originating from the act of forming a collective identity, which is why Ricoeur cast collective identity as 'a kind of storage of... violent blows, wounds and scars.'<sup>789</sup>

Establishing identity as a core feature of abuses of memory enabled Ricoeur to advance a call for an ethics of memory, where narratives that seek to shape memory are placed under close scrutiny. For Ricoeur, the narrative facilitates connections between memory and forgetting by revealing how certain events are eliminated in the construction of plots that are used to build collective identities. This means that 'narratives, therefore, are at the same time the occasion for manipulation through reading and directing narratives, but also the place where a certain healing of memory can begin.'<sup>790</sup> So while the narrative form may reveal memory's sometimes untruthful relationship with the past, it is precisely from within this space of manipulation/manoeuvre that narrative enables memory to be ethical by ensuring that it is 'always possible to tell in another way' the narratives upon which collective identities rely.<sup>791</sup> Furthermore by leaving open the possibility of alternative accounts of identity to emerge, the exercise of memory via the narrative form can be thought of as 'an exercise in *telling otherwise*... in letting others tell their own history.'<sup>792</sup> This propensity to construct alternative narratives of identity is especially important when we think about how 'what is considered a founding event

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<sup>788</sup> Paul Ricoeur, 'Memory and Forgetting' in Richard Kearney and Mark Dooley (eds), *Questioning Ethics: Contemporary Debates in Philosophy* (Routledge 1999) 5, 8

<sup>789</sup> Paul Ricoeur, 'Memory and Forgetting' in Richard Kearney and Mark Dooley (eds), *Questioning Ethics: Contemporary Debates in Philosophy* (Routledge 1999) 5, 8

<sup>790</sup> Paul Ricoeur, 'Memory and Forgetting' in Richard Kearney and Mark Dooley (eds), *Questioning Ethics: Contemporary Debates in Philosophy* (Routledge 1999) 5, 9

<sup>791</sup> Paul Ricoeur, 'Memory and Forgetting' in Richard Kearney and Mark Dooley (eds), *Questioning Ethics: Contemporary Debates in Philosophy* (Routledge 1999) 5, 9

<sup>792</sup> Paul Ricoeur, 'Memory and Forgetting' in Richard Kearney and Mark Dooley (eds), *Questioning Ethics: Contemporary Debates in Philosophy* (Routledge 1999) 5, 9

in our collective memory may be a wound in the memory of the other.<sup>793</sup> Abuses of memory would therefore appear to deny the possibility of alternative narratives, condemning the other to a cycle of humiliating memories rather than allowing them the opportunity to extract the 'exemplarity dimension' of the event in question to move forward into the future.<sup>794</sup>

The third level of analysis advanced by Ricoeur is the ethical-political, where he introduced the question of whether or not there is a duty to remember. This question presents a challenge as through its concern with transmitting the meaning of the past to subsequent generations it engages in 'the construction of the future.'<sup>795</sup> In spite of the problems that this may pose, Ricoeur outlined four arguments in support of an ethical duty to remember, starting with the need to fight against the erosion of traces.<sup>796</sup> He then moved on to examine forgiveness and promising and how by preserving traces it is possible for an individual/collective to 'be liberated from the burden of the past.'<sup>797</sup> Thirdly he suggested that the idea of a duty to remember enables us to 'become heirs of the past' by preserving 'the relation of the present to the past.'<sup>798</sup> Finally he has argued that a duty to remember makes sure that we 'keep alive the memory of suffering over against the general

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<sup>793</sup> Paul Ricoeur, 'Memory and Forgetting' in Richard Kearney and Mark Dooley (eds), *Questioning Ethics: Contemporary Debates in Philosophy* (Routledge 1999) 5, 9

<sup>794</sup> Paul Ricoeur, 'Memory and Forgetting' in Richard Kearney and Mark Dooley (eds), *Questioning Ethics: Contemporary Debates in Philosophy* (Routledge 1999) 5, 9

<sup>795</sup> Paul Ricoeur, 'Memory and Forgetting' in Richard Kearney and Mark Dooley (eds), *Questioning Ethics: Contemporary Debates in Philosophy* (Routledge 1999) 5, 9

<sup>796</sup> Paul Ricoeur, 'Memory and Forgetting' in Richard Kearney and Mark Dooley (eds), *Questioning Ethics: Contemporary Debates in Philosophy* (Routledge 1999) 5, 10

<sup>797</sup> Paul Ricoeur, 'Memory and Forgetting' in Richard Kearney and Mark Dooley (eds), *Questioning Ethics: Contemporary Debates in Philosophy* (Routledge 1999) 5, 10

<sup>798</sup> Paul Ricoeur, 'Memory and Forgetting' in Richard Kearney and Mark Dooley (eds), *Questioning Ethics: Contemporary Debates in Philosophy* (Routledge 1999) 5, 10

tendency of history to celebrate the victors.<sup>799</sup> In doing so he alluded to the propensity for a type of history that counters ‘the history of success and victory’<sup>800</sup> to emerge. I would argue that Ricoeur’s proposed use of memory can be linked to Koselleck’s proposed use of context in the sense that while both memory and context can only too easily be associated with acts of prefiguration, both theorists advanced a means of avoiding this. By resisting the lure of final conclusions both Ricoeur and Koselleck advance a means of navigating past occurrences without becoming trapped within them. Nevertheless, while it is possible to see how such an approach to the preservation of memory/past contexts can lead to the production of more inclusive histories, it does however raise an additional question that needs to be addressed: If there is a duty to remember, is there also a duty to forget? To answer this question, it is helpful to turn to the field of transitional justice where it is possible to see the challenges outlined above played out in relation real life conflicts.

### iii. Shaping the Circulation of the Past: Rethinking Transitional Justice

Explorations of the relationship between memory, history writing and national identity formation and maintenance can be undertaken in a variety of contexts; with the emergence of the field of transitional justice making it possible to use law as a lens through which to examine this relationship more carefully. Transitional justice has been identified as ‘a field of policy making and an academic discipline’<sup>801</sup> that emerged during the 1980s. It is a field that embraces a number of disciplines including: anthropology, peace and conflict studies, international relations, psychology and sociology.<sup>802</sup> Interest in this area has grown rapidly, especially in the aftermath of periods of violent civil conflict. The increased interest in transitional

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<sup>799</sup> Paul Ricoeur, ‘Memory and Forgetting’ in Richard Kearney and Mark Dooley (eds), *Questioning Ethics: Contemporary Debates in Philosophy* (Routledge 1999) 5, 10

<sup>800</sup> Paul Ricoeur, ‘Memory and Forgetting’ in Richard Kearney and Mark Dooley (eds), *Questioning Ethics: Contemporary Debates in Philosophy* (Routledge 1999) 5, 10

<sup>801</sup> Francesca Lessa, *Memory and Transitional Justice in Argentina and Uruguay: Against Impunity* (Palgrave Macmillan 2013) 10

<sup>802</sup> Francesca Lessa, *Memory and Transitional Justice in Argentina and Uruguay: Against Impunity* (Palgrave Macmillan 2013) 10

justice has resulted in the development of a number of definitions, ranging from broad normative definitions to narrow operational ones.<sup>803</sup> For example the UN have advanced a definition of transitional justice, stating that it refers to:

...the full range of processes and mechanisms associated with a society's attempt to come to terms with a legacy of large-scale past abuses, in order ensure accountability, serve justice and achieve reconciliation. These may include both judicial and non-judicial mechanisms, with differing levels of international involvement (or not at all) and individual prosecutions, reparations, truth-seeking, institutional reform, vetting and dismissals, or a combination thereof.<sup>804</sup>

In this sense transitional justice can be seen as an attempt to establish a clean break between the present and the trauma of the past. However, Francesca Lessa has observed that by focusing on dissociating the present from the past to facilitate a more peaceful future, several potentially problematic dualisms have emerged, dualisms that introduce a dilemma between ideas of truth and justice. Examples of these dualisms include: restoration and retribution, amnesty and punishment, trials and forgiveness and national political order and international legal imperatives.<sup>805</sup> The dilemma of truth versus justice that emerges from these dualisms has recently come under a great deal of scrutiny, with many scholars in this area now seeking alternative ways of moving forward that do not require us to think of truth and justice as mutually exclusive terms.<sup>806</sup> Instead more holistic approaches to transitional justice have begun to surface, resulting in a proliferation of the use of amnesties, trials, truth commissions and reparations as a means of addressing past harms.

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<sup>803</sup> Stephanie R. Golob, 'Volver: The Return of/to Transitional Justice Politics in Spain' (2008) 9(2) *Journal of Spanish Cultural Studies* 127, 129

<sup>804</sup> UNSC, 'The Rule of Law and Transitional Justice in Conflict and Post-conflict Society' (23 August 2004) S/2004/616

<sup>805</sup> Francesca Lessa, *Memory and Transitional Justice in Argentina and Uruguay: Against Impunity* (Palgrave Macmillan 2013) 11

<sup>806</sup> For example, Alexander Wilde has suggested that we turn to the 'expressive dimension of transitional justice' so that we can focus on how collective memory is put to work in transitional societies. For more on this see: Alexander Wilde, 'Interruptions of Memory: Expressive Politics in Chile's Transition to Democracy' (1999) 31(2) *Journal of Latin American Studies* 473

Transformations within transitional justice can also be seen in relation to the three waves of transitional justice that have emerged in the European context. The first appeared in the aftermath of the Second World War, the second in relation to southern Europe (Greece, Portugal and Spain) and the third in relation to Latin America during the mid-1980s, spreading across Eastern Europe, Africa and Asia in the 1990s.<sup>807</sup>

Each wave of transitional justice has involved adopting distinct strategies for dealing with past acts of violence and repression. However, within these three waves it is nevertheless possible to trace the emergence of two distinct models of transitional justice, with each model representing 'the two intellectual wings that dominate the transitional justice movement.'<sup>808</sup> The first is the retribution model and the other is the reconciliation model.<sup>809</sup> While each model bears a very different focus, it has been suggested that they both nevertheless cast:

...coming to terms with the past as a democratisation imperative, by linking retribution and reconciliation to such outcomes as helping to consolidate the rule of law, enhancing democratic values, bringing dignity to those victimised by political violence or repression, purging the body politic of the memory of political trauma, and preventing history from repeating itself.<sup>810</sup>

For some, if the past goes unaddressed during the process of transition the democracy that results from the transition is presumed to be 'weak or flawed.'<sup>811</sup>

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<sup>807</sup> For more discussion on this see: Alexander Barahona de Brito, Carmen González-Enríquez and Paloma Aguilar, 'Introduction' in Alexander Barahona de Brito, Carmen González-Enríquez and Paloma Aguilar (eds), *The Politics of Memory and Democratisation* (Oxford University Press 2003) 3-5

<sup>808</sup> Omar G. Encarnación, *Democracy Without Justice in Spain: The Politics of Forgetting* (University of Pennsylvania Press 2014) 9

<sup>809</sup> A key example of the retribution model can be seen in the Nuremburg Trials whereas a key example of the reconciliation model can be seen in the South African Truth and Reconciliation Commission.

