

Temporality in Legal History  
Panel proposal: 2009 American Society for Legal History annual meeting

This panel will explore different problems of temporality in legal history. Its principal objective is to bring into legal history a critical analysis of temporality developing in other fields. Time itself is an important topic of study in anthropology and other fields, but historians, Lynn Hunt recently argued, have paid little attention to it. “Like everyone else,” she writes, “historians assume that time exists, yet despite its obvious importance to historical writing -- what is history but the account of how things change over time? -- writers of history do not often inquire into the meaning of time itself.” New work complicates an understanding of time in earlier scholarship (e.g. E.P. Thompson’s classic work on labor and clock time), finding multiple and contested meanings of time and of the past. In this panel, Christopher Tomlins takes up the representation of history, law, and time through an examination of two sets of texts that construct a “beginning” and an “end” of 250 years of law time on the American mainland. Kunal Parker’s focus is on the way legal thinkers from the late 18<sup>th</sup> to the late 19<sup>th</sup> centuries used notions of “history” to think critically about law, comparing them with the late 19<sup>th</sup> century legal modernism of Holmes and others. Mary Dudziak treats “wartime” as a feature of legal thought that breaks the 20<sup>th</sup> century into different kinds of time (wartime/peacetime), with the nature of law thought to be contingent upon that temporal construction. Thomas Allen, University of Ottawa, author of *A Republic in Time: Temporality and Social Imagination in Nineteenth-Century America*, will comment.

Chair: Alexis McCrossen, Department of History, Southern Methodist University

Papers: Representations of Law and Justice: The American Mainland, from ‘Beginning’ to ‘End.’  
Christopher Tomlins, American Bar Foundation

Thinking “Historically” About Law: Legal Modernism and its Antecedents  
Kunal M. Parker, Cleveland-Marshall College of Law, Cleveland State University

Law, War, and the History of Time  
Mary L. Dudziak, University of Southern California Gould School of Law

Comment: Thomas M. Allen, Department of English, University of Ottawa

**Contact information for panelists:**

Mary L. Dudziak (panel organizer)  
University of Southern California Gould School of Law  
5 Post Office Square #4  
Sharon, MA 02067  
781.793.7904  
[mdudziak@law.usc.edu](mailto:mdudziak@law.usc.edu)

Thomas M. Allen  
Department of English  
University of Ottawa  
Ottawa, Ontario, Canada K1S 1J7  
613.562.5800 x 1204  
[tallen@uOttawa.ca](mailto:tallen@uOttawa.ca)

Alexis McCrossen  
Department of History  
Southern Methodist University  
Dallas, Texas 75275-0176  
214.768.3676  
[amccross@smu.edu](mailto:amccross@smu.edu)

Kunal M. Parker  
Cleveland-Marshall College of Law  
2121 Euclid Avenue  
Cleveland, OH 44115  
216.288.3817  
[kunalmparker@gmail.com](mailto:kunalmparker@gmail.com)

Christopher Tomlins  
American Bar Foundation  
750 North Lake Shore Drive, 4th Floor  
Chicago, IL 60611-4557  
312.988.6553  
[clt@abfn.org](mailto:clt@abfn.org)

**ASLH Annual Meeting (2009)**  
**Paper Proposal**

Representations of Law and Justice: The American Mainland, from 'Beginning' to 'End.'  
Christopher Tomlins

My paper discusses representations of history, law and time in two widely separated but related groups of texts. The first group includes Taney's opinion for the court in *Dred Scott v Sandford* (1857) and the reply to that opinion delivered by Abraham Lincoln's First and Second Inaugurals. The second group includes George Chapman's *The Memorable Maske of the Two Honorable Houses or Inns of Court* and William Shakespeare's *The Tempest* both performed in early 1613 as part of the festivities accompanying the wedding of Princess Elizabeth to the Elector Palatine.

The two groups of texts occupy positions respectively as the "beginning" and the "end" of 250 years of law time on the American mainland. The space between them is filled by the historical premises of Taney's opinion in *Dred Scott*, which presents a history of America as the interaction of three races (white, Indian and Negro) "from the time of the first emigration to the English colonies to the present day" (Taney in *DS*).

