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Does Law Have an Outside?

Janet Halley

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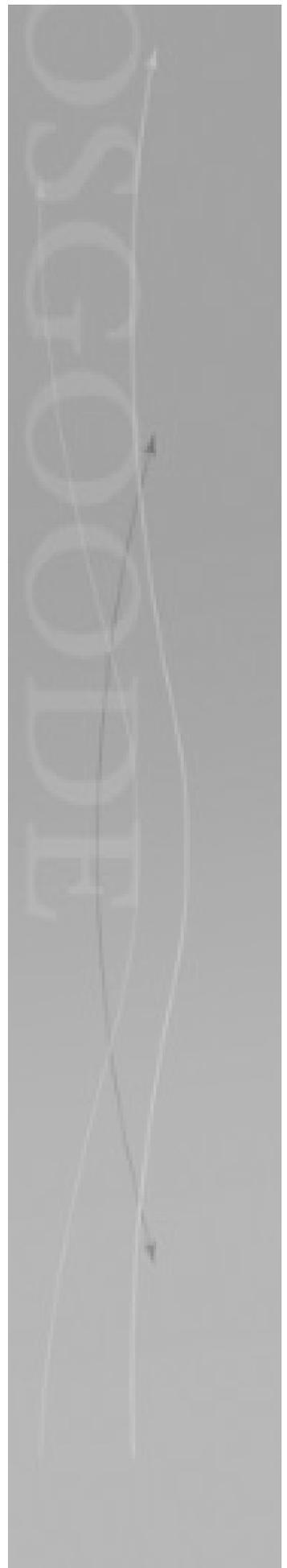
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Janet Halley*

Does Law Have an Outside?

Abstract: I've been pondering this problem as I participated in this sparking conference titled "Beyond the Law": What, if anything, is "beyond the law"? The better parent's risk aversion; the propertyless man's hunger: should we insist that these are non-legal attributes about these characters which interact with legal rules to condition legally important decisions? Are they inside or outside of the law?

We can think of it either way. Most of the time, to be sure, I'm engaged in descriptive projects that are basically attempts to extend the reach of law. Not that I want it to be big; I'm trying to understand how big it is. But in the rest of my remarks I'd like to spool out my ambivalence about this. Why does it feel more critical, more decisive, to insist on the coercive character of background rules, no matter how far in the background they lurk? And why does the resulting picture of the world seem so narrowed, so reduced, once we have succeeded in drawing it? What's at stake in positing that law is everywhere – or that there is something beyond it?

Keywords: law, beyond law, outside law

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Janet Halley

Royall Professor of Law

Harvard Law School

Email: jhalley@law.harvard.edu

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Does Law Have an Outside?

Janet Halley*

Let's imagine a woman sitting at the kitchen table. The house is dark, everyone else is asleep. It has been a really bad day. She suspects that this may turn out to be the day in which she finally, irrevocably loses faith in her marriage.

She has been here before, and feels it is within her power to reenter the marriage spiritually, to try one more time to make it work – or to give up, to throw in the towel, to make a plan for leaving her husband. What is her next step in life?

As we know, there is no way out of marriage that does not involve the law. It is a legal relationship, and the state jealously retains a monopoly over the power to dissolve it. But does our woman think about legal divorce, sitting at the kitchen table, in the silence of the sleeping house? Or do her thoughts center on religious ideas, on her need for safety and solace, on awe at the prospect of fundamental change, on her love for this man who has so disappointed her, on the erotic thrill provoked by the idea freedom from him?