<sup>810</sup> Omar G. Encarnación, *Democracy Without Justice in Spain: The Politics of Forgetting* (University of Pennsylvania Press 2014) 9

<sup>811</sup> Omar G. Encarnación, *Democracy Without Justice in Spain: The Politics of Forgetting* (University of Pennsylvania Press 2014) 9

This belief can be seen to stem from growing discussions on the idea of a right to truth, where truth telling is construed as a condition of securing a remedy.<sup>812</sup> For example the retribution model focuses on promoting prosecution and strengthening the rule of law 'by boosting the principle of equality under the law and due process for all parties in society.'<sup>813</sup> According to advocates of this model, 'trials not only enforce moral norms, they also drive home the point about the consequences of wrongdoing.'<sup>814</sup> The prosecution of wrongdoers would therefore seem to play an important role in grounding the democratic values of a society emerging from a repressive regime. In contrast to this, the reconciliation model focuses on the construction of an official record of human rights abuses. By focusing on the construction of an official account of past events the reconciliation model advocates the use of full or partial amnesties. In this context amnesties are used strategically as 'the driving force of reconciliation resides in truth-telling itself, as a means to shift attention in the dispensing of justice against the old regime away from the perpetrators of human rights abuses and toward their victims.'<sup>815</sup> Advocates of this approach emphasise not only the therapeutic aspects of truth-telling but also what they regard to be the didactic potential of the past, arguing that if we are able to master the past we are able to avoid repeating it. Nevertheless, while each approach to transitional justice may differ in their preferred means of securing a peaceful future (with one focusing on the perpetrators of past abuses and the other on their victims), what has generally been agreed upon is that

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<sup>812</sup> Unfortunately due to the demands of brevity I am unable to provide a fuller account of the idea of a right to truth and the debates surrounding truth telling as a form of reparations. For an overview of this area refer to: Margaret Urban Walker, 'Truth Telling as Reparations' (2010) 41(4) *Metaphilosophy* 525, UNCHR, 'Revised set of basic principles and guidelines on the right to reparation for victims of gross violations of human rights and humanitarian law' (24 May 1996) UN Doc E/CN.4/Sub.2/1996/17 and UNCHR, 'Promotion and Protection of Human Rights: Study on the Right to Truth' (8 February 2006) UN Doc E/CN.4/2006/91.

<sup>813</sup> Omar G. Encarnación, *Democracy Without Justice in Spain: The Politics of Forgetting* (University of Pennsylvania Press 2014) 10

<sup>814</sup> Omar G. Encarnación, *Democracy Without Justice in Spain: The Politics of Forgetting* (University of Pennsylvania Press 2014) 10

<sup>815</sup> Omar G. Encarnación, *Democracy Without Justice in Spain: The Politics of Forgetting* (University of Pennsylvania Press 2014) 11

transitional justice is something that occurs alongside processes of democratisation in the aftermath of repressive regimes.<sup>816</sup>

The need to find a way of mediating between personal memory, collective memory and historical memory in the aftermath of violent conflict along with a growing interest in human rights violations has resulted in the proliferation of memory laws.<sup>817</sup> It has been suggested that such laws are crafted with the aim of 'addressing questions of justice and harm', defining 'who is to blame for the violence and who is a deserving victim.'<sup>818</sup> As a result of this, Michael Humphrey has suggested that laws tasked with regulating memory have three distinct elements. The first element relates to 'a statement of official collective memory', while the second involves 'the criteria for inclusion and exclusion in the new social and political order.'<sup>819</sup> Finally there must then be 'a political consensus which underpins law's legitimacy and endurance.'<sup>820</sup> Each of these elements can be seen to direct themselves towards the construction of a clear victim that can then be used to control the circulation of memory through the imposition of a homogenised official collective memory. Humphrey has suggested that this official collective memory is then often used to 'constitute a collective identity and membership

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<sup>816</sup> For a detailed discussion of different approaches to the treatment of memory in the aftermath of violent conflict see: Alexandra Barahona De Brito, Carmen González-Enríquez and Paloma Aguilar (eds), *The Politics of Memory and Democratisation* (Oxford University Press 2001)

<sup>817</sup> Madeline Davis has distinguished between personal, collective and historical memory by stating that while personal memory refers to individual memory, collective memory can be seen to denote 'public, social, and cultural practices and discourses'. In contrast to both of these historical memory is identified with 'official records and the writing of history.' For more on this see: Madeline Davis, 'Is Spain Recovering its Memory? Breaking the Pacto del Olvido' (2005) 27(3) *Human Rights Quarterly* 858, 866-867.

<sup>818</sup> Michael Humphrey, 'Law, Memory and Amnesty in Spain' (2014) 13(3) *Macquarie Law Journal* 25, 26

<sup>819</sup> Michael Humphrey, 'Law, Memory and Amnesty in Spain' (2014) 13(3) *Macquarie Law Journal* 25, 27

<sup>820</sup> Michael Humphrey, 'Law, Memory and Amnesty in Spain' (2014) 13(3) *Macquarie Law Journal* 25, 27



based on ideas about cause, blame and the deserving victim.<sup>821</sup> This process would seem to involve precisely the kind of flattening of personal experience that Koselleck was fearful of, as it grounds collective identity in a process of suppression and exclusion. It is perhaps for this reason that some critics of transitional justice have commented on how while directed towards peace, transitional justice can only too easily come to look a lot like revenge.<sup>822</sup> For me, one of the central challenges of transitional justice can be found in the assumptions that are made with regards to the nature and reach of history and memory. For example, while the retribution model presumes that it is possible to neatly distinguish between the concerns of the past, present and future the reconciliation model would appear to cast history as something that exists in the singular. By this I mean to say that the reconciliation model would seem to task itself with replacing one all-encompassing narrative with another seemingly more palatable one. I would argue that by allowing such assumptions about the nature of history and its writing to be incorporated into processes of transitional justice, advocates of each model have come to rely on the grand narrative form to add strength to the normative dimension of their claims. As I have suggested in previous chapters, the grand narrative form can be closely associated with the masking of power dynamics and less visible conflicts. So rather than securing a peaceful transition, I would suggest that these models of transitional justice bear the potential to allow conflicts and imbalances of power to persist beyond the transitions that they are tasked with facilitating. It is for this reason that Spain's rejection of established approaches to transitional justice presents itself as an interesting opportunity to not only re-problematise the challenges faced by societies that are seeking to break free from a traumatic past, but also revisit the meeting place of law, historiography and memory.<sup>823</sup>

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<sup>821</sup> Michael Humphrey, 'Law, Memory and Amnesty in Spain' (2014) 13(3) *Macquarie Law Journal* 25, 27

<sup>822</sup> For a more detailed overview of some of the arguments advanced by critics of transitional justice see: Omar G. Encarnación, *Democracy Without Justice in Spain: The Politics of Forgetting* (University of Pennsylvania Press 2014) 13-16

<sup>823</sup> My engagement with Spain's transition to democracy is made at the level of methodological reflection rather than at the level of the event. By this I mean to say that rather than attempting the daunting task of providing an exhaustive account of Spain's transition I aim to use Spain's rejection of traditional transitional justice to illustrate the arguments that I have made in relation to law's interactions with historiography and resistance. For an example of the rich literatures that provide a more detailed account this complex process see: Gregorio Alonso and Diago Muro

Instead of instituting a public strategy for addressing past atrocities in the immediate aftermath of Francisco Franco's death, silence was chosen instead. Spain's decision to set the past to one side and to focus on the future has been met with mixed reactions, both domestically and internationally. While some celebrate the peaceful transition that Spain has made to democracy, others are suspicious of the potential cracks that lay beneath the surface of her remarkable transformation into a world leader in human rights issues. In order to evaluate Spain's somewhat unorthodox transition to democracy it is important to think about some of the factors that underpinned the decision to turn away from the past rather than towards it. To do this it is useful to remind ourselves of the very real threat posed by longstanding internal divides and how these divides shaped attitudes towards the past. After the collapse of the dictatorship of Miguel Primo de Rivera and the abdication of King Alfonso XIII in 1930, the rivalry between right-wing Nationalist and left-wing Republican parties grew, culminating in the army removing the Republicans from power in 1936. The civil war that then followed can be seen to have drawn on numerous tensions already existing within Spain, many of which related not only to uneven levels of development and the cultural divides that resulted from them, but also the broader influence of the Catholic Church and the attitude of the Military. Franco's victory in 1939 and his resulting dictatorship do not therefore mark the start of Spain's challenging past; instead Franco's rise to power can be thought of as one of a series of outward manifestations of internal discontent.<sup>824</sup> For example Paloma Aguilar has commented on the especially fragile nature of Spain's transition from dictatorship to democracy, observing how long standing internal political instability resulted in a growing culture of risk

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(eds), *The Politics and Memory of Democratic Transition: The Spanish Model* (Routledge 2011).