Lincoln's First Inaugural explicitly silences the law-time of *Dred Scott*; the Second Inaugural represents the war-time that succeeds *Dred Scott* as a messianic quest to meet the demands of divine justice. Chapman's *Memorable Maske*, which depicts the first contact between Virginia and England, summons law into being as the means by which the obeisance of Indian princes shall be transferred from their own mythic gods to "our Britan *Phoebus*." Shakespeare similarly explores the same early colonial moment as one in which "magic" is put aside for legality.

The two groups of texts figure, respectively, the "beginning" of Taney's period of history as the replacement of myth/magic by law and its "end" as the overcoming of law in a moment of divine justice. The conjunction of beginning and end, and of myth/law and of law/justice, speaks with extraordinary clarity to Walter Benjamin's *Zur Kritik Der Gewalt* ("Critique of Violence"), to its theory of the form of law, and to his representation of revolution as messianic violence. An account of "Critique" will structure my interpretation of the relationships within and between the two groups of texts.

Thinking “Historically” About Law: Legal Modernism and its Antecedents  
Abstract Proposal for the 2009 American Society for Legal History Annual Meeting  
Kunal M. Parker<sup>1</sup>

In the standard account of the history of American legal thought, there is a “modernist” moment occurring in the late nineteenth and early twentieth centuries. This “modernist” moment—typically associated with the writings of Oliver Wendell Holmes—is seen as inaugurating a self-consciously “historical” anti-foundationalist view of law. Holmes repeatedly and explicitly claimed the mantle of “history” in distinguishing his own thought from those of his intellectual antagonists. Prominent “modernist” legal and philosophical thinkers who followed in Holmes’ wake—for example, John Dewey, Benjamin Cardozo, and Jerome Frank—equally claimed the mantle of “history” to account for their related anti-foundationalisms. But might we be in danger of overstating legal modernism’s claims? This paper will draw upon materials from my forthcoming book, *Custom and History: Common Law Thought and the Historical Imagination in Nineteenth Century America*, to explore how earlier generations of legal thinkers—from the late eighteenth century to the late nineteenth—used notions of “history” to think critically about law. In juxtaposing these earlier “historical” efforts with those associated with late nineteenth century legal modernism, the paper will ask what it might mean in the first place to think “historically” about law.

---

<sup>1</sup> James A. Thomas Distinguished Professor of Law, Cleveland-Marshall College of Law, Cleveland State University.

## Law, War, and the History of Time

Paper Abstract: 2009 American Society for Legal History annual meeting

Mary L. Dudziak

This paper will argue that a conception of time is a basic feature of our understanding of law and war. This understanding of time is assumed and not examined, as if time was a natural phenomenon with an essential nature, providing determined shape to human action and thought. But this understanding of time is in tension with the experience of war in the 20th century. The problem of time, in essence, clouds an understanding of the problem of war.

In scholarship on law and war, time is seen as linear and episodic. There are two different kinds of time: wartime and peacetime. Historical progression consists of moving from one kind of time to another (from wartime to peacetime to wartime, etc.). Law is thought to vary depending on what time it is. The relationship between citizen and state, the scope of rights, the extent of government power depend on whether it is wartime or peacetime.

The onset of war triggers legal responses. The concept of “wartime,” however, gives war a temporal frame, suggesting that the onset of war opens an era that has temporal boundaries on both sides. Leading works on the history of law and war, such as Geoffrey Stone, *Perilous Times: Civil Liberties in Wartime*, assume that war is an aberration, and that most of American history occurs in “peacetimes.” This perspective fails to account for persistent U.S. engagement in military action, especially in the 20<sup>th</sup> century.

This paper will, first, excavate the understanding of time that is embedded in scholarship on law and war. Second, it will illustrate the way this conception of time affects the literature on the history of rights during war. Third, it will argue that this understanding of time impedes our understanding of the persistent impact of war on American law in the 20<sup>th</sup> century.