The way I teach Family Law, she thinks about law – even though I know she doesn't always. She gathers up the ideas she has about divorce, and makes a cost/benefit analysis of her situation. I want my students to imagine that she asks herself: what would happen if we divorced, would I land on my feet or be destroyed? Could I keep the house? Do I make sure the children get to have his love, or do I need to save the children from his bad influence, and in either case could I do it? Could I increase the number of hours I work or would I lose his help with the kids and have to work less, earn less? The way I teach Family Law, she loses or saves her faith in the marriage in part because of what this cost/benefit analysis tells her. And if she stays in the marriage, the law of divorce, as she has imagined it, conditions her bargaining power with her husband from here on in: the marriage will have to get even worse before she will hit her strike price and leave him, and she'll have to absorb all the marriage's costs *plus* that deterioration, if it happens. The law of divorce will condition the amount of misery, or violence, or forbearance, or despair she will have to endure; it may route both of them back into a slow, painful but genuine reconciliation; it will also condition small things, like who takes out the garbage. I teach my students to think of the legal rules as mattering even when they are not applied, because people do imagine their application and guide their conduct in light of what they have envisioned.

I have some legal theory on my side when I do this. I start my course with Robert Hale's essay "Coercion and Distribution in a Supposedly NonDistributive State"¹ and then move to Lewis

* Royall Professor of Law, Harvard Law School, Email: jhalley@law.harvard.edu

¹ Robert Hale, "Coercion and Distribution in a Supposedly Non-Coercive State" (1923) 38 *Political Science Quarterly* 470; Hale's essay is reprinted, with a very useful introduction and bibliography, in David Kennedy and William W.

Kornhauser and Robert Mnookin's "Bargaining in the Shadow of the Law."² Here's how these theoretical preparations go.

Hale confronted a legal academy and policy universe which imagined that contract was the preeminent legal relationship, and that freedom of contract was at its core. According to Hale's *laissez faire* interlocutors, the wage paid to a worker by an industrialist was freely negotiated between them; if the state intervened in that freedom to regulate the terms of their contract, the will of the state had supplanted the will of the parties, and the freedom of both the worker and the industrialist had been curtailed.

Hale shifted his focus from contract to property. This is the move from the foreground rules to the background rules. The worker and the industrialist became the propertyless man and the property owner. And the rules of property, sitting there in the background, didn't merely *influence* the wage; they *coerced* it. The propertyless man comes to the situation with *one and only one* nonlegal attribute: he is a being who must eat or die. Every single strategy he might actually adopt to get food confronts him with a world paved wall to wall with the rules of property. Shall he eat that bag of peanuts sitting on the counter? It has an owner, and though that owner has the legal power to give it to the propertyless man, he also has the legal right to refuse to do so, and to convey it to him only for a price. In the actual world, the owners of peanuts are all insisting on a price. Ok, so no peanuts. The propertyless man could *grow* some food. But that requires land, and this means of production is also within the power of a propertied man, who can permit the propertyless man to start a garden on his land, but who need not. The landowner can instead refuse access to it unless he is paid a fee for its use – and all the actual landowners, as it happens, do insist on the payment of rent. Ok, so no farming. The propertyless man could *make* something valuable to *sell* for money, and try again at the peanuts: but the factors of industrial production are, again, property. Their owners can permit our hungry hero to use them, but all the actual owners refuse to do so in the form of rent; they insist on wage labor that results in *their* ownership of the things produced. The propertyless man, as we've said, must eat: so he sells his labor to the industrialist and takes home a wage. That wage, Hale insists, though it is negotiated between the employer and the employee, is coerced – its size is determined by the rules of property. It is a *legal* artifact; and law, even when it hovers in the background and merely *conditions* rather than *dictates* the outcome of a bargain, *coerces* it into existence and *coerces* its terms.

Fisher III, *The Canon of American Legal Thought* (Princeton: Princeton University Press, 2006) at 85-110 [Kennedy & Fisher, Cannon].

² Lewis Kornhauser and Robert Mnookin, "Bargaining in the Shadow of the Law: The Case of Divorce" (1979) 88 *Yale L. J.* 954.