<sup>824</sup> Again due to the demands of brevity I am unable to do justice to the full complexities of the Spanish civil war and Franco's resulting dictatorship, instead I am only able to summarise points that are most pertinent to my broader argument. For some examples of the rich literatures that engage with this more fully see: Raymond Carr and Juan Pablo Fusi, *Spain: Dictatorship to Democracy* (Allen & Unwin 1987), Paul Preston, *The Spanish Civil War: Reaction, Revolution and Revenge* (Harper Perennial 2006), Gerald Brenan, *The Spanish Labyrinth: An Account of the Social and Political Background of the Spanish Civil War* (Cambridge University Press 2015) and Katherine O Stafford, *Narrating War in Peace: The Spanish Civil War in the Transition and Today* (Palgrave Macmillan 2016).

aversion.<sup>825</sup> This culture of risk aversion then shaped Spain's attitude towards transitional justice, leading to a general reluctance to publicly acknowledge its violent past.<sup>826</sup> It was not until 2002 that the Spanish parliament formally condemned Franco's dictatorship, something that is indicative of the 'fear [that] was present throughout the transition.'<sup>827</sup>

During Spain's transition period both the extreme left and right continued to pose a credible threat to peace, which is perhaps why those involved in negotiating the transition were so anxious to draw a line under past acts of violence and repression. Aguilar has suggested that 'a curtain was drawn over the past in the name of "national reconciliation".'<sup>828</sup> However while this curtain may have acted to facilitate the much longed for free elections of 1977 (the first in 41 years), it did not necessarily bring an end to the conflict between the extreme right and left. Political violence continued for many years to come, with both left and right-wing terrorist attacks claiming lives not only during the transition period itself but also after it.<sup>829</sup> It is important to bear all of this in mind when reflecting on official approaches to Spain's past, as while visible attempts were made to stifle engagements with past traumas through the imposition of a forced silence, these attempts were not necessarily made with further repression in mind. Instead it is possible to see how pragmatic concerns over the use of the past as a weapon in ongoing political

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<sup>825</sup> Paloma Aguilar, 'Justice, Politics, and Memory in Spanish Transition' in Alexandra Barahona De Brito, Carmen González-Enríquez and Paloma Aguilar (eds), *The Politics of Memory and Democratisation* (Oxford University Press 2001) 92, 94

<sup>826</sup> For a more detailed overview of Spain's rejection of traditional transitional justice see: Omar G. Encarnación, *Democracy Without Justice in Spain: The Politics of Forgetting* (University of Pennsylvania Press 2014) 16-18

<sup>827</sup> Paloma Aguilar, 'Justice, Politics, and Memory in Spanish Transition' in Alexandra Barahona De Brito, Carmen González-Enríquez and Paloma Aguilar (eds), *The Politics of Memory and Democratisation* (Oxford University Press 2001) 92, 94

<sup>828</sup> Paloma Aguilar, 'Justice, Politics, and Memory in Spanish Transition' in Alexandra Barahona De Brito, Carmen González-Enríquez and Paloma Aguilar (eds), *The Politics of Memory and Democratisation* (Oxford University Press 2001) 92, 96

<sup>829</sup> For a more detailed account of such violence see: Rafael Leonisio, Fernando Molina and Diego Muro (eds), *ETA's Terrorist Campaign: From Violence to Politics, 1968-2015* (Routledge 2016)

struggles were allowed to shape Spain's approach to its history. It is only now that many of these threats have subsided that it is possible to reflect on the broader consequences of allowing pragmatic concerns to take priority over the long-term goals of recovery.

iv. Writing History, Writing Law: Confronting Collective Memory

One way of evaluating the broader consequences of Spain's initial rejection of its past involves reflecting on the extent to which Spain has been able to forget its past by looking at how those seeking redress have turned to alternative outlets of expression. By shifting my attention to the persistence of memory in the face of institutionalised forgetting I hope to reveal how official accounts of the past (including those that embrace silence) will always result in the emergence of alternative accounts. Or to put it another way, by drawing attention to what is at stake when we write our history I hope to draw attention to the possible resistance that can emerge in relation to it. In the Spanish context, the specific legal interventions around which issues of memory and history writing can be seen to pivot force us to confront the consequences of law's attempt to regulate the past. More specifically they provide us with a means of revisiting the meeting place of law, historiography and memory, allowing us to rethink law's role in not only remedying historical harms but also in the construction and maintenance of stable national identities. They also provide us with an opportunity to acknowledge the impact of law's continued preoccupation with linear temporality on everyday lives and see how law's linearity struggles to cope with the realities of everyday life.

To examine the issues that emerge when law is assigned the task of mediating our access to the past I will frame my discussions using the Amnesty Law of 1977 (*Ley* 46/1977) and the Historical Memory Law of 2007 (*Ley* 52/2007). I have chosen to confine my discussions to these two provisions because of how they allow me to focus on the role of law in the construction of a particular sense of national identity/community through the imposition (and modification) of a collective memory rooted in an official interpretation of past events.<sup>830</sup> For example the

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<sup>830</sup> While earlier Amnesty Decrees were made in July 1976 and March 1977, the Amnesty Law of 1977 and the Historical Memory Law of 2007 are more relevant to my argument as they are both products of a diverse democratically elected body and can therefore be seen to represent official attempts to regulate the circulation of the past during Spain's transition to democracy. For a more detailed account of

Amnesty Law of 1977 is worthy of note because of the ways in which it has been associated with promoting a singular vision of Spain by initiating a process of mass public forgetting. Instead of seeking to establish an official record of past atrocities or providing a framework through which to punish/purge perpetrators of past crimes from public office, the Amnesty Law of 1977 focused on rehabilitation and reform. Some have characterised this focus on rehabilitation as a 'third route toward impunity.'<sup>831</sup> Rather than deriving from a unilateral decision taken by an authoritarian regime or the outcome of a public examination of past atrocities, the impunity that emerged as a result of the Amnesty Law of 1977 emanated from the agreement of a wide political cross-section of those involved in the transition.<sup>832</sup> It is this that marks Spain out from other post-transition democracies. Instead of enduring the pain of confronting the past in its entirety, Spain appears to have made its transition to democracy by agreeing to focus its efforts on the future by attempting to minimise the impact of the past on the present. In doing so it has established a strong national identity rooted in (a somewhat sanitised) collective memory. However, while it is possible to see how the decision to side-line the past in favour of the future has provided Spain with an overarching sense of unity, such a conscious decision to forget has nevertheless proved to be highly controversial (both domestically and internationally), especially given the breadth of the amnesty offered by the 1977 Act.<sup>833</sup>

Article 1 of the 1977 Amnesty Law granted amnesty for all criminal action undertaken for political reasons (regardless of the outcome), and Article 2 even

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these provisions see: Omar G. Encarnación, *Democracy Without Justice in Spain: The Politics of Forgetting* (University of Pennsylvania Press 2014)

<sup>831</sup> Luc Huyse, 'Justice After Transition: On the Choices Successor Elites Make in Dealing with the Past' in Neil J. Kritz (ed), *Transitional Justice: How Emerging Democracies Reckon with Former Regimes* (United States Institute of Peace 2004) 104, 338

<sup>832</sup> It is however important to remember that this blanket amnesty was not endorsed by all. Ironically, the strongest opponents of the amnesty were drawn from the far right. For them the amnesty presented a challenge to the rule of law. For more on this see: Omar G. Encarnación, *Democracy Without Justice in Spain: The Politics of Forgetting* (University of Pennsylvania Press 2014) 73

<sup>833</sup> For an example of such a criticism see: Rafael Escudero, 'Road to Impunity: The Absence of Transitional Justice Programs in Spain' (2014) 36(1) *Human Rights Quarterly* 123

went so far as to provide amnesty to public servants and law enforcement officials that engaged in such acts. As a result of this the 1977 Amnesty Law can be seen to have acted as one of the mechanisms through which it was possible for Spain to establish an official history where the question of blame was spread equally amongst all involved. This formal mechanism for securing a blanket amnesty directed at levelling off issues of culpability was then consolidated by a broader agreement amongst politicians to leave the past in the past, something which resulted in the emergence of what many have come to refer to as the Pact of Forgetting/Oblivion (*el pacto del olvido*).<sup>834</sup> The tacit agreement to not draw on past suffering when attempting to advance arguments in the present spawned a culture of public forgetfulness, where open discussions of life under Franco were muffled by calls for unity. It is in this sense that I would argue that law was used to provide a framework/lens through which to read Spain's past, creating issues of intelligibility and compatibility with regards to individual memories that were either unwilling or unable to conform to the collective memory upon which Spanish national identity was being re-built.<sup>835</sup> Individual memories of past traumas were excluded from the collective memory, leaving gaps in accounts of Spain's history.

Rafael Escudero has identified three key features of the Spanish transition, the first of which relates to the agreement of both Franco supporters and members of the democratic opposition to 'remain silent about the crimes, their authors, and, more generally, everything that happened during the dictatorship.'<sup>836</sup> This effectively meant banning discussions of the dictatorship from 'academic, cultural, social, and political life.'<sup>837</sup> Secondly Escudero has suggested that the Spanish approach indicates a rejection of attempts to vindicate the past, creating 'an ideological and

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<sup>834</sup> The Pact of Forgetting is not a formal pact, instead it can be said to allude to an approach to transition that bypasses processes that are traditionally associated with transitional justice.

<sup>835</sup> For an interesting discussion on the importance of social ties in relation to the quality of public life in Spain see: Robert M. Fishman, *Democracy's Voices: Social Ties and the Quality of Public Life in Spain* (Cornell University Press 2004)

<sup>836</sup> Rafael Escudero, 'Road to Impunity: The Absence of Transitional Justice Programs in Spain' (2014) 36(1) Human Rights Quarterly 123, 132

<sup>837</sup> Rafael Escudero, 'Road to Impunity: The Absence of Transitional Justice Programs in Spain' (2014) 36(1) Human Rights Quarterly 123, 132

political middle ground... between dictatorship and democracy.<sup>838</sup> Finally Escudero has argued that the Pact of Forgetting was rooted in a desire to absolve those responsible for committing the gravest of offences of any blame to ensure their co-operation with the democratising process.<sup>839</sup> All of these observations point towards an attempt to cultivate a sense of collective guilt where any political advantage to be gained from recalling the events of the past is nullified. The gaps in Spain's history that result from forced silences would therefore seem to be just as important, if not more important, than any official accounts of Spain's past. By bracketing off past wrongs and placing them beyond the reach of official memory, the 1977 Amnesty Law served to circumvent the dialogues that emerge out of processes of history writing. In doing so it projected a very narrow understanding of Spain's recent past into the future with the aim of securing a sense of stability. The cost of this stability was high, with the Pact of Forgetting coming to be regarded as a significant challenge to transitional justice culture. The indictment of former Chilean dictator Augusto Pinochet only added to growing concerns over Spain's unaddressed past, as it was Spanish judges Baltasar Garzón Real and Manuel García Castellón that led the way in examining Pinochet's abuses.

Madeline Davis has commented on how Spain's involvement Pinochet's indictment resulted in claims of 'moral hypocrisy'.<sup>840</sup> Such claims were then given yet greater weight when in 2002 the United Nations Working Group on Enforced or Involuntary Disappearances listed Spain as a country that was yet to address issues of forcible detention and disappearances. The issue had been brought to their attention by the Spanish nongovernmental organisation the Association for the Recovery of Historical Memory (*Asociación para la Recuperación de la Memoria Histórica*), who had begun to coordinate exhumations and investigations into locating mass graves containing the remains of Republicans that had disappeared during Franco's dictatorship.<sup>841</sup> The Association for the Recovery of Historical Memory had tasked

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<sup>838</sup> Rafael Escudero, 'Road to Impunity: The Absence of Transitional Justice Programs in Spain' (2014) 36(1) Human Rights Quarterly 123, 132

<sup>839</sup> Rafael Escudero, 'Road to Impunity: The Absence of Transitional Justice Programs in Spain' (2014) 36(1) Human Rights Quarterly 123, 132-133

<sup>840</sup> For a more detailed account of these criticisms see: Madeline Davis, 'Is Spain Recovering its Memory? Breaking the Pacto del Olvido' (2005) 27(3) Human Rights Quarterly 858.