Hale was at pains to insist that coercion wasn't necessarily bad; he thought that the widely shared reluctance to use the term to describe the law's contribution to labor contracts was the result of its being unnecessarily freighted with moral negativity. Drop the normative baggage and we could talk about degrees and kinds of coercion as endemic, not special. When Kornhauser and Mnookin returned to Hale's idea, and incorporated it specifically in a classic article on the law of divorce, they rejected this: for them, a husband and wife negotiating (rather than litigating) their divorce were engaged in *private ordering*. If we extend Kornhauser and Mnookin, and imagine the husband and wife to silently decide who will take out the garbage based on their silent sense of each partner's strike price for divorce, this too is private ordering. In both settings, the husband and wife are *bargaining in the shadow of the law*. For Hale, bargaining in the shadow of the law is legally coerced; for Mnookin and Kornhauser, it's legally conditioned but free.

I think it's much more powerful to think of the law of divorce as conditioning not only divorce negotiations but garbage decisions; and to think of it as coercive rather than as setting the context for private ordering. First, this is the legal realist way of trying to put a check on the liberal idea that law's purpose is achieved when law runs out and freedom begins. It exposes the idea of freedom of contract to be ideology, liberal ideology. If being a leftist is standing to the left of liberalism, wherever liberalism is at any particular moment, then Hale's insistence on coercion opens up possibilities for a left critique.

Second, this expansive view of law asks us to do something very difficult, something that has become even more difficult after the partial convergence of left legalism with subordination-focused identity politics: it asks us to think of coercion as morally neutral, and to ground our moral and/or political judgments on something other than the fact that power has had effects. Once again Hale can guide us. It is not only the peanut owner and the factory owner and the land owner who can refuse to enter into a labor contract: so, up until the point of starvation, can the propertyless man. He is acting *coercively* when he refuses a proposed labor contract because he thinks he can get a higher wage or better working conditions elsewhere. Hale posits that the wage earner is paid more than the entirely self-interested slave owner would pay to maintain a slave, and that that increment is precisely the mark of the wage earner's countercoercive power.

This move opens up an idea that has been anathema to the strong structural- subordination theses of the identity-political wing of the legal left. They see power as being *over* and their identity groups as being *under*; power is *bad*; and the solution for the identity groups is emancipation, liberation, equality. The idea that the solution for the identity groups might be to understand and marshal their countercoercive power has been hard for people invested in structural subordination premises to imagine. The unnecessary presumption that power is bad blocks both analysis and strategy.

Third, Hale's move shifts responsibility for outcomes back onto law. It asks us to think of law as having distributional effects. As Hale concludes, the myriad interactions of all the propertied men and propertyless men as they negotiate labor contracts determines the wealth of every

man in that social order. Seeing law as intrinsic to this immense sorting process allows us to see it as *distributive*.

These theoretical orientations ask us to look *at* law but also *through* it, to a world that is contingent on it. Here is an example of why looking *at* law alone can be misleading, drawn from Kornhauser and Mnookin. When married parents divorce, the state provides the rules for who gets the kids. In the US, our current mainline rule is to allocate custody according to the “best interests of the child.” If we only look *at* law, this bit of it is nicely reassuring: it makes it look like we really care about the welfare of children. But as Kornhauser and Mnookin point out, best interests is a completely open-ended standard: if the husband and wife were to litigate custody, they would do so under insurmountable uncertainty about who would win. Then Mnookin and Kornhauser posit (and this is just hypothetical) that the parent who should get custody – the one who *should* win a best-interests contest – is also the one who is the most risk averse on this point. Take the rule (or rather, in this case, the standard), add one basic idea from bargaining theory and shezam: you get a parent who is too scared to litigate custody. He or she will negotiate if possible, and in the negotiations he or she will cave on other issues to secure primary custody or at least more time with the children. He or she may impoverish him- or herself to get custody – and may impoverish the kids in the process. If that happens, you get a divorce negotiation in which the parent whom we have designated, *ex hypothesi*, the better parent suffers a debilitating blow dealt by the very rule that – on its face – favored him or her. Best interests *sounds* like policy favoring the children; but *in action* it can be the exact opposite. It doesn’t have to be that way, but it can be. Best interests is as coercive as a rule requiring nonowners to get the consent of owners before eating their peanuts or using their tools or cultivating their land. We won’t know whether that’s good or bad until we look at the outcomes.

Those are at least some of the reasons I like to teach Family Law as a web of background rules that condition people’s intimate dealing not only on the night of crisis, but in everyday humdrum decisions, even on the first serious date. You could say that my approach is imperialistic for law; the way I teach it, *law always matters*.

Let me take you down a different route to the same point. Let’s say that, because we are lawyers, we regard it as an important thing to be able to say what the law is. And here the set text for legal realism, the uber-canonical granddaddy piece of writing is surely Oliver Wendell Holmes’ “Path of the Law.”³ In that essay, Holmes counseled that, if we really want to know *what the law is*, we need to see it as the Bad Man does. Holmes’ Bad Man is not an outlaw: he wants to avoid a legal sanction, and thus to avoid breaking the law or at least to avoid being

³ Oliver Wendell Holmes, “The Path of the Law” (1897) 10 *Harv. L. Rev.* 457; For a useful introduction and bibliography, see Kennedy & Fisher, Cannon, *supra* note 1 at 21-43.

sanctioned for breaking the law; but he also wants to act as self-interestedly as he can short of that. He reads the law not for its aspirational reach but for its limits; not for its moral claims, but for its implicit permissions. This is what makes him Bad. The Bad Man thus divides the world into the Law and the range of permitted action that he can indulge in *beyond* the law – and if we would see the law *that way*, Holmes argues, we would see *what the law is*.

Let's go back to best interests to see what this might mean. Best interests purports to say that children of divorcing parents will get the custody arrangement that is best for them. But we allow divorcing parents to negotiate the terms of their divorces, and thus we allow Bad Parents to insist on getting a lot of custody from risk averse Good Ones and then to trade their child-time back for concessions on property division, alimony, and even child support. Within very exiguous limits, courts will approve their agreements and even adopt them as decrees. *That*, Holmes would have us know, is as much the law as the prediction that a benevolent judge will ascertain the child's best interests and secure them. And it's not a perversion of the law; it *is* the law.

This is an important move in legal realist thought, and in critical legal analysis. It is almost exactly the opposite of Hale's procedure, which was to pave the propertyless man's world with law. For Holmes, the goal is "a right study and mastery of the law as a business with well understood limits, a body of dogma enclosed within definite lines."⁴ At some point, the law *runs out*. But it would not be right to say that the Bad Man is *free to act* in the domain where law runs out. The Bad Man is by definition acting within law. As long as he modifies his conduct in deference to a fear of legal sanction, he occupies a space of *permission*, not *freedom*. The scope of *that* domain, its contents, everything about its landscape, are created by the law. It's a little like the image of the vase that is also the image of a face, but never both at the same time because our heuristic incapacity keeps us from seeing both at once. The law defines the domain of permitted action, but we can't know the former except as the negative of the latter.

Holmes limited himself to the prediction of what *courts* will do, but of course the realists were firm that the whole panoply of what Karl Llewellyn called "lawmen" constituted the relevant set of actors. Here is Llewellyn's extension of Holmes' idea, to be found in his argument that the rise of *divorce* was going to change *marriage*:

What will in this paper hereafter be meant by "law" is in first instance and especially all that the lawmen do, as such. And in second instance, what one may reasonably anticipate that they will do. And in third instance, the rules laid down for their doing. Fourthly, the ideology about their doing prevalent among them (following precedent, e.g.). Lastly, the ideology of other folk about the law comes into the discussion. Where necessary, some one or more of the several phases will be singled out for emphasis or contrast with another. And the question now recurs, have any of the phases any effects on other people, in regard to marriage?⁵

⁴ *Ibid.* at 459.

⁵ Karl Llewellyn, *Behind the Law of Divorce* Part I (1932) 32 Colum. L. Rev. 1281 at 1297.