<sup>841</sup> For a more detailed account of the trend towards recovering Spain's memory through mass exhumations see: Carlos Jerez-Farrán and Samuel Amago (eds),

itself with drawing attention to not only those that were killed between 1939 and 1975, but also those that were discriminated against out of revenge for their opposition during the civil war and other groups that did not conform to the values of Franco's regime.<sup>842</sup> While their efforts were initially marginalised, after the victory of the Partido Socialista Obrero Español in March 2004 attitudes began to change. It was perhaps in light of both international and domestic pressures such as these that 2006 was declared to be the 'Year of Historical Memory'<sup>843</sup>, marking an important step in re-visiting Spain's traumatic past. This move towards recovering Spain's memory of life (and death) under Franco was then consolidated in the Historical Memory Law of 2007, where a conscious attempt was made to address imbalances in memory and commemoration. Issues of human rights were placed at its core, with the writing of a more inclusive and transparent history being identified as crucial to Spain's journey forward.

Michael Humphrey has commented on how the Historical Memory Law of 2007 was tasked with shattering 'the silence on the scale of past repression', allowing 'the private memory of traumatised victims of the Civil War and dictatorship to contest the *consenso* underpinning the Amnesty Law of 1977 by pluralising memory.'<sup>844</sup> He has however also observed how despite promoting a more open approach to the past, issues of impunity remained unchallenged.<sup>845</sup> Instead emphasis was placed on constructing 'the victim as the *victim of human rights abuse*'<sup>846</sup>, with Articles 5 to 10 focusing on providing victims and their families with economic, social and medical assistance. As well as securing the provision of

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*Unearthing Franco's Legacy: Mass Graves and the Recovery of Historical Memory in Spain* (University of Notre Dame Press 2010).

<sup>842</sup> For a more detailed account of the work of the Association for the Recovery of Historical Memory see: <http://memoriahistorica.org.es/who-are-we/>

<sup>843</sup> 2006 was declared as the 'Year of Historical Memory' as a result of Law 24/2006.

<sup>844</sup> Michael Humphrey, 'Law, Memory and Amnesty in Spain' (2014) 13(3) *Macquarie Law Journal* 25, 35

<sup>845</sup> While the decisions of military tribunals and councils of war during Franco's dictatorship were declared illegitimate, their judgements were not annulled (Article 3.1, 3 and 3.2). The question of securing criminal convictions was also sidestepped.

<sup>846</sup> Michael Humphrey, 'Law, Memory and Amnesty in Spain' (2014) 13(3) *Macquarie Law Journal* 25, 36



assistance to victims of past abuses Article 1.2 of the Historical Memory Law of 2007 signals a move to conform with the goals of reconciliation based models of transitional justice by promoting the preservation of documents pertaining to Franco's dictatorship in public archives, something that is extended by Articles 20 to 22 to include private archives and the establishment of The Documentary Centre on the Historical Memory in Salamanca. The move towards acknowledging the role that may be performed by archives is an interesting one, especially when thought of in relation to broader academic literatures (such as those referred to in the introduction to Part I). If construed as 'a space of memorialisation or containment (or both)'<sup>847</sup> it is possible to see how via archival practices relationships in Spain are set to be mediated and forms of governance produced. Sara Kendall has suggested that archives that emerge in the aftermath of civil unrest via legal intervention can be regarded as both practice and place in that they seek to 'contain a material history of atrocity within law while presenting the place of justice and redress in particular institutional locations.'<sup>848</sup> For her:

...the very process of recording information entails acting upon it, rendering it available and opening it to future use in ways that build upon the intervention of the inscription. Inscription is an act of interpretive framing and selection, enabling relationships to be established between different elements and across space, containing and consolidating as well as opening the inscribed to new possibilities.<sup>849</sup>

The significance of the archive in relation to process of inscription is made all the clearer by Ann Stoler and her belief that archival documents are 'active, generative

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<sup>847</sup>Sara Kendall, 'Archiving Victimhood: Practices of Inscription in International Criminal Law' in Stewart Motha and Honni van Rijswijk (eds), *Law, Memory, Violence: Uncovering the Counter-Archive* (Routledge 2016) 156, 156

<sup>848</sup>Sara Kendall, 'Archiving Victimhood: Practices of Inscription in International Criminal Law' in Stewart Motha and Honni van Rijswijk (eds), *Law, Memory, Violence: Uncovering the Counter-Archive* (Routledge 2016) 156, 156

<sup>849</sup> Sara Kendall, 'Archiving Victimhood: Practices of Inscription in International Criminal Law' in Stewart Motha and Honni van Rijswijk (eds), *Law, Memory, Violence: Uncovering the Counter-Archive* (Routledge 2016) 156, 159

substances with histories, as documents with itineraries of their own.<sup>850</sup> So when thought of as a conscious move away from public forgetfulness it is possible to identify the archive as a space where law may be able to re-evaluate its relationship with history and its writing.

In addition to the creation of dedicated archives, Articles 11 to 14 build on processes of recognition by promoting activities concerned with locating mass graves and identifying remains, however it is important to note that such activities have been framed as being private in nature. The decision to characterise the identification of past victims as a private act can be contrasted against Article 15's treatment of monuments celebrating the military coup of 1936, the civil war and Franco's dictatorship. Here a decision was made to only preserve buildings and monuments of particular artistic value in an attempt to remove the symbolism of Francoism from the Spanish landscape. However, the continued presence of the remains of Franco and Primo de Rivera's at Valle de los Caídos would appear to stand at odds with this, maintaining a sense of ongoing asymmetry in terms of public presence between Nationalists and Republicans. The significance of this asymmetry can be seen when the continued prominence of Valle de los Caídos is read through Koselleck's work on monuments and other marks of the past. For Koselleck, memorials not only identify the dead. They also identify those that survive.<sup>851</sup> In doing so they not only evoke a remembrance of the dead but also questions surrounding the justification of their deaths. As a consequence of this the survivors that observe memorials 'are themselves put in a position where they are offered an identity: an offer to which they should or must act.'<sup>852</sup> After all, the 'war memorial does not only commemorate the dead; it also compensates for lost lives

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<sup>850</sup> Ann Laura Stoler, *Along the Archival Grain: Epistemic Anxieties and Colonial Common Sense* (Princeton University Press 2010) 1

<sup>851</sup> Reinhart Koselleck, 'War Memorials: Identity Formations of the Survivors' in *The Practice of Conceptual History: Timing History, Spacing Concepts* (Todd Presner tr, Stanford University Press 2002) 285, 287

<sup>852</sup> Reinhart Koselleck, 'War Memorials: Identity Formations of the Survivors' in *The Practice of Conceptual History: Timing History, Spacing Concepts* (Todd Presner tr, Stanford University Press 2002) 285, 287

so as to render survival meaningful.<sup>853</sup> For Koselleck, 'the death that has taken place becomes fully a function of the victory that is supposed to be permanently set by means of a historical screen.'<sup>854</sup> This means that when we interact with memorials 'we are dealing with a conscious exclusion of others by obfuscation or silence- a practice more or less observed in all victory memorials.'<sup>855</sup> It is for this reason that memorials have tended to involve the separation of enemies, as 'enmity is supposed to reach even beyond death so as not to forfeit the identity of one's own cause.'<sup>856</sup> Koselleck has concluded that as a result of this continued enmity 'equality in death is revoked in favour of an equality safeguarding national homogeneity.'<sup>857</sup> His suggestion that 'war memorials refer to a temporal vanishing line in the future in which the identity of the particular community of agents who had the power to commemorate the dead with monuments was supposed to be safeguarded' poses a serious challenge to the attempts that have been made to rehabilitate the Valle de los Caídos. As while efforts have been made to reframe the site as a monument to democracy and place of reflection, for many it continues to operate as a spectacle of Spain's painful past. As a visual signature, war memorials have tended to be associated with the formation and maintenance of nation-states, performing a function in the transmission of tradition through the act of ascribing collective meaning to individual tragedy. The Valle de los Caídos can therefore be read as a particularly challenging site that can neither be forgotten/rejected as a site of past wrongs or embraced as a site of collective mourning and remembrance. Those concerned with achieving both political and

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<sup>853</sup> Reinhart Koselleck, 'War Memorials: Identity Formations of the Survivors' in *The Practice of Conceptual History: Timing History, Spacing Concepts* (Todd Presner tr, Stanford University Press 2002) 285, 287

<sup>854</sup> Reinhart Koselleck, 'War Memorials: Identity Formations of the Survivors' in *The Practice of Conceptual History: Timing History, Spacing Concepts* (Todd Presner tr, Stanford University Press 2002) 285, 308

<sup>855</sup> Reinhart Koselleck, 'War Memorials: Identity Formations of the Survivors' in *The Practice of Conceptual History: Timing History, Spacing Concepts* (Todd Presner tr, Stanford University Press 2002) 285, 308

<sup>856</sup> Reinhart Koselleck, 'War Memorials: Identity Formations of the Survivors' in *The Practice of Conceptual History: Timing History, Spacing Concepts* (Todd Presner tr, Stanford University Press 2002) 285, 314

<sup>857</sup> Reinhart Koselleck, 'War Memorials: Identity Formations of the Survivors' in *The Practice of Conceptual History: Timing History, Spacing Concepts* (Todd Presner tr, Stanford University Press 2002) 285, 314

social reconciliation will therefore need to think carefully about the physical remnants of Franco's regime when attempted to unsilenced the past.