Compared to Holmes', Llewellyn's is a significantly expanded legal domain. All the things that all the lawmen do, all the things one can reasonably predict that they will do, the rules they apply, the ideologies they hold, and the ideologies that "other folk" have about them – no matter how contradictory, these are all "law"; and ultimately they matter because of "any effects" that they have on "other people." "Other people" exist beyond the law; but once any of the elements of law have "any effects" on them, they come in as the necessary objects of *legal study*.

I want to call this *law as its effects*. One of the most difficult challenges of doing legal study in this tradition is finding some way of containing and ordering the almost crazy-making complexity of law seen this way. Here is an example, from my own work in progress on same-sex marriage as we have it in the US. When same-sex marriage advocates began to see that they would win recognition for same-sex marriage in some state courts, they also began to argue that marriages valid in a first-mover state would be valid in all the other states, through the operation of the Full Faith and Credit Clause of the Federal Constitution.⁶ Never mind that there is no basis in positive Full Faith law for this claim; it's not absolutely *contradicted* by positive law, and it took the law reviews quite a while to print all the spin that advocates were willing to put on that gap in the rules. By that time, opponents to same-sex marriage had gotten really alarmed and angry: would red states have to recognize first-mover-state same-sex marriages, despite adamant popular, legislative and judicial opposition within their borders? They discovered a rule that sits quietly in judicial doctrine, saying that a marriage valid where it is performed is valid in another state as long as this second state does not make it illegal or consider it a serious violation of its public policy. This is the political origin of the DOMA's – the Defense of Marriage Acts stipulating, for 40 states plus federal law, that marriage is a relation between a man and a woman. These are declarations of repugnancy to public policy, and their purpose was to tell state courts not only that there will be no same-sex marriage within the DOMA state, but also that same-sex marriages travelling in from elsewhere cannot be recognized as valid marriages there. They will fall not within the rule requiring recognition, but in its exception permitting nonrecognition.

Let's go back now to our woman sitting at a kitchen table wondering whether her marriage is falling apart, but this time let's give her a woman for a spouse. Let's say they married in Massachusetts, and live there. Far away is the state of Virginia, a state with a ferociously strong DOMA. The Virginia DOMA not only bars recognition of same-sex marriages; it bars recognition of same-sex civil unions, same-sex partnership contracts and even any "other arrangement

⁶ For the story in detail, with citations, see Janet Halley, "Behind the Law of Marriage, Part II: Travelling Marriage," – *Unbound: A Harvard Journal of the Legal Left* – (Forthcoming 2011).

entered into by persons of the same sex"! All of these are void and unenforceable; nor may they give rise to contract rights.⁷

If we follow Llewellyn, the invalidity of our woman's marriage in 40 states of the Union and in almost all applications of federal law is an intrinsic characteristic *of her marriage*. You might think this makes her more vulnerable, but let's make her a Bad Woman. Let's suppose it dawns on her that – if she and her spouse moved to Virginia, she could just walk out on her partner, taking far more of their shared assets than what Massachusetts divorce law would give her. She could even take far more than Virginia contract law would give her, because Virginia's DOMA blocks contract enforcement in their "relationship." Even if her spouse moved to a same-sex-marriage-recognizing state and sued for divorce, and eventually got a divorce decree that you would think Virginia courts would have to heed under the Full Faith and Credit clause, there's caselaw giving them an out. Their marriage is both valid in Massachusetts and invalid almost everywhere else, and where it's invalid, depending on the facts, it's also indissoluble.

If we follow Holmes and Llewellyn again, the complex ricochet pattern of powers and vulnerabilities that this choice of law regime creates between the parties to a Massachusetts same-sex marriage are part of these marriages even if they never leave Massachusetts and even if they never break up. The Bad Woman exercise has shown us the permissions built into the system, and they are just as real as its prescriptions.