Georgina Blakeley has suggested that while the Pact of Forgetting can be associated with attempts to secure political reconciliation, the Historical Memory Law of 2007 can be associated with an attempt to secure social reconciliation.<sup>858</sup> However Spain's continued reluctance to pursue perpetrators of past atrocities operates as an ongoing source of criticism, as while in 2008 Baltasar Garzón attempted to pursue a criminal investigation into crimes committed during the dictatorship, he then went on to be accused of abusing his authority by committing the crime of prevarication.<sup>859</sup> Official attempts to engage with individual memories of repression and violence would therefore seem to be plagued by ongoing concerns about fracturing Spain's hard fought for unity. I would argue that both the 1977 Amnesty Law and the Historical Memory Law of 2007 raise important questions with regards to the extent to which law can be used to regulate both private and public engagements with the past. By bracketing off the trauma of Franco's dictatorship and then attempting to re-introduce it gradually to avoid direct confrontation we are left with the challenge of determining how we ought to characterise the types of history that emerge when official accounts are deliberately left blank. When attempting to address questions such as these I think it is helpful to return to Kundera's proposition that the act of preserving traces can be thought of as a form of resistance, as it enables us to cast attempts to circumvent the institutionalisation of forgetting via less direct engagements with processes of history writing as instances of potential resistance. Such histories/eruptions of memory challenge the grand narrative of shared guilt that was introduced via the Amnesty Law of 1977, drawing attention to how the call for 'mutual forgiving and forgetting' resulted in 'the conflation of amnesty and amnesia.'<sup>860</sup>

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<sup>858</sup> Georgina Blakeley, 'Politics as Usual? The Trials and Tribulations of the Law of Historical Memory in Spain' (2008) 7 *Entelequia. Revista Interdisciplinar* 315, 317

<sup>859</sup> For a more detailed account of this see: Peter Burbidge, 'Waking the Dead of the Spanish Civil War' (2011) 9 *Journal of International Criminal Justice* 753, 760-770 and Rafael Escudero, 'Road to Impunity: The Absence of Transitional Justice Programs in Spain' (2014) 36 *Human Rights Quarterly* 123

<sup>860</sup> Omar G. Encarnación, *Democracy Without Justice in Spain: The Politics of Forgetting* (University of Pennsylvania Press 2014) 71

Paul Ricoeur has commented on the importance of distinguishing between amnesty and amnesia by examining the role of amnesties in processes of recovery. He has observed that in classical Greece ‘most cities at regular intervals elaborated *amnesty* as an institution’, with one city even proclaiming a law ‘that citizens should not evoke the memory of evil, or what was considered bad.’<sup>861</sup> He argued that it is possible to see how the sentiment of this practice has persisted through to the present by claiming that ‘amnesty is present in all our institutions, because when somebody has reached the end of his punishment all his civic rights are re-established.’<sup>862</sup> He claimed that this indicates that ‘there can be an institution of *amnesty*, which does not mean *amnesia*. Or to put it another way, by using the example of what happens when a prisoner is released from prison Ricoeur illustrated how amnesty does not require us to forget past transgressions. Instead it asks us to ‘go beyond [the] anger and hatred’<sup>863</sup> attached to them.<sup>864</sup> By confusing amnesia with amnesty proponents of the Pact of Forgetting would appear to have mistakenly attributed the potentially healing properties of amnesia to the institutionalisation of forgetting. Furthermore, in blurring the boundary between amnesia and amnesty I would argue that proponents of the Pact of Forgetting greatly underestimated not only the pervasiveness of memory, but also the importance of more flexible modes of history writing in securing lasting peace. So while the Historical Memory Law of 2007 can be seen to initiate a return to the distinction between amnesty and amnesia though its attempt to formally acknowledge past suffering, it is only a start.<sup>865</sup> The element of forgetting present

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<sup>861</sup> Paul Ricoeur, ‘Memory and Forgetting’ in Richard Kearney and Mark Dooley (eds), *Questioning Ethics: Contemporary Debates in Philosophy* (Routledge 1999) 5, 11

<sup>862</sup> Paul Ricoeur, ‘Memory and Forgetting’ in Richard Kearney and Mark Dooley (eds), *Questioning Ethics: Contemporary Debates in Philosophy* (Routledge 1999) 5, 11

<sup>863</sup> Paul Ricoeur, ‘Memory and Forgetting’ in Richard Kearney and Mark Dooley (eds), *Questioning Ethics: Contemporary Debates in Philosophy* (Routledge 1999) 5, 11

<sup>864</sup> For a more detailed account of Ricoeur’s approach to addressing past trauma using law see: Paul Ricoeur, *The Just* (David Pellauer tr, The University of Chicago Press 2000) 133-155

<sup>865</sup> For more on this along with an overview of the idea that Spain’s involvement in the post-transitional justice movement see: Stephanie R. Golob, ‘Volver: The

in processes of memorialisation is still yet to be fully addressed, as is the continued use of collective memory in the consolidation of national identity. Jenny Edkins has already explored how 'private grief' is often 'overlaid by national mourning'<sup>866</sup>, alluding to a tendency for private trauma to be appropriated and put to work in service of consolidating national identity. I would argue that in the Spanish context it is still possible to see an attempt to structure personal memory so that it remains in line with national identity, as while the imperative to forget has been replaced by a more open attitude towards the past, the most painful aspects of Spain's memory nevertheless largely remain located outside of the public sphere (as it is controlled by law).

v. Eruptions of Memory: Resistance and the Preservation of Traces

One of the challenges of using law to regulate history and its writing when memory forms the core of the repository of knowledge being drawn upon is that memory operates in the present, meaning that it not only provides an account of past events but also present attitudes towards the past. While the Pact of Forgetting served to introduce and then consolidate a strong collective memory shaped by the desire to make the transition from dictatorship to democracy, little could be done to shape individual memories of repression and suffering. So, while the scope of official engagements with the past were kept narrow, this is not to say that alternative less direct accounts did not emerge. Ángel G. Loureiro has argued that it is important to observe the contributions of 'newspapers, independent publishers, novelists, workers, students, [and] graphic artists'<sup>867</sup> to debates on Spain's past, as they can be seen to represent an attempt to counter the hegemony of the Pact of Forgetting. From the late 1990s/2000 onwards it is possible to identify a 'flood of radio and television programmes, films, books and touring exhibitions' that began to 'break the silence of the past.'<sup>868</sup> For example, Georgina Blakeley has suggested that

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Return of/to Transitional Justice Politics in Spain' (2008) 9(2) Journal of Spanish Cultural Studies 127

<sup>866</sup> Jenny Edkins, *Trauma and the Memory of Politics* (Cambridge University Press 2003) 1

<sup>867</sup> Ángel G. Loureiro, 'Pathetic Arguments' (2008) 9(2) Journal of Spanish Cultural Studies 225, 225

<sup>868</sup> Georgina Blakeley, 'Digging Up Spain's Past: Consequences of Truth and Reconciliation' (2005) 12(1) Democratization 44, 49

historical novels contributed towards not only a re-evaluation of the past but also the creation of a 'dialogue and debate amongst the different generations of readers.'<sup>869</sup> In addition to this David K. Herzberger has commented on the various narrative strategies adopted by novelists, observing a need to 'recover the past by setting narrative over and against the historiographic myths of Franco' and 'the mythmaking mechanisms that constitute the founding matrix of such writing.'<sup>870</sup> An interesting example of a novel that made use of Spain's shifting attitude towards its past is Javier Cercas's *Soldiers of Salamis*, first published in 2001.<sup>871</sup> In this novel Cercas blurred the divide between history and fiction to explore the process of investigating the events of the Spanish civil war. This format proved to be very popular as it fed into a growing desire to give meaning to past events that were denied a public voice. Samuel Amago has suggested that *Soldiers of Salamis* represents a 'self-conscious engagement with the historiographical enterprise'<sup>872</sup>, raising important questions concerning 'the ethical responsibility of the historian.'<sup>873</sup> One of these questions arguably relates to trying to explain the resurgence of memory that took place during the late 1990s within Spain. This issue is confronted directly in the closing pages of the novel where the narrator reflects on why survivors of the civil war like Miralles (a former Republican soldier) continue to remember the dead in spite of mass public failures of memory. He concludes that 'he [Miralles] remembers because, although they died sixty years ago, they're still not dead, precisely because he remembers them. Or perhaps it's not his remembering them, but them clinging on to him, so they won't die off entirely.'<sup>874</sup>

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<sup>869</sup> Georgina Blakeley, 'Digging Up Spain's Past: Consequences of Truth and Reconciliation' (2005) 12(1) *Democratization* 44, 49

<sup>870</sup> David K. Herzberger, 'Narrating the Past: History and the Novel of Memory in Postwar Spain' (1991) 106(1) *PMLA* 34, 38

<sup>871</sup> Javier Cercas, *Soldiers of Salamis* (Anne McLean tr, Bloomsbury 2003)

<sup>872</sup> Samuel Amago, 'Speaking for the Dead: History, Narrative, and the Ghostly in Javier Cercas's War Novels' in Carlos Jerez-Farrán and Samuel Amago (eds), *Unearthing Franco's Legacy: Mass Graves and the Recovery of Historical Memory in Spain* (University of Notre Dame Press 2010) 243, 245

<sup>873</sup> Samuel Amago, 'Speaking for the Dead: History, Narrative, and the Ghostly in Javier Cercas's War Novels' in Carlos Jerez-Farrán and Samuel Amago (eds), *Unearthing Franco's Legacy: Mass Graves and the Recovery of Historical Memory in Spain* (University of Notre Dame Press 2010) 243, 247

<sup>874</sup> Javier Cercas, *Soldiers of Salamis* (Anne McLean tr, Bloomsbury 2003) 199

By acknowledging the continued presence of the dead in the consciousness of survivors of the civil war Cercas provided those without a direct memory of the conflict and the dictatorship that followed a means of accessing a fuller account of life under Franco. *Soldiers of Salamis* can therefore in some ways be cast as an important site of intervention and an example of an indirect way of challenging the linear sense of temporality imposed by Spain's memory by laws. However, while *Soldiers of Salamis* acts an interesting exploration of how memory solidifies into history it can also be seen to feed into broader concerns relating to the blurring of fact with fiction. As a genre, the historical novel has attracted a number of critics, some of which have alluded to the potentially damaging character of such engagements with the past.<sup>875</sup> Man Booker prize winner Hilary Mantel has commented on how within this genre fact and fiction have become confused, resulting in the frequent production of *alternative facts*. For her this raises important questions about whether historical fiction enhances or betrays history. While she acknowledges questions of authority and authenticity, she nevertheless argues that authors of such works should not regard themselves as inferior historians. Instead she argues that readers of historical fiction should acknowledge that literary authors and historians belong to two very different, yet complementary trades.<sup>876</sup> While I do not underestimate the risks that may be associated with fictional explorations of the past, especially when they overstep the boundaries of their genre in an attempt to create something close to a truthful account, I would say that I agree with Mantel to the extent that it is important to remember that like the lawyer, the historical novelist does something different than an historian. What I find interesting in Cercas's *Soldiers of Salamis* is not so much the narrative that he advanced, but his decision to tackle to issue in the first place. His attempt to navigate the relationship between memory and history in relation to the events of Franco's dictatorship betrays a preoccupation with gaining access to the past. However, by committing his protagonist to a search for truth her perhaps missed the scope for manoeuvre offered by his chosen form of expression.