The line of thinking that I've been pursuing so far is bold in its ambitions for law: not much is "beyond" it. It animates my work; it animates work I admire; the sense that it is difficult and new and that a lot of people are trying to figure it out gives the lie to the idea that critical legal studies are dead. But there is a big problem with this way of doing things: it's often just simply wrong. Let's go back to Hale, where we started. His point that coercion is ubiquitous collapses if we undo the enclosures and restore the commons. The only reason his propertyless man can't grow his own food is because the legal order Hale knew best imagined the whole territorial world to be mapped on a grid of recorded deeds. Also – our propertyless man can eat if he marries a rich wife, or wins the lottery, or joins a monastery or commune. Of course all those moves – to the commons, to marriage, to the welfare state, to communal life – throw him into contact with *other* background rules, so perhaps Hale's world-paved-with-law vision can be restored simply by pitching it 1, 2, 3 "n" levels of generality lower. But if we are going to go all the way, don't we have to admit at some point that some of the background systems that matter aren't *legal*? After all, the fact that he must eat is not a product of law. What if his psyche, his aesthetic sense, his age and stamina play a role? Maybe my solitary woman decides to stay in her marriage not because she anticipates that divorce would be too

⁷ *Va. Code Ann.* § 20-45.3 (2004). The argument above depends on the continuing constitutionality of the DOMAs. If they are decisively held to be unconstitutional by the US Supreme Court – and litigation currently underway may well eventually result in this holding – then the entailments elaborated above will no longer be a plausible prediction of what the lawmen will do. See *Perry v. Schwarzeneger*, 702 F.Supp.2d 1132 (N.D. Cal. 2010). On the other hand, if the Supreme Court eventually finds a place in the US Constitutional order for the DOMAs, then the predictions made above will continue to come true.

costly but because she likes her husband when he isn't drunk and doesn't want to lose the pleasure of his company. What if she bargains in the shadow not of law but of her own hedonic vitality?

I've been pondering this problem as I participated in this sparkling conference titled "Beyond the Law": What, if anything, is "beyond the law"? The better parent's risk aversion; the propertyless man's hunger: should we insist that these are nonlegal attributes about these characters which interact with legal rules to condition legally important decisions? Are they inside or outside of the law?

We can think of it either way. Most of the time, to be sure, I'm engaged in descriptive projects that are basically attempts to extend the reach of law. Not that I *want* it to be big; I'm trying to understand *how big it is*. But in the rest of rest of my remarks I'd like to spool out my ambivalence about this. Why does it feel more *critical*, more *decisive*, to insist on the coercive character of background rules, no matter how far in the background they lurk? And why does the resulting picture of the world seem so narrowed, so reduced, once we have succeeded in drawing it? What's at stake in positing that law is everywhere – or that there is something *beyond* it?

Let's take a break from law completely to see what can be said on the other side of this ambivalence. Let's go "beyond law." I've gotten myself in hot water with some feminists of my generation by arguing that it might be useful, might be revealing, might open us up to unforeseen social understandings and new, important political alliances to *take a break from feminism*.⁸ And I'm the coeditor of a collection of essays with English professor Andrew Parker in which we asked a group of notable producers of queer theory whether there is anything in their work that could be described as "beyond" sex and/or "beyond" queer theory.⁹ I've gotten some pretty sharp rebukes for these "beyond" moves. For some people who are working hard to expand the explanatory power and social space for feminism or queer theory, it is nothing short of frightening and enraging to hear someone on the left -- someone who has benefitted in a million ways from feminism and queer theory and who wouldn't have ever gotten an academic post from which to question them without them – suggesting that it might be good to posit a limit to them. Why do it? Why do it *twice*?

One reaction I get to these "take a break" proposals tips me off that I'm right: the claim that it's *impossible* to take a break from feminism or from queer theory without going seriously wrong because women's subordination or endangered sexual desire is the *primum mobile* of whatever

⁸ Janet Halley, *Split Decisions: How and Why to Take a Break from Feminism* (Princeton: Princeton University Press, 2006).