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<sup>875</sup> For more on this see: Simon Schama, 'What historians think of historical novels' *Financial Times* (London, 13 February 2015).

<sup>876</sup> For more on this refer to Mantel's 2017 BBC Reith Lectures, available: <http://www.bbc.co.uk/programmes/b00729d9/episodes/player> <accessed 1st June 2017>).



A further example of a less direct means of accessing Spain's obscured past can be seen in film. Unlike the novel, film is not so easily drawn into attempts to completely capture what *actually* happened. Instead it can be seen to allow access to a more visceral encounter the past that defies attempts to capture, grasp, constitute or foreclose. Mercedes Maroto Camino has undertaken an extensive study of Spanish films, focusing on depictions of armed resistance between 1936 and 2010.<sup>877</sup> For Camino 'cinematic representations of the Spanish guerrillas [have] become instrumental in the recuperation of a usable past and in the debate about the possibility of recovering repressed, ignored or disregarded aspects of the historical experiences of the era.'<sup>878</sup> She has identified film as a means of filling gaps in Spain's history, characterising many cinematic interventions as being of crucial importance to Spain's cultural history. For example, she suggests that it is possible to use film to trace the relationship between the 'self-presentation' of Franco's regime and its manipulation of public opinion and historical interpretation.<sup>879</sup> To illustrate this point she has drawn on films about the *maquis* that were made during the 1950s, showing how they were involved in 'the projection of an "alien" enemy within the family with degraded images of women, workers and resistance fighters.'<sup>880</sup> By presenting their enemies as outsiders, supporters of Franco's regime were able to invoke 'the threat of foreign invasion... as an effective way to rally and unite all citizens behind its banner.'<sup>881</sup> She has also drawn on film to explore 'the difficulty of separating collective and individual memories'<sup>882</sup>, showing how films have contributed towards not only inventing but also forging and forgetting elements of individual, social and collective identity.

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<sup>877</sup> Mercedes Maroto Camino, *Film, Memory and the Legacy of the Spanish Civil War: Resistance and Guerrilla 1936-2010* (Palgrave Macmillan 2011)

<sup>878</sup> Mercedes Maroto Camino, *Film, Memory and the Legacy of the Spanish Civil War: Resistance and Guerrilla 1936-2010* (Palgrave Macmillan 2011) 16

<sup>879</sup> Mercedes Maroto Camino, *Film, Memory and the Legacy of the Spanish Civil War: Resistance and Guerrilla 1936-2010* (Palgrave Macmillan 2011) 43

<sup>880</sup> Mercedes Maroto Camino, *Film, Memory and the Legacy of the Spanish Civil War: Resistance and Guerrilla 1936-2010* (Palgrave Macmillan 2011) 44

<sup>881</sup> Mercedes Maroto Camino, *Film, Memory and the Legacy of the Spanish Civil War: Resistance and Guerrilla 1936-2010* (Palgrave Macmillan 2011) 70

<sup>882</sup> Mercedes Maroto Camino, *Film, Memory and the Legacy of the Spanish Civil War: Resistance and Guerrilla 1936-2010* (Palgrave Macmillan 2011) 136

The potential for film to act as an alternative site for exploring issues of collective identity is especially interesting when thought of in relation to attempts to establish an official collective memory rooted in silence. In this sense the medium of film provides individuals with not only an opportunity to re-visit specific events through fictional reconstructions, but also an opportunity to explore the role of remembering and forgetting in establishing a shared identity. For example Jo Labanyi has studied Víctor Erice's *The Spirit of the Beehive* (*El espíritu de la colmena*) and Carlos Saura's *Raise Ravens* (*Cría cuervos*), revealing how attempts to explore and record Spain's history were being made as early as 1973 and 1975 respectively. In order to avoid censorship, Labanyi has observed how the motif of haunting was used in both films to explore issues relating to Francoist repression.<sup>883</sup> The concept of haunting facilitates access to a level of representation that is able to destabilise linear notions of temporality, as by acknowledging the return that is made by ghosts the practice of haunting is able to shatter liners understandings of time. This is because 'the temporality to which the ghost is subject is... paradoxical, as at once they "return" and make their apparitional debut.'<sup>884</sup> Literatures on hauntology have shown how as a product of time, haunting is fundamentally out of joint, creating opportunities to identify situations where the temporal categories of past, present and future create a disjuncture between ontology, history and temporality more generally. Such opportunities have been rigorously explored in relation to film and music, where hauntology is used to supplant the 'near-homonym ontology, replacing the priority of being and presence with the figure of the ghost as that which is neither present nor absent, neither dead nor alive.'<sup>885</sup> While this thesis does not attempt to explore the methodological insights that have been made within the field of deconstruction in any great detail, I find that it is nevertheless useful to observe how this body of literature signals a way of engaging with unresolved past trauma in a responsible way that enables

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<sup>883</sup> Jo Labanyi, 'Memory and Modernity in Democratic Spain: The Difficulty of Coming to Terms with the Spanish Civil War' (2007) 28(1) *Poetics Today* 89, 97

<sup>884</sup> Peter Buse and Andrew Stott (eds), 'Introduction: A Future for Haunting' in *Ghosts: Deconstruction, Psychoanalysis and History* (Palgrave Macmillan 1990) 1, 11.

<sup>885</sup> Colin Davis, 'Hauntology, Spectres and Phantoms' (2005) 59(3) *French Studies* 373, 373

those that have lived through such violence to create a space of remembrance that neither seeks to fully depict and then absorb what has past nor doom those that have experienced the violence to become trapped in a cycle of its repetition.<sup>886</sup> By shattering linear understandings of temporality, hauntology encourages survivors of past trauma to 'learn to live with ghosts.'<sup>887</sup> By using stories of haunting to allow for the return of traumatic memory, ghosts are cast as 'welcome, if disquieting spurs to consciousness' and 'calls for political action.'<sup>888</sup> It is in this sense that fictional accounts that pivot around the concept of haunting are able to reach beyond accounts that concern themselves with strictly empirically verifiable data to reveal traces of the past that otherwise go unaccounted for.

For some, hauntology offers history a unique opportunity to open up an ongoing conversation with the ghosts of disappeared victims of war and dictatorship. Michalinos Zembylas has suggested that 'as metaphor, hauntology evokes the figure of the ghost in order both to trouble the hegemonic status of representational modes of knowledge in remembrance practices and to undermine their ontological frames and ideological histories.'<sup>889</sup> Zembylas uses hauntology both as a metaphor and as a pedagogical methodology for 'deconstructing the orthodoxies of academic history thinking and learning', creating an opportunity to reframe 'histories of loss and absence' as 'points of departure.'<sup>890</sup> When explored in relation to Franco's Spain it is possible to see how film became a medium through which to explore the

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<sup>886</sup>Here I am alluding to Freud's notions of mourning and melancholia were challenges surrounding remembering and forgetting are explored in relation to psychoanalysis.

<sup>887</sup> Jacques Derrida, *Spectres of Marx* (Routledge 2006) xvii-xviii

<sup>888</sup> Martha Lincoln, 'Toward a Critical Hauntology: Bare Afterlife and the Ghosts of Ba Chuc' (2014) 57(1) *Comparative Studies in Society and History* 191, 191

<sup>889</sup> Michalinos Zembylas, 'Pedagogies of Hauntology in History Education: Learning to Live with the Ghosts of Disappeared Victims of War and Dictatorship' (2013) 63(1) *Educational Theory* 69, 69

<sup>890</sup> Michalinos Zembylas, 'Pedagogies of Hauntology in History Education: Learning to Live with the Ghosts of Disappeared Victims of War and Dictatorship' (2013) 63(1) *Educational Theory* 69, 71

unspoken yet ever present. For example, the protagonist in both *The Spirit of the Beehive* and *Raise Ravens* was a child that was being haunted by traumatic events that they had witnessed. Unlike the adults that surrounded them, each child sought to confront what haunted them directly, breaking the silence that surrounded them. In *The Spirit of the Beehive* it is the monster from James Whale's 1931 adaptation of *Frankenstein* that is summoned, whereas in *Raise Ravens* it is the ghost of the protagonist's dead mother that is called forth. It has been accepted that both figures of trauma are allegories of 'the violence of the civil war and its repressive aftermath', with each child's decision to confront these figures representing a break with 'the traumatised silence into which ... [they]... had fallen as a result of ... [their] ... experiences.'<sup>891</sup> However in contrast to *The Spirit of the Beehive*, *Raise Ravens* sees the protagonist recover from her past trauma by ultimately choosing to leave her past behind her, something that Labanyi suggests reflects the generational gap between each director.<sup>892</sup> While Saura was born in 1932, Erice was not born until 1940 and did not therefore have direct experience of the war. Instead he belonged to a generation with a growing interest in the reach of past trauma. Nevertheless, despite their differences each film can be seen as an attempt to resist ongoing repression through the cultivation of a less direct means of accessing the past. By developing a less direct way of confronting issues of memory and forgetting, each film can be seen to contribute towards exploring the role of memory in processes of recovery, generating an account of past events that makes use of fictional devices (such as allegory) that are rooted in real experiences.