⁹ Janet Halley & Andrew Parker, eds., *After Sex? On Writing Since Queer Theory* (Durham, N.C.: Duke University Press, 2011).

needs explaining or fixing. These are structuralist hypotheses; those who espouse them posit a deep structure to human life, and dedicate themselves to discovering it and its pervasive influence in parts of life that seem utterly innocent of it. They demand of themselves a hermeneutics of suspicion, a will to unmask; a vigilance to undo common sense. But even more, they demand a certain epistemic fixity: the world may look as though we're beyond male domination, beyond sexual repression – but we're *not*.

One of the odd things about this widely shared reaction, though, is that third wave feminism became possible only through a break with intellectual and political ideas of sex and sexuality prevailing in the 1960's; and queer theory became possible only when some political, social, intellectual and libidinal energies that were effervescing in the late 1980's and early 1990's focused themselves on a desire to understand sexuality in terms *other* than feminist. Feminism was born saying "No" to the ideas about gender in which it emerged. Queer theory was more ambivalent; the idea behind about half of queer theory at the time it emerged wasn't to *contradict* feminism, but to *add* to it. To work on another dimension. To use other key terms. Ok, so contradictions might emerge; but that could be good for feminism, good for our understanding of sexuality.

The queer break was animated by an anti-structuralist impulse; it fomented a strong critique of identity, of "categories," of knowledge, and of truth. One of the most productive things about it, in my view, was the way it shook up our ideas about power. Coming into it, many of its inventors were all feminists all the time, and our feminism was about bad, top-down power. We were committed to an anti-subordination project. Some of us imagined women's power as redemptive; some thought that power itself was irredeemable. We ran smack dab into Foucault's *History of Sexuality Volume 1*, one of the canonical texts of the queer break.¹⁰ Foucault wrote that book – it was first published in French in 1976 – to find an alternative to the Freudian idea that sexual desire was the deepest, truest, most personal thing about each of us, and that in the infancy of each of us it had bowed down to the Law of the Father by allowing itself to become *repressed*. Foucault thought instead that, at the very time that this repressive force was supposedly in its most magnificent heyday, sexuality was being produced – proliferated – in the profusion of repressive apparatuses that spanned Victorian society. They weren't effectively repressive – if anything, they were immensely productive. The problem was sexuality itself, not its repression. He imagined that we could loosen the "grip" of sexuality on our bodies and our pleasures if we imagined power otherwise. Power, he posited, might not be the Law; we needed to get beyond the idea that it primarily resides in the King and his Sword; it might be an immanent web of highly mobile impulses running throughout human life, congealing sometimes in concentrated forceful energies that could amount to domination, but more usually dispersed, small, and fluid. Power might *include* rather than *oppose itself to* resistance.

¹⁰ Michel Foucault, *History of Sexuality: An Introduction, Volume 1*, trans. by Robert Hurley (London: Vintage Books, 1990; 1st printing 1978). **Error! Main Document Only.**

This is a picture of power beyond law, and as much as Foucault yearned to believe it when he wrote *Volume 1*, he didn't really. The idea that sexuality had a *grip* on our bodies and pleasures and that we must engage in a deep strategy to get *free* of it – that very idea is built on the form of power-over; of domination; of the Law as the Law of the Father, the Law as the sword of the prince. The Foucault of Volume One had not achieved the transformation of power that Hale had successfully wrought many years before, working on coercion.¹¹

American Queer Theory inherited this partially achieved break with the Law, and one of the reasons it has never fit too well into critical studies in the law school is that this image of law is so unlike the one we inherit from legal realism. The paranoid attitude that the Foucault of Volume 1 managed to preserve toward the confessor, the psychiatrist, and the King with his Sword – despite his famous reformulations about power – has troubled queer theory across its entire expanse, and drastically narrowed its expectations of what it might hear from queers in law. All the more important, then, to observe the complete transformation in Foucault's ideas about law and about power in Volume 2 of his *History of Sexuality*. This book was first published in French in 1984 – almost a decade after *Volume 1*.¹² Studying late antique conduct books, Foucault discovered the *unimportance* of what he called the “moral code” – the rules about what sexual things one should and should not do. Instead, the emphasis of these books fell on inculcating an attitude of self-observation, self-management; the experience of sexuality as problematic resulted in an idea of the self as self-governing. Becoming the subject of sexual desires was becoming an ethical subject, a subject in relationship to itself; a subject whose characteristic form of power is self-observation and self-management. “I am not supposing that the codes are unimportant,” Foucault wrote. But they were not legal mandates; they gave shape to practices of self-governance, practices which one would perform in their shadow in a way that was conditioned on them but neither liberated nor dominated. “[T]his is the hypothesis that I would like to explore here – that there is a whole rich and complex field of historicity in the way the individual is summoned to recognize himself as an ethical subject of sexual conduct.”¹³ Thus the rule requiring the husband to confine his sexual conduct to his wife, for example, was not a repressive prohibition; it was his opportunity to achieve not self-denial but an ethical relationship to himself – and that, not the unleashing of forbidden desire or a subsidence into bodies and pleasures, offered him freedom.

¹¹ Duncan Kennedy, “The Stakes of Law, or Hale and Foucault!” (1991) 15 *Legal Studies Forum* 327; Reprinted in Duncan Kennedy, *Sexy Dressing etc.* (Cambridge, MA: Harvard University Press, 1993) at 83.

¹² Michel Foucault, *History of Sexuality: An Introduction, Volume 2, The Use of Pleasure*, trans. by Robert Hurley (NY: Viking, 1985).

¹³ *Ibid.*, at 32.

This is a complete break with Volume One, as Foucault himself admitted in a paragraph that I treasure. It comes in the introduction, where Foucault is explaining why it took him so long to produce Volume Two. To write it, he said, he had to “think differently” – and this was not easy:

And as to those for whom to work hard, to begin and begin again, to attempt and be mistaken, to go back and rework everything from top to bottom, and still find reason to hesitate from one step to the next – as to those, in short, for whom to work in the midst of uncertainty and apprehension is tantamount to failure, all I can say is that clearly we are not from the same planet.¹⁴

Do we have the courage to loosen our hold on what we think we know because we are students of law, and go on a similar voyage?

I propose that what Foucault went through intellectually between 1974 and 1984 was a trip “beyond the law.” He was willing, almost literally, to take a break from the idea of, and his chronic resentment of, Law as the Sword. The result was disorientation, years of research in the mode of profound doubt, and ultimately an image and a genealogy of power that corresponded with the theory of it that he had advanced in the beginning. This break-taking had a transformative effect on his idea of law – brought it much closer to the one I derived in the beginning of this essay from legal realism.

In closing, I wonder what it would be like for us, as students of law, to seek to imitate Foucault’s effort to get beyond what we know about law by getting beyond law itself. All the formulations of law – Hale’s, Kornhauser and Mnookin’s, Holmes’s, Llewellyn’s -- that I gave in the beginning of this lecture *do* have an outside. They would not necessarily have to be trashed if we took a break from them. What if, for instance, we conducted the “law and humanities” interdiscipline *without* the persistent, never-spoken but omnipresent rule that good work of this kind had to identify an *overlap* between law and the humanities? What if the very purpose of the exercise were instead to find elements of human life that could be called *aesthetic* or simply *beautiful* that had *nothing to do with law*? The law schools have pretty much given up on the psyche – we have rational actors with their cognitive biases, but we don’t listen for the terrifying, roaring pounding of the human heart. And politics: we hardly ever teach or study politics: we study politics *as it is governed by law*. To a hammer everything is a nail – and to legally trained people, every political problem is a legal problem. In the course of doing this – it’s almost a full employment act for ourselves and our graduates, so weaning ourselves of it would be hard -- we have contributed to the emaciation of politics on a local, national and international scale. If we took a break from law, could we find ways to stop doing that?

¹⁴ *Ibid.*, at 7.