Erice and Saura's use of haunting to explore issues of trauma introduced a potential role for the genres of fantasy and horror in gaining access to Spain's recent past. Instead of acting as a means of escapism, I would argue that the genres of fantasy and horror have proved themselves to be particularly well equipped at exploring issues of traumatic memory, making it possible to interpret such films as a reaction to official attempts to circumvent the discussions that emerge when we attempt to write our history.<sup>893</sup> Two particularly interesting

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<sup>891</sup> Jo Labanyi, 'Memory and Modernity in Democratic Spain: The Difficulty of Coming to Terms with the Spanish Civil War' (2007) 28(1) *Poetics Today* 89, 98

<sup>892</sup> Jo Labanyi, 'Memory and Modernity in Democratic Spain: The Difficulty of Coming to Terms with the Spanish Civil War' (2007) 28(1) *Poetics Today* 89, 98

<sup>893</sup> Fantasy has long been extended beyond simple escapism, for an example of how fantasy can be seen to assist the satirist see: Robert Donald Spector,

examples of the use of fantasy and horror to explore issues of memory can be found in Mexican director Guillermo del Toro's *The Devil's Backbone* (*El espinazo del Diablo*) and *Pan's Labyrinth* (*El laberinto del fauno*). Both films can be located within Spain's memory boom where questions of memory and its recovery are explored in relation to graphic acts of violence. For example, in *The Devil's Backbone* (2001) we see how if left unaddressed, history is able to haunt the present. In this film we see del Toro construct a microcosm of the Spanish civil war, using a ghost story to reveal that the real monsters in life are human.<sup>894</sup> In *Pan's Labyrinth* (2006) we are presented with a more direct opportunity to explore the struggles of trying to remember in the face of forced forgetting, however what is perhaps particularly interesting about *Pan's Labyrinth* is how fantasy is used to intensify the conflicts that it depicts. To do this Del Toro effectively created three worlds: that of Vidal's fascist group, the revolutionaries and Ofelia's imaginary world. The world of the revolutionaries is defined in relation to that of the fascists whereas Ofelia's imaginary world can be seen to provide us with an opportunity to explore their interactions more carefully. The depth of the violence of the civil war is revealed through fairy tale and Ofelia's ability to see beyond the surface of things. In some ways Ofelia's imaginary world can be regarded as a means of confronting the ongoing horrors of the civil war and the ways in which forced silences perpetuate them. In an interview given in 2013, del Toro argued that using fairy tale to explore the civil war enhances its horror as 'the value of dark and light become clearer when they are together.'<sup>895</sup> The propensity for film to act as a means of preserving difference would therefore seem clear, as while the Amnesty Law of 1977 may have succeeded in limiting the scope of official written histories, it was unable to regulate the eruptions of memory that occurred in film.

The scope for the image to overtake the text when seeking to mediate between the past, present and future is something that has been observed on a more general

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'Lagerkvist, Swift, and the Devices of Fantasy' (1958) (12) *Western Humanities Review* 75

<sup>894</sup> For more on the idea of using fantasy to expose the monstrous dimension of humanity see: Mark Kermode, 'Guillermo del Toro' *The Guardian* (London 21 November 2006) <https://www.theguardian.com/film/2006/nov/21/guardianinterviewsatbfisouthbank> accessed 16 February 2016

<sup>895</sup> Mar Diestro-Dópido, *Pan's Labyrinth* (Palgrave Macmillan 2013) 81

level by the philosopher Vilém Flusser. Flusser suggested that it was ‘with the invention of writing, history begins, not because writing keeps a firm hold on processes, but because it transforms scenes into processes: it generates historical consciousness.’<sup>896</sup> By taking the written form, history was therefore naturally drawn to linear approaches to temporality. However, after the introduction of what he referred to as technically produced images (i.e. photographs) Flusser identified the emergence of nonlinear modes of composition and reading. For him this meant that ‘in pictures we may get the message first, and then try to decompose it... This difference is one of temporality, and involved the present, the past and the future.’<sup>897</sup> His observations regarding the impact of technology on our approach to issues of temporality are interesting, as by identifying the growing importance of the image Flusser was able to conclude that ‘a changing consciousness calls for a changing technology, and a changing technology changes consciousness.’<sup>898</sup> When thought of in relation to how the image has been used to explore Spain’s past the image would therefore appear to hold much potential when it comes to finding a way of re-evaluating the relationship between historiography and resistance.

vi. Concluding Remarks

The challenges posed by memory and the cultivation of collective memory draw attention to the flattening of experience that takes place when attempts are made to define the present in relation to a particular past. Even when a conscious effort is made to limit the impact of the past on the present (such as that seen in Spain), the formative effects of the past are inescapable. This makes it possible to argue that official histories punctuated by silence generate just as much resistance as those that engage in establishing full accounts of past events, signalling a need to think carefully about how we balance the act of remembering with processes of forgetting. If the example of post-Franco Spain tells us anything it is that the explosive potential of recording and recounting the past cannot be contained

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<sup>896</sup> Vilém Flusser, *Writings* (Erik Eisel tr, University of Minnesota Press 2004) 39

<sup>897</sup> Vilém Flusser, *Writings* (Erik Eisel tr, University of Minnesota Press 2004) 23

<sup>898</sup> Vilém Flusser, *Does Writing Have a Future?* (Ann Roth tr, University of Minnesota Press 2011) 17

through the imposition of a linear understanding of temporality via the application of law. By this I mean to say that Spain shows us that law cannot be used to maintain a clean break between past, present and future, as this is not how we engage with these temporal categories in our everyday lives. Instead attempts to regulate history and its writing only draw attention to its disruptive potential, allowing eruptions of memory to emerge in opposition to attempts to flatten individual experience. Moreover, by revealing ongoing struggles over memory and its place in the construction of national identity, Spain has shown us how history and its writing continue to act as an important manifestation of power, even when attempts are made to ensure the inclusivity of the narratives that are produced. So before accepting law as a useful lens through which to navigate past trauma it will first be necessary to revisit its relationship with temporality.

# Concluding Remarks

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*The conditions of possibility of real history are, at the same time, conditions of its cognition. Hope and memory, or expressed more generally, expectation and experience - for expectation comprehends more than hope, and experience goes deeper than memory - simultaneously constitute history and its cognition. They do so by demonstrating and producing the inner relation between past and future or yesterday, today, or tomorrow.*

Reinhart Koselleck<sup>899</sup>

*Writing is motivated by an impulse not only to direct ideas but also to direct them toward another. Only when a piece of writing reaches another, a reader, does it achieve this underlying intention. Writing is not only a reflective, inwardly directed gesture but is also an expressive, outwardly directed (political gesture).*

Vilém Flusser<sup>900</sup>

*... for memory to function well, it needs constant practice: if recollections are not evoked again and again, in conversations with friends, they go.*

Milan Kundera<sup>901</sup>

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In order to navigate the relationship between historiography, law and resistance I have divided my thesis into two parts. In the first part I sought to expand upon social science based literatures on resistance by examining the categories through which this practice has come to be read. In doing so I identified a tendency to focus on material practices and measurable outcomes, revealing how categories such as scale, location, organisation and visibility operate on both inclusive and exclusive levels. I then turned to the methodological writings of Reinhart Koselleck to expand my understanding of resistance, focusing on how by introducing concepts as powerful value-laden tools that adapt to the circumstances in which they are being deployed, Koselleck provided us with an opportunity to construe concepts such as resistance more flexibly. By characterising the grand narrative form as my target of resistance, I was then able to develop an understanding of resistance as something

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<sup>899</sup> Reinhart Koselleck, "'Space of Experience" and "Horizon of Expectation": Two Historical Categories' in *Futures Past: On the Semantics of Historical Time* (Keith Tribe tr, Columbia University Press 2004) 255, 258

<sup>900</sup> Vilém Flusser, *Does Writing Have a Future?* (Nancy Ann Roth tr, University of Minnesota Press 2002) 7

<sup>901</sup> Milan Kundera, *Ignorance* (Linder Asher tr, Faber and Faber 2002) 33



that emerges within particular power dynamics. More specifically I was able to concentrate on the silencing effects of grand narratives and how these effects are often put to work when we attempt to carve out discreet areas of research. In doing so I identified attempts to use history as a straightforward contextualising device as something that needs to be revisited. To make this point more fully, I framed my engagements with resistance to the grand narrative form using the concepts of national identity, tradition and legitimacy, identifying them as a means of examining how processes of history writing interact with issues of resistance. In the second part of my thesis I then moved on to examine how through its interactions with processes of history writing, law has become involved in the construction of national identities whose legitimacy is rooted in narrow understanding of tradition. Here the examples of the Ancient Constitution and post-Franco Spain enabled me to explore law's ongoing commitment to linear understandings of temporality and how this commitment has informed its attempts to establish and maintain authoritative singular accounts of past events. I was then able to use this commitment to singular authoritative accounts to highlight the ways in which resistance has emerged in relation to law, establishing memory as a potential means of challenging the scope of narrow engagements with the past.

While I acknowledge that considerable effort has already been made to draw attention to the problems created by law's reliance on linear conceptions of temporality (such as those discussed in chapter three), the extent to which these insights have been extended to examining law's (ab)uses of history is limited. I have sought to address this deficit by combining literatures on law and temporality with literatures on developments in critical legal history with the view of recapitulating the importance of methodological reflection. In doing so I have drawn attention to the formative aspects of our historiographical choices, observing how these choices define not only the scope of our engagements with the past but also the type of questions that we pose to it in the first place. I have also shown how our historiographical choices betray an uneasy ongoing commitment to the grand narrative form, identifying a role for historiography in resisting the grand narratives upon which we as legal scholars still implicitly rely. I reached these conclusions after exploring two sets of research questions. My first set of research questions focused on the nature of the relationship between historiography and resistance by looking at how our understanding of the temporal categories of past, present and future can shape the scope of resistance. For example, in part one I of my thesis I explored the following:

1. To what extent can historiography be linked to ideas of resistance?
  - a. How can processes of history writing become bound to our understanding of what it means to resist and what it is that is resisted?
  - b. In what ways can claims of national identity, tradition and legitimacy shape an encounter between historiography and resistance?
  - c. To what extent can our view of the relationship between past, present and future create renewed possibilities for resistance?

In my introduction I established a need to problematise the relationship between historiography and resistance by identifying history writing as an important site of activity. I achieved this by demonstrating how history is something that is continuously re-enacted rather than something that is objectively sought out, and in doing so alluded to both the stabilising and de-stabilising functions of history writing. I then focused my attentions on the de-stabilising functions of history writing and how they can be linked to ideas of resistance, adopting a Foucauldian understanding of power to show how historiography may be able to function as a form of resistance in situations where other more visible forms of resistance would appear impossible.

In chapter one I then deepened these observations by framing my discussions around questions 1 and 1(a). To do this I identified a problematic narrowing of the concept of resistance, showing how attempts to define resistance according to categories such as scale, location, organisation and visibility bear the potential to erode the dynamic core of this concept. In an attempt to side-step the limitations of defining resistance narrowly I made a series of claims with regards to history writings ability to reconfigure and reconstruct power relations. I suggested that engagements with different theories of history writing give us access to the vital elements of contingency that exist within official accounts of events, extending James C. Scott's work on hidden transcripts to examine how resistance can operate on a conceptual level to shift our attention away from measurable outcomes and material change, towards the shifting nature of meaning and conditions of possibility. In order to make this point more fully I drew on the work of

historian Reinhart Koselleck, paying particular attention to the role he assigned to synchronic and diachronic analysis in setting into motion static representations of past events to reveal the contemporary conflicts they secretly pertained to. I then incorporated a consideration of how the past and present are enclosed within a common historical plane into my examination of the relationship between historiography and resistance, showing how reflections on processes of history writing are able to achieve two things. Firstly, by reflecting on how history is written we are able to identify the potential for resistance to emerge in relation to static representations of past events. Secondly, such reflections then enable us to identify alternative engagements with these representations as potential instances of resistance. By reaching this conclusion I was able to challenge social science based understandings of resistance where emphasis is placed on the need to legitimise and quantify the practices we identify as resistance according to particular normative claims. Instead of connecting resistance to particular social interests and ideas of positive change (or resistance to negative change), I was able to show how resistance is able to operate within power relations without any particular normative goal or aim in mind.

In chapter two I focused on addressing questions 1(b) and 1(c) by deepening my analysis of how resistance emerges in relation to universalising discourses. To do this I framed my discussions around the concepts of national identity, tradition and legitimacy, focusing on the use of the grand narrative in securing stable national identities that are able to extend into the future by reaching into the past. I examined how acts of national identity formation and solidification rely on processes of history writing to secure their legitimacy, and in doing so highlighted the challenges that arise when attempts are made to reconcile multiple personal affiliations with a need for a strong overarching identity by re-stating the arguments of Samuel P. Huntington and Amartya Sen. As a result of this I was able to show how national identity can be seen to shape an encounter between historiography and resistance by presenting an opportunity to confront the historical narratives upon which national identities rely. In addition to this I was able to extend literatures on identity by showing how through its reliance on processes of history writing, identity is something that derives its legitimacy from being performed, thus affirming the idea that identity functions as a way of seeing and doing things.

In the second part of my thesis I moved on to address how law can become implicated in exchanges between historiography and resistance, focusing on the

extent to which law facilitates/restricts exchanges between law and resistance. In doing so I explored the following questions:

2. In what ways, if any, can a historical understanding of law be implicated in the relationship between historiography and resistance?
  - a. What is the relationship between a historiography of law and a historiography of national identity? Can they be thought to be constitutive of a historiography of resistance?
  - b. Can memory be thought of a site in which law and historiography as resistance can meet?

In chapter three I provided an outline of literatures on law and temporality, focusing on how law's commitment to linear understandings of temporality has been widely acknowledged as a problem in need of greater attention. To do this I started by looking at more general literatures on law and temporality that focus on how temporality impacts on law on an operational level. I then moved on to look at how these insights have been received by critically oriented legal historians. In doing so I have observed how debates on the impact of law's temporality on processes of history writing are just beginning, enabling me to conclude that a re-engagement with law's relationship with temporality will be crucial in the years to come if critical legal historians are to avoid a stagnation in their field. I also introduced a potential direction for future scholarship, drawing on Peter Goodrich's idea of construing law as a tradition (in a Gadamerian sense) as a means of introducing a less linear understanding of temporality into law.

In chapter four I scrutinised law's engagements with temporality more closely via a reflection on how law's tendency to draw on the legitimating force of the past has resulted in the adoption of a linear understanding of temporality. In doing so I focused my discussions on questions 2 and 2(a), reflecting on the role of the Ancient Constitution in shaping England's historical outlook from the 17<sup>th</sup> century onwards. By drawing on the Ancient Constitution I was able to pinpoint law's commitment to positivistic forms of historiography, locating law's preference for the grand narrative form in its ability to stifle any claims that may detract from claims of legitimacy and its compatibility with linear understandings of temporality. To illustrate this preference, I turned to the concept of tradition and how it has come

to be associated with acts of prefiguration and law's tendency to attach greater weight to the past than the present or the future. I then built upon my suggestion from the previous chapter that one way of rethinking law's relationship with temporality could involve revisiting what we understand by the term tradition, incorporating Gadamerian hermeneutics to reveal a more fluid understanding of this concept. In doing so I was able to not only show how law's relationship with national identity and processes of history writing was cemented through the development of the ancient constitution, but I was also able to show how historical understandings of law's legitimacy and the construction of national identities generates resistance by turning to discourses on the ancient condition that emerged during and after the English civil wars. While the ancient constitution has inspired a highly diverse range of literatures that I cannot hope to do justice to, by focusing on how this account of law's origins can be seen to expose the driving force behind law's preoccupation with linear temporality I hope to have contributed to debates on the benefits of thinking of law as a tradition. Peter Goodrich's exploration of law's involvement in processes of transmission holds promise for the future as it forces us to acknowledge how knowledge of law is the product of relationships, events and networks.<sup>902</sup> In making such an admission, he points towards the possibility of revisiting law's relationship with temporality, something which I would suggest alludes to an opportunity to reassess law's relationship with historiography.

In chapter five I then further refined my observations on law's relationship with linear understandings of temporality and the possibility of revising it to include multiple theories of temporality. Using question 2(b) to frame my discussions, I introduced memory as a potential means of re-visiting law's attempts to order the temporal categories of past, present and future sequentially. This examination of the scope of memory was undertaken in the context of post-Franco Spain where it is possible to see law directly engage with questions about the past through the imposition of limits on how past atrocities are remembered (and forgotten). By looking at law's attempt to regulate history and its writing in the aftermath of violent civil unrest I was able to expose how unofficial eruptions of individual memory can be used to resist the universalising discourses that emanate from attempts to strictly control engagements with past events. To make this point more fully I

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<sup>902</sup> For a more detailed account of this see: Peter Goodrich, 'Intellection and Indiscipline' (2009) 36(4) *Journal of Law and Society* 460.

provided an overview of how eruptions of memory have not only been responsible for sparking an interest in processes of recovering hidden/forgotten pasts, but also how such eruptions have used the medium of film to write traumatic histories that are able to circumvent restrictions on traditional written histories. In doing so I have established memory as a site in which law and historiography as resistance are able to meet, combining literatures on memory studies, transitional justice and resistance to show how law's oversimplified understanding of the nature and functions of historiography provoke resistance to the grand narratives it espouses.

By guiding my exploration of the relationship between historiography, law and resistance using the concepts of national identity, tradition and legitimacy I have been able to conclude that there is indeed a relationship to be found between historiography and resistance. My identification of the grand narrative form as a potential target of resistance has enabled me to identify forms of history writing that seek to disrupt singular accounts as a form of resistance to the silencing effects of universalising discourses. Moreover, by identifying historiography as a potential form of resistance I have shown how our understanding of temporality impacts upon the function(s) performed by history and its writing. In the context of the common law tradition, I have shown how a commitment to linear understandings of temporality limits the potential for law to become involved in the relationship between law and resistance. Instead, if law is to become implicated more fully in the relationship between historiography and resistance it must first revisit its relationship with temporality. One way of doing this could be via the concept of memory, as seen in relation to post-Franco Spain. Another way could involve a further exploration of how law understands the concept of tradition.

#### i. Reflections on the Work: Limitations and Future Directions

While I have established a need to revisit law's relationship with historiography by extending social science based understandings of resistance to include an engagement with alternative theories of history writing, I have done so by focusing on the historiographical tensions that arise as a result of law's continued commitment to linear understandings of temporality. This has meant that rather than advancing a way of reconciling law's preoccupation with linear temporality with other forms of temporality, I have instead pointed towards the potential incommensurability of law and history on a disciplinary level. In doing so I have left open a series of questions that relate to law's ability to accommodate more flexible

theories of history writing. In order to assess the broader impact of my findings on the operation of law I would need to turn to an additional body of literature that focuses on the impact of external perceptions of law on the actual operation of law. An interesting example of such a literature can be found in Richard K. Sherwin's examination of law's relationship with popular culture, where the challenges posed by law's transformation into a spectacle via its numerous interactions with communication technologies are examined through an engagement with how public perceptions shape the operation of law.<sup>903</sup> For me, Sherwin's work signals an opportunity to extend my research because of the ways in which it engages with the blurring of reality and fiction that has occurred as a result of the growing impact of popular culture on law. In many respects, he has identified some of the ways in which we are being forced to rethink the extent to which it is possible to regard law as a tool for securing authoritative meaning. It is for this reason that I feel that by incorporating my reflections on the potential for historiography to operate as a form of resistance it may be possible to take my research forward to include an examination of the potential for law to break free from the grand narrative form entirely. This would most likely require me to move beyond Koselleck's contributions to historiography to include a reflection on history's relationship with more visual representational practices. A potential starting point may be the work of Vilém Flusser and his concept of the techno-image. Another may pertain to more general literatures on the philosophy of photography. Either way, what is clear to me is that this thesis only acts as a starting point for a re-examination of law's (ab)uses of history and its writing.

Nevertheless, while the task of navigating the relationship between historiography, law and resistance has formed the core of this thesis, its broader aim has been to contribute towards ongoing debates on not only the nature and reach of resistance, but also law's relationship with historiography more generally. For me the need to return to questions of methodology is of paramount importance, as while instrumental deployments of historical narratives may initially serve to extend law's engagement with issues such as the adjudication of historical harms, the scope of such extensions is stymied by a reluctance to openly acknowledge the full range

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<sup>903</sup> For an examples of Sherwin's work see: Richard K. Sherwin, *When Law Goes Pop: The Vanishing Line Between Law and Popular Culture* (University of Chicago Press 2000), Richard K. Sherwin, *Popular Culture and Law* (Routledge 2006) and Richard K. Sherwin, *Visualising Law in the Age of the Digital Baroque: Arabesques and Entanglements* (Routledge 2011).

of power dynamics that are at play when we draw on history and its writing. By focusing on the emancipatory force of giving voice to previously suppressed narratives we have come to bypass important points of reflection, something that has resulted in a tendency to replace one grand narrative with a seemingly more inclusive one. I would argue that while this may have resulted in the emergence of a diverse range of literatures addressing past wrongs and their continued impact on the present, our deployment of suppressed histories has inadvertently served to mask the violence of the grand narrative form itself. By this I mean to say that by adopting an activist approach to history some scholars have overlooked the cost of challenging law's links to repression, something that if left unaddressed could culminate in a stagnation of critical legal thought. In order to avoid stagnation and make the most of the valuable insights that have been gained by focusing on suppressed and marginalised voices I would advocate a return to the question of not only what it means to have a history, but also what it means to write that history. It is hoped that by adding an additional level of reflection to critical engagements with the past and how it is written it will be possible to find a way of confronting past harms that does not result in the perpetuation of conflict between competing singular historical accounts. Instead it is hoped that competing historical accounts will be brought into conversation with one another, facilitating a dialogue that embraces difference without underestimating the challenges posed by the past's continued presence in the present.